ARTICLE: WHO SHOULD REGULATE LAWYERS?

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BIO:

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This Article is dedicated to the memory of Albert M. Sacks.

SUMMARY:

... Predictably, the ABA clings to the traditional view that disciplinary agencies operating under the supervision of state supreme courts should retain primary responsibility for ensuring that lawyers live up to their professional obligations. Yet, when this agency problem became apparent to corporate clients in the mid-seventies, they did not invoke the protection of the disciplinary system. Because most corporate lawyers work in firms, this decision also has the unfortunate consequence of making it more difficult to sanction corporate lawyers. Once this parallel is drawn, it is plausible that the willingness of a particular lawyer to demonstrate one of these two forms of independence will be affected by whether she is representing an individual or a corporate client. Thus, as Figure 3 demonstrates, independence claims can be tested in four distinct contexts: individual/client motivated independence, individual/public motivated independence, corporate/client motivated independence, and corporate/public motivated independence. They therefore raise exactly the kind of corporate externality problems that pose the greatest danger to the fair and efficient administration of justice and the rights of innocent third parties that underlie the publicly motivated professional independence. Moreover, the actual effect that any given enforcement system is likely to have on a lawyer's independent professional judgment is largely a function of whether the embedded pressures make the lawyer more or less likely to abandon the client's legitimate interests. ...

HIGHLIGHT: For most of this century, disciplinary agencies acting under the supervision of state supreme courts have been primarily responsible for enforcing the rules of professional responsibility. During the last decade, however, these agencies have been joined by a number of other systems designed to detect and deter unethical conduct. These alternatives have provoked heated debate about whether and under what circumstances lawyers should be subject to various forms of external regulation.

In this Article, Professor Wilkins provides a framework for understanding and evaluating this debate. The analysis separates the many arguments for and against particular enforcement systems into two general categories: compliance arguments, which are efficiency claims about the costs and benefits of using a particular form of control, and independence arguments, which seek to link regulatory systems to the virtues of an independent legal profession. Professor Wilkins argues that credible assertions of either of these claims must account for relevant differences among professional norms and among various markets for legal services. He therefore analyzes compliance and independence arguments in terms of a matrix of lawyer-client interactions that highlights these differences. Based on this examination, Professor Wilkins reasons that a system of multiple controls can be both efficient and compatible with a proper understanding of professional independence. He concludes by setting out some tentative proposals as to how such a system might be constructed.
I. INTRODUCTION

"Where were [the attorneys]" and "why didn't any of them speak up or disassociate themselves from the [se] transactions?" These questions, posed by Judge Stanley Sporkin as he reviewed the events leading up to the multi-billion dollar collapse of Lincoln Savings and Loan, capture the sentiments of many Americans when they discover the extent to which some of this country's leading law firms may be implicated in the tawdry events surrounding the savings and loan crisis. In the eyes of many, these revelations are part of a larger pattern of lawyer misconduct that has contributed to a diverse array of modern woes, including the litigation crisis, the spiraling cost of medical care, the insider trading scandals on Wall Street, and the proliferation of fraudulent tax practices. Indeed, in a recent speech to the American Bar Association (ABA), the Vice President of the United States strongly suggested that lawyers who "overuse and abuse the legal system" are partially to blame for America's failure to compete effectively in the global economy. Although ABA President John Curtin disagreed with this assertion, even the ABA concedes that "the public continues to be critical of lawyer regulation."

This consensus disappears, however, when the discussion focuses on controlling lawyer misconduct. Predictably, the ABA clings to the traditional view that disciplinary agencies operating under the supervision of state supreme courts should retain primary responsibility for ensuring that lawyers live up to their professional obligations. This position has become more difficult to maintain in light of the burgeoning number of alternative systems for controlling lawyer misconduct. For example, judges now routinely use rule 11 to sanction lawyers for filing frivolous claims or defenses or otherwise needlessly increasing the costs of litigation. Federal regulators bring enforcement actions, both administratively and in the courts, against lawyers who aid and abet their client's violations of applicable regulatory statutes. State legislatures and Congress continue to expand the range of liability actions that can be filed against lawyers, while judges dismantle many of the restrictions against suits by third parties under existing statutory and common law theories. Even traditional malpractice liability has been transformed as courts have removed many of the evidentiary and procedural impediments that have traditionally made it difficult for clients to sue their lawyers successfully. More changes could soon be on the way, as policymakers contemplate new enforcement schemes ranging from the Competitiveness Council's recommendation for a "loser pays" rule in diversity cases and a moratorium on one-way fee shifting to a variety of state initiatives that would place some or all of the disciplinary process under the control of the legislature.

The presence of these alternative enforcement models has sparked a heated debate over who should have responsibility for regulating lawyers and how that authority should be exercised. The debate proceeds on several levels. On the policy level, lawyers, judges, and legal academics argue whether the benefits of particular control systems outweigh their costs. This debate, however, is often merely a surrogate for a deeper theoretical and methodological disagreement about the criteria for conducting a cost-benefit analysis in this context. On this theoretical level, partisans of particular enforcement strategies argue about the proper goals of professional regulation and the assumptions and processes that should guide any attempt to determine whether these goals are likely to be met.

This Article attempts to provide a framework for resolving these disputes. Part II sets the terms for a comparative analysis of enforcement systems. The argument proceeds in three parts. First, I separate the most commonly discussed enforcement systems into four paradigmatic models: disciplinary controls, liability controls, institutional controls, and legislative controls. Second, I divide the claims made on behalf of these models into "compliance arguments," which are efficiency claims about the costs and benefits of a particular enforcement strategy, and "independence arguments," which are claims about whether a given form of regulation promotes or undermines lawyer independence. Third, I assert that reaching an accurate judgment in either of these categories of argument requires paying careful attention to differences in enforcement contexts. I therefore construct a matrix of lawyer-client interactions that highlights certain key contextual differences.

The next two Parts use this matrix to evaluate compliance and independence arguments in the four paradigmatic enforcement systems. In Part III, I conclude that no single enforcement system is likely to address all categories of lawyer misconduct efficiently. Each system nevertheless has certain comparative advantages in particular contexts. As a result, placing independence claims to one side, an optimal enforcement strategy would utilize some combination of all four regulatory approaches.

In Part IV, I examine whether independence arguments should deter society from implementing this optimal enforcement strategy. After rejecting many of the most common claims about the relationship between enforcement and professional independence, I conclude that some aspects of an optimal compliance strategy might discourage
lawyers from resisting pressures by either clients or the state when it would be socially desirable for them to do so. This
danger, however, is realistic only for certain clients in specific contexts and thus does not provide a persuasive reason
for abandoning the optimal enforcement strategy outlined in Part III.

Therefore, in Part V, I examine how the preceding analysis can be used to illuminate the operation of a world in
which there are multiple centers of professional control. Specifically, I argue that the matrix of lawyer-client
interactions developed in Part II can help regulators reach better decisions about when we should subject lawyers to
each of the four control systems and how the systems should be administered.

II. ENFORCING PROFESSIONAL NORMS: AN OVERVIEW OF THE CURRENT DEBATE

In this Part, I summarize the current debate over lawyer discipline and propose a framework for evaluating the
diverse arguments that have been offered for and against various regulatory proposals. Section A lays the foundation
for this work by identifying four paradigmatic approaches to enforcing professional norms. Section B separates
the many claims for and against these enforcement strategies into two general categories, which I call "compliance
arguments" and "independence arguments." In section C, I contend that plausible compliance or independence
arguments must account for the dual nature of the lawyer's role and relevant differences in lawyering contexts. Section
D therefore proposes an analytic matrix that highlights these differences.

A. The Enforcement Systems

Enforcement proposals can be grouped into four models: disciplinary controls, liability controls, institutional
controls, and legislative controls. Although these four models share many features, each system accomplishes its
objectives through a different mix of structures and practices. These distinctive characteristics have important
implications for the costs and benefits of utilizing these control strategies.

1. Disciplinary Controls. -- The reference point for this model is the current disciplinary system, in which
independent agencies acting under the supervision of state supreme courts investigate and prosecute violations of the
rules of professional conduct. The basic structure resembles a criminal prosecution. To avoid the appearance of
favoritism or bias, disciplinary enforcement is consciously set apart from the day-to-day performance of legal work.
The process is conducted almost exclusively ex post by independent officials who have no prior association with the
case. These officials are instructed to reach their judgments solely on the basis of the evidence presented
at a formal hearing in which the accused lawyer is accorded a full panoply of due process protections. In keeping
with the criminal justice analogy, disciplinary agencies primarily focus on punishment and deterrence. Compensation, although allowed under limited circumstances, remains a secondary goal.

2. Liability Controls. -- Injured clients, and to a limited extent third parties, have traditionally had the right to sue
lawyers under a variety of statutory and common law theories. Although bar leaders and others have tried to
separate "malpractice" from "discipline," these efforts have been largely unsuccessful. Recent developments are
likely to blur the distinction even further. For example, the Resolution Trust Company has filed a number of lawsuits
alleging that several prominent law firms committed malpractice when, in conjunction with the managers of various
savings and loans, they prevented regulators from discovering massive financial improprieties at these federally
insured institutions. Similarly, as courts and legislatures relax the traditional restrictions against suits by
nonclients, a growing number of third parties are suing lawyers for breaching ethical duties. As a result, litigation
is now a viable alternative to professional discipline.

Like the disciplinary model, liability controls operate on the basis of ex post complaints by injured parties. A
victorious claimant, however, is entitled to full compensatory and even punitive damages. Restrictions on the
lawyer's right to practice law, on the other hand, are generally not available. Finally, claims are subject to the normal
rules of practice and procedure that govern litigation in state and federal courts, including, when appropriate, trial by
jury.

3. Institutional Controls. -- Lawyers work either directly in, or in the shadow of, state institutions. With increasing
frequency, these institutions are expressly taking responsibility for uncovering and sanctioning lawyer misconduct. For
example, rule 11 now authorizes judges to impose sanctions for certain kinds of litigation-related misconduct. Similarly, several federal administrative agencies, including the Security and Exchange Commission (SEC), the
Office of Thrift Services (OTS) and the Internal Revenue Service (IRS) are now seeking to sanction lawyers who do not properly advise their clients about their duties under these regulatory regimes.

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These and similar efforts share a common goal: to locate enforcement authority inside the institutions in which lawyers work. As a result, the structure and operation of any particular system will be primarily a function of the institution within which it is situated. Nevertheless, a few generalizations are useful. First, enforcement authorities are in a position to observe lawyer misconduct directly. A judge, for example, will know if a lawyer has failed to file a pleading. Second, because the enforcement official and the lawyer to be disciplined are involved in a continuing relationship, sanctions can be imposed either immediately or after a separate hearing. Finally, the substantive jurisdiction of these institutional enforcement officials is likely to be confined to the area in which the institution operates. For example, SEC officials cannot discipline lawyers outside of the securities area.

4. Legislative Controls. -- Certain public officials and other commentators have proposed a new administrative agency that would have sole responsibility for investigating and prosecuting lawyer misconduct. n31 Although such an agency might be patterned after the agencies that currently regulate doctors in many states, nothing requires this particular form. Instead, an agency might adopt procedures utilized by other regulatory agencies, such as the Occupational Safety and Health Administration (OSHA) or the SEC. All that is [*809] required of this form of control is that its authority and operation ultimately rest in the hands of the executive or the legislative branch rather than the courts.

B. A Typology of Enforcement Arguments

Supporters and opponents of these four regulatory developments deploy a wide range of arguments to justify their positions. For expository purposes, these arguments can be classified as "content arguments," "compliance arguments," and "independence arguments" according to whether they focus on the substantive content of the rules to be enforced, the ability of an enforcement system to produce substantial compliance at acceptable costs, or the relationship between a particular sanctioning system and the status of lawyers as independent professionals. Although all three sets of concerns are implicated in the choice of an enforcement system, reaching a comparative judgment requires bracketing disputes over the content of professional norms.

1. Content Arguments. -- Content arguments often underlie enforcement debates. For example, in a number of recent speeches, OTS's chief counsel has made it clear that one of the primary reasons his agency intends to regulate lawyers is to ensure that they practice "whole law," a standard going beyond "the minimally accepted conduct that avoids disbarment or other form[s] of bar discipline." n32 Not surprisingly, many lawyers object to this approach on the ground that it "go[es] beyond what the law requires and what the profession requires." n33 Although disputes about the content of professional norms are therefore what is really at stake in many of these debates, it is important to distinguish these important concerns from the enforcement questions at issue here.

The debate between OTS and the bar parallels a much wider dispute about whether lawyers should play a greater or lesser role in preventing their clients from engaging in socially undesirable conduct. n34 Regardless of how this debate is resolved, however, regulatory [*810] officials must decide how the resulting obligations should be enforced. n35 To isolate this question, it is necessary to assume a single set of rules that will be interpreted and applied by all enforcement officials. Because the ABA's Model Rules of Professional Conduct and Model Code of Professional Responsibility continue to constitute the most influential sources of professional norms, I assume that all enforcement officials agree that lawyers can only be sanctioned for conduct proscribed in one of these two documents. n36

This assumption, however, will not completely remove content questions from the analysis. Even in the absence of formal rulemaking power, enforcement officials in a common law system invariably influence the practical meaning of norms. n37 This is particularly true when the norms are ambiguous, incomplete, or in tension with other, plausibly applicable rules. n38 As many commentators have noted, both the Model Code and the Model Rules are filled with such commands. n39 Under these circumstances, conferring enforcement authority is tantamount [*811] to empowering a particular set of actors to place their own interpretation on these ambiguous professional norms. n40

Unlike rulemaking considerations, this level of content analysis cannot be assumed away in considering the effects of utilizing a particular enforcement model. There is, however, no straightforward way to factor this possibility into the comparative calculus. Opponents of the content given to these ambiguous commands will consider this evolutionary process a significant -- and perhaps even prohibitive -- cost of adopting a particular enforcement strategy. Those who approve of the substantive tilt, on the other hand, will likely count this movement as an important benefit of the new system. This dispute cannot be resolved without taking a substantive position about what obligations lawyers ought to have in the first instance.
There is, however, a method for resolving these disputes that, by definition, is not available in the rulemaking context. Because enforcement officials do not have rulemaking authority, the substantive tilt produced by their discretionary decisions potentially can be corrected by rulemaking. n41 Once this potential is taken into account, however, substantive tilt is more appropriately categorized as either a compliance or an independence issue. From the perspective of a subsequent rulemaking corrective, substantive tilt is an error cost that must be weighed against whatever enforcement benefits are produced by that particular method of control. It is therefore part of the efficiency analysis of compliance claims. Until the rulemaker steps in, however, practicing lawyers may face multiple and perhaps conflicting interpretations of a given norm. Substantive tilt is therefore simply one of the many reasons why lawyers must continually make decisions about how to act in the face of ambiguity. I discuss this problem at length in connection with the independence claims set out below. n42

[*812] 2. Compliance Arguments. -- Compliance arguments are on the surface of every enforcement debate. For example, bar leaders traditionally argue that disciplinary agencies are the most effective enforcement authority because their members are uniquely qualified to determine whether an ethical breach has occurred and to design an appropriate sanction. n43 Critics of this form of regulation, on the other hand, assert that disciplinary committees are slow, costly, and inherently biased in favor of lawyers. n44 Similarly, supporters of rule 11 assert that trial judges are in the best position to monitor and control lawyer misconduct during litigation and that monetary sanctions are the most effective form of deterrent. n45 Opponents respond that monetary sanctions fail to deter lawyer misconduct and produce satellite litigation that needlessly increases costs for both the parties and the court. n46

These arguments are obviously relevant to the choice of an appropriate enforcement system. Society has a clear interest in ensuring that lawyers comply with applicable professional rules. Moreover, as with any public program, society benefits when compliance can be obtained at the lowest possible cost. Underlying this straightforward endorsement, of course, are many unanswered questions about how "benefits" and "costs" ought to be defined and measured in this context. I return to these arguments below. n47 For the moment, however, it is only necessary to note that the claim that a particular enforcement system will either lower costs or increase compliance is a powerful argument in favor of its use.

3. Independence Arguments. -- Finally, for many participants in these regulatory debates, compliance issues are not the sole ground, or perhaps even the most important ground, for choosing among competing enforcement frameworks. n48 They argue that the choice of an appropriate enforcement system also must be constrained by a cluster of considerations flowing from lawyers' status as "independent" professionals.

The bar has been the most vigorous advocate of independence claims. For more than a century, bar officials asserted that "self-regulation" was the only enforcement system compatible with the fact that lawyers are "independent professionals." n49 Although the bar has softened this rhetoric in recent years, it still maintains that giving the executive or the legislature the power to enforce the rules of professional conduct would undermine the separation of powers and intimidate lawyers from zealously defending individual rights against state power. n50

Similar arguments are now made, however, against other potential enforcement systems. Critics of rule 11, for example, contend that giving judges the power to sanction professional misconduct threatens lawyer independence because lawyers will be chilled from asserting creative arguments that a judge might later determine to be without merit. n51 Those opposed to making it easier for clients or third parties to sue lawyers for professional misconduct frequently assert that whatever compliance gains might result from expanding liability will be more than offset by the harm that will result from "defensive lawyering." n52 Paradoxically, even the current disciplinary system has been attacked on the ground that it undermines professional independence by making lawyers too dependent on their clients. n53

Although those who make these arguments speak as though independence claims constitute a distinct reason for supporting or opposing a particular enforcement system, the actual relationship between "independence" and "compliance" in this context is far more complex than these contentions generally suggest. I return to these complexities in Part IV. n54 As an initial matter, the claim that some or all of the values grouped together under the rubric of professional independence might constitute a distinct constraint on the choice of an appropriate enforcement system is sufficiently plausible that it merits separate consideration. This treatment is consistent with the rules of professional conduct, which seem to imply that preserving independence is a goal separate from merely ensuring that lawyers comply with stated norms. n55 Moreover, the costs that would allegedly [*814] flow from undermining professional independence -- endangering individual liberties, flouting the separation of powers, retarding the development of legal doctrine -- are fundamentally different from, or at least not easily reducible to, the kind of efficiency calculus contemplated by compliance claims. Finally -- and this will turn out to be the crucial point -- no
enforcement system can ensure perfect compliance, particularly given the level of conflict and ambiguity in the current rules of professional conduct. To the extent that independence claims relate to the way lawyers act in areas beyond the reach of effective enforcement, by definition they present issues that cannot be reduced to compliance claims.

Thus, for now I assume that compliance and independence claims state distinct, although ultimately interconnected, reasons for preferring one enforcement system over another. Evaluating both claims, however, requires careful attention to certain key contextual differences.

C. The Role of Context

Participants in the various enforcement debates often speak as though their compliance and independence arguments capture universal truths about lawyers, clients, and the state. For example, the ABA's claim that judicially supervised disciplinary agencies should exercise "exclusive" control over the enforcement process implicitly asserts that this form of regulation is the best system for controlling all lawyer misconduct in all contexts. Similarly, when lawyers oppose "external" regulation on the ground that it would undermine "professional autonomy," they usually couch their assertions about the proper relationship between the lawyer and the state in universal terms. These universalist claims ignore relevant distinctions in both the content of professional norms and the market for legal services.

[*815] I. Acknowledging Conflict Within the Lawyer's Role. -- It is axiomatic that lawyers are expected to be both zealous advocates for the interests of their clients and officers of the court. Each of these roles generates distinct professional duties. As an advocate, a lawyer is expected to keep the client informed, safeguard the client's secrets, provide competent and diligent services at a reasonable fee, and abide by the client's wishes concerning the purposes of the attorney-client relationship. As an officer of the court, however, a lawyer should not counsel or assist the client in fraudulent conduct, file frivolous claims or defenses, unreasonably delay litigation, intentionally fail to follow the rules of the tribunal, or unnecessarily embarrass or burden third parties. These disparate professional duties complicate the comparative analysis of various enforcement alternatives in two respects.

First, whether the duty is owed primarily to the client or to the legal framework is likely to shape the incentives of the participants in the enforcement process. A client, for example, has an obvious and potent incentive to determine whether his lawyer is faithfully performing his duties as a zealous advocate and to seek redress when a violation occurs. The same client, however, may have no incentive to deter violations of the lawyer's duties as an officer of the court especially when these violations further the client's own interests. On the other hand, state officials charged with administering a particular legal regime often will have a strong incentive to prevent lawyer misconduct that damages the legal framework. These same officials, however, may have relatively little interest in ensuring that lawyers represent clients competently and effectively. An overall assessment of the effectiveness of any given enforcement system, therefore, must account for these differences.

Second, the coexistence of these two sets of duties suggests that the prevailing rules value two distinct kinds of professional independence. As advocates, lawyers must be independent from corrupting influences that might induce them to sacrifice their client's goals improperly. As officers of the court, they must independently assess whether the client's actions are likely to contravene the bounds of the law or otherwise improperly interfere with the lawyer's obligations to the legal framework. Independence claims, like compliance arguments, must account for this dual focus.

2. Understanding the Role of the Market. -- Discussions on this topic tend to assume a uniform lawyer-client relationship in which the client is incapable of understanding and evaluating lawyer conduct. This assumption fails to capture the complexity of contemporary legal practice. Clients vary widely in their experience and sophistication concerning legal practice. Some clients will hire a lawyer only once in their lifetime. For others, interacting with lawyers is a way of life. Corporations are likely to dominate this latter category. As "repeat players," these sophisticated consumers usually have a considerable baseline of experience from which to formulate the goals of the representation and to evaluate lawyer performance. In addition, corporations have comparatively more resources to devote to the task of understanding and evaluating lawyer conduct.

This gap between corporate and individual clients is amplified by stratification and specialization within the bar. The formal and informal relationships lawyers form with colleagues, adversaries, and state officials produce unique and
effective norms, procedures, and sanctions. n78 These embedded control systems are likely to be different for corporate and individual lawyers. Corporate lawyers tend to work in larger firms, make more money, and have greater professional status and occupational mobility than lawyers who primarily represent individuals. n79 Similarly, corporate and individual lawyers tend to concentrate in different fields of law and interact with different state officials. n80 These and other differences have led many to conclude that lawyers who represent corporations occupy a separate hemisphere from those who primarily represent individuals. n81 A lawyer's hemisphere [*818] of practice plausibly will affect the operation of whatever enforcement system coexists with these embedded controls. n82

D. A Contextual Model

Contextual differences relating to the lawyer's role and the identity of the client suggest a matrix of possible lawyer-client interactions. Figure 1 illustrates this matrix. The vertical axis charts the identity of the client, from "individuals" to "corporations," as a surrogate for the range of embedded controls likely to influence the conduct of a particular lawyer. The horizontal axis delineates lawyer conduct as it relates to the two faces of the lawyer's role: "advocacy duties" represent obligations to clients and "officer of the court duties" symbolize responsibilities to the legal framework, identifiable third parties, and the public at large.

![Figure 1](image_url)

[*819] Deciding where any given case falls within this matrix will always be a matter of judgment, particularly at the margins. Certain individual clients undoubtedly will have more in common with the average corporation than with other individuals. For example, the relationship between dethroned investment banking czar Michael Milken and his principal lawyer Arthur Liman, a partner in one of New York's most prestigious law firms, probably more closely resembles interactions between Drexel Burnham and its lawyers than the experience of most individual criminal defendants. n83 Similarly, many professional duties can fairly be characterized as being owed both to clients and to the legal framework. A lawyer who knowingly files a frivolous lawsuit without informing the client of the weakness of the claim may be simultaneously violating both her duty to assist in the efficient administration of justice and her obligation to serve her client's interests competently. Nevertheless, each end of the two axes -- individual/corporate and advocate/officer of the court -- captures something important about the context in which any enforcement system must operate. These categories therefore serve as useful reference points for the multiplicity of contextual factors that will affect the operation of any regulatory regime. The next two Parts test this claim by examining compliance and independence arguments as they relate to the categories of the matrix.

III. COMPLIANCE ARGUMENTS

Compliance arguments are efficiency claims and therefore require a standard for measuring benefits and costs. Section A briefly outlines the terms of an efficiency analysis in this context. Section B examines the extent to which each of the four enforcement models is likely to control efficiently conduct falling within each quadrant of the matrix. Based on this evaluation, section C establishes the parameters of an optimal enforcement strategy.

A. The Role of Context in the Construction of Costs and Benefits

The conduct axis of the matrix separates professional duties according to whether they are primarily directed toward serving clients or preserving the legal framework. This distinction suggests that enforcement officials must try to prevent two categories of professional misconduct. The first, which I call "agency problems," involve cases [*820] in which lawyer misconduct primarily injures clients. Common examples include overbilling, allowing the statute of limitations to run, and representing conflicting interests in the same or substantially similar cases. The second, which I
call "externality problems" or "strategic behavior," involve cases in which lawyers and clients together impose unjustified harms on third parties or on the legal framework. Common examples include cases in which a lawyer files frivolous pleadings during the course of litigation, knowingly allows her client to present perjured testimony, or assists the client in preparing a false or misleading proxy statement. The client axis suggests that these problems may vary according to whether the client is an individual or a corporation. As a result, each enforcement system must be evaluated in terms of its ability to control four categories of lawyer misconduct: individual/agency problems, corporate/agency problems, individual/externality problems, and corporate/externality problems. Figure 2 illustrates this matrix.

Figure 2

<table>
<thead>
<tr>
<th>Individual</th>
<th>Client</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporate/Agency</td>
<td>Individual/Agency</td>
</tr>
<tr>
<td>Agency</td>
<td>Externality</td>
</tr>
<tr>
<td>Individual/Agency</td>
<td>Externality Conduct</td>
</tr>
</tbody>
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Whatever compliance gains are achieved in these four quadrants must be balanced against a likely assessment of the costs associated with employing a particular method of control. Three categories of costs are potentially relevant: administrative costs, by which I mean the public costs of operating the enforcement system; participant costs, which represent the costs incurred by lawyers, clients, and other private parties in determining whether a violation has occurred and in fashioning an appropriate sanction; and third party costs, which constitute whatever additional costs the use of a particular enforcement system may impose on public or private actors other than those directly involved in the enforcement process. As with the benefits of enforcement, the likely incidence of these costs may also vary with the categories of the matrix.

Two additional assumptions guide this cost-benefit inquiry. First, I assume that lawyers, clients, and regulators generally act rationally and according to what they perceive to be their self-interest. Second, I assume that enforcement officials will generally only impose sanctions when a lawyer has clearly violated a relatively unambiguous professional norm. In Part IV, I relax these assumptions to consider how the choice of an enforcement system might affect a lawyer's willingness to act contrary to her self-interest, or the interests of some other powerful party, when the governing rules are ambiguous or in conflict.

B. A Comparative Evaluation of Enforcement Systems

1. The Structural Limitations of Disciplinary Controls. -- I begin with disciplinary controls because this is the regulatory structure against which all others are expressly or implicitly compared. Moreover, the ABA continues to insist that a properly functioning disciplinary process can effectively control lawyer misconduct. This claim is not plausible, however, once we examine the institutional characteristics of this form of control.

(a) Client Reporting Systems Are Unlikely to Control Externality Problems. -- The institutional characteristics of disciplinary controls make it unlikely that this system will effectively address externality problems. Given the structural separation of the disciplinary process from the arenas in which lawyers work, disciplinary officials depend on others to generate information about lawyer misconduct. Although judges and lawyers are strongly urged to report misconduct, these knowledgeable parties rarely file complaints.

A cursory examination of the incentives facing lawyers and judges in this context reveals the causes of this deficiency. For lawyers, not only are there no tangible rewards for reporting misconduct, but adversaries who turn in their fellow lawyers also run the risk of inviting a retaliatory response. Moreover, the complex web of embedded controls surrounding many aspects of legal practice makes it possible for a lawyer wishing to sanction another member of the bar to accomplish his goal more effectively through informal controls. Although a judge does not face the same adversary system disincentives as a lawyer, she nevertheless may feel that it is not her role to interfere in the lawyer-client relationship of those who appear before her. Moreover, even if she overcomes this initial resistance, it is likely that she will, like the lawyer, prefer to use the more efficient embedded controls at her disposal to discourage the attorney conduct that most directly implicates her interests.
Given this confluence of incentives and embedded controls facing lawyers and judges, it is not surprising that the vast majority of the complaints coming to the attention of the disciplinary system are filed by clients. n92 These clients, however, have little incentive to report strategic behavior taken on their behalf. n93 Despite its formal breadth, [*824] therefore, disciplinary regulation will inevitably focus on agency problems. But even in that area, the system is likely to accomplish much less than it promises.

(b) The Paradox of Agency Problems. -- In order to access the benefits of the disciplinary system, a client must first understand that she may have been injured by lawyer misconduct. Paradoxically, clients in the best position to make this determination are the least likely to bring their complaints to the attention of disciplinary authorities.

As frequent consumers of legal services, corporations have both the resources and the incentive to reduce the information asymmetry that usually exists between lawyers and clients. Thus, many corporations have hired "in house" lawyers to help them identify their legal needs, hire competent outside counsel, and monitor attorney performance. n94 Others have delegated these functions to non-lawyers. n95 Access to this kind of sophisticated advice will substantially reduce the incidence of certain kinds of agency problems.

Consider the frequent complaint by both individual and corporate clients that legal fees are too high relative to the real value of the [*825] services actually performed. n96 During the decade of the seventies, a growing number of corporations began to complain about the rising cost of legal services. n97 Although such complaints are still frequently heard, these sophisticated consumers have undertaken several cost control measures that have made it more difficult for corporate lawyers to "run the meter." Many corporations took a substantial portion of their legal work "inside," which reduced opportunistic pricing by outside firms. n98 Moreover, when the decision is made to hire an outside lawyer, corporations can employ their legally sophisticated intermediaries to collect and evaluate reputational information about lawyer competence and trustworthiness. n99 Outside firms may be asked to submit competitive bids, n100 periodic budgets, detailed records, and obtain prior approval before filing documents or making major strategy decisions. n101 Such measures will help the corporation pinpoint and eliminate lawyer incompetence or opportunistic behavior.

Finally, these client controls are likely to be reinforced by the structure of relationships inside the corporate law firm. Corporate lawyers are generally paid according to the number of hours [*826] worked, n102 which gives them a strong incentive to follow through on their commitments. n103 Lawyers' incentives to keep the client happy also increase as firms move away from lock-step compensation systems toward ones that directly reward lawyers for revenue-generating activities, such as bringing in business or billing more hours. n104 In addition, corporate firms have become increasingly rationalized and bureaucratic. n105 Given that the heightened monitoring capabilities of corporations are likely to make the law firm as a whole more concerned with satisfying client desires, these bureaucratic controls help ensure that client directives are followed throughout the organization. n106

Taken in combination, the embedded controls available to corporations make it more difficult for lawyers to overcharge these sophisticated consumers. Of course, neither corporate counsel nor senior partners are likely to invest the time that would be required to wipe out opportunistic billing in its entirety. n107 Nevertheless, one of the most persistent agency problems for individual clients -- and one of the most frequent complaints voiced to disciplinary authorities n108 -- is unlikely to be a significant concern in the corporate hemisphere. n109 [*827] This is not to suggest, however, that corporate lawyers do not commit agency violations. Just as the structure of corporate law practice makes some agency problems less likely to occur, it undoubtedly increases the probability of others. Yet, corporations have little incentive to bring violations to the attention of disciplinary officials.

Conflict-of-interest problems are a typical example. The rules of professional conduct prohibit a lawyer from either simultaneously representing conflicting interests or representing a current client whose interests are adverse to those of a former client in a matter substantially related to the prior representation. n110 The size of the average corporate law firm increases the danger of conflicts problems. n111 Moreover, corporations are in a peculiarly difficult position to detect potential conflicts. At any given time, a large corporation often will have several law firms working on dozens of separate matters. Keeping track of their own work, let alone what other work these firms may be doing, is an extremely time consuming and difficult task. n112 [*828] Even sophisticated clients, therefore, may be unable to protect themselves against conflicts.

Yet, when this agency problem became apparent to corporate clients in the mid-seventies, they did not invoke the protection of the disciplinary system. The disciplinary system, with its emphasis on ex post review and punitive sanctions, was not an effective means of accomplishing the objectives of corporate clients. n113 Instead, corporations filed a wave of disqualification motions to prevent their former lawyers from representing clients with conflicting...
interests. This strategy proved relatively successful, as corporate law firms instituted procedures for preventing these problems from occurring in the first place. n114 The formal disciplinary system was simply not a part of this strategy. n115

Corporate clients are therefore unlikely to use the disciplinary system, even when they have actually been harmed by lawyer misconduct. n116 Individual clients do not have access to the embedded [829] sanctions available to corporations. Although individuals have a greater incentive to invoke the disciplinary system as a protection against agency problems, they are unlikely to be able to utilize these controls effectively. As "one-shot" participants in the legal marketplace, individual clients are subject to each of the three major information asymmetries that foster agency problems: they do not know what services they need, they do not have access to information that would allow them to predict the quality of the services that a particular lawyer is likely to render, and they do not have a sufficient baseline from which to evaluate the quality of the services performed. n117 By relying on client complaints, disciplinary enforcement simply reproduces these market defects.

Overall, the claim that the disciplinary system will effectively enforce professional norms across the entire spectrum of lawyer-client interactions seems quite dubious. The system simply does not address externality problems. Those clients most likely to use the process to combat agency problems are the least likely to be able to do so effectively. Corporate clients that have the ability to monitor and evaluate lawyer conduct also have powerful embedded controls at their disposal that render the system largely unnecessary.

Finally, the administrative costs of achieving even this limited range of benefits can be high. n118 Because the proceedings take place after the fact, enforcement officials must bear all of the costs of investigation, prosecution, and adjudication. Moreover, some of these agencies are chronically underfunded. n119 As a result, many disciplinary cases take years to resolve, further adding to both participant and administrative costs. n120

Some of these administrative costs may be avoidable. In its recent review of the disciplinary system, the ABA proposed a number of reforms that could streamline the process and reduce costs significantly. n121 In addition, the bar also advocates creating various mediation [830] and arbitration programs to resolve contractual disputes between lawyers and clients. n122 To evaluate whether these alternatives will result in substantial savings, however, it is first necessary to examine how such disputes would be resolved in the absence of these measures.

2. Liability Controls: The Costs and Benefits of Using Litigation as Regulation. -- As with the disciplinary system, liability controls operate on the basis of ex post complaints by injured parties. Whether these controls can effectively enforce norms of professional conduct depends in the first instance upon which injured parties are likely to sue lawyers and what claims these litigants assert. Traditionally, the range of parties and claims has been narrow.

(a) Reinforcing Agency Controls Through Malpractice Liability. -- Liability controls traditionally have been used almost exclusively by injured clients. n123 The results of this limitation are predictable. First, many injured clients are left out of the system because they never discover that they are the victims of malpractice. n124 Second, clients who do sue complain only about agency problems. n125 Even with these limitations, however, the structure of liability controls makes it likely that certain claims will be pursued in this system that would not be brought to the attention of disciplinary authorities.

From the perspective of the injured client, the most obvious difference between liability controls and the disciplinary system is that only the former allows for a monetary recovery in excess of whatever fee the client has paid to her lawyer. The chance to recover full compensatory (and perhaps even punitive) damages is obviously a substantial incentive to file suit. n126 The effects of this incentive, [831] however, should not be exaggerated given the large participant costs associated with this form of control. n127 In general, only agency problems that result in large provable damages are likely to be brought into the system. n128 Moreover, litigation against lawyer-defendants is particularly difficult to win. n129 Lawyers are adept at covering their tracks ex ante and fabricating self-interested reconstructions of the facts ex post. n130 In addition, courts tend to be deferential to the exercise of judgment by lawyers. n131 As a result, despite their desire for compensation, clients with small or difficult to prove claims are unlikely to gain access to the malpractice system. n132 For clients with [832] substantial claims, however, malpractice and other ex post liability schemes are likely to provide an attractive alternative to the disciplinary system.

These advantages might seem particularly appealing to corporate clients, who have both the expertise to discover lawyer misconduct and the resources to minimize the impact of many of the transaction costs normally associated with bringing this kind of claim. n133 In fact, the number of malpractice actions filed by corporate clients remains relatively small. n134 This should not be taken to mean that these sophisticated clients do not use this form of control.
On the contrary, the fact that these clients can credibly threaten malpractice suits undoubtedly provides a further incentive for corporate lawyers to prevent agency problems and helps these clients reach favorable settlements when a dispute occurs. Anecdotal evidence suggests that the threat of malpractice liability has caused corporate lawyers to institute a number of preventive measures, such as circulating master calendars, keeping better track of their time, and implementing continuing legal education courses. Moreover, if a problem does arise, corporate lawyers have both the incentive and the ability to settle disputes before formal charges are filed. Liability controls therefore allow sophisticated corporate clients to tighten their hold over lawyer conduct without filing a claim.

These clients are also able to minimize the financial costs associated with this strategy. The deep pockets of many corporate clients undoubtedly provide an incentive for lawyers to overinvest in safety precautions at the client's expense. For example, a law firm contemplating a lawsuit for a major corporate client might be tempted to prepare detailed research memoranda on every conceivable legal issue before filing the complaint to protect itself against a charge that it failed to conduct an adequate pre-filing investigation. Although some measure of lawyer self-protection is inevitable, corporate clients have the resources to detect and control this kind of defensive lawyering. By carefully reviewing time records, work product, and strategic decisionmaking, corporate clients can accurately determine whether their lawyers are overinvesting in precautions that are likely to be of little value to the corporation. A law firm that continues to overcharge its clients in this manner will lose business to other, less risk-averse firms.

Overall, a traditional client-centered liability regime appears likely to replicate the central problems of professional regulation: externality problems are ignored completely, and individual agency violations are substantially underenforced. Moreover, these results can be achieved only at fairly substantial costs to the participants and to society. The picture looks quite different, however, if third parties are given standing to sue.

(b) Controlling Externality Problems Through Third Party Liability. -- The growing number of third party suits often raises the kind of externality problems that are unlikely to be brought to the attention of disciplinary authorities. Consider In re Flight Transportation Corporation Securities Litigation, a typical example of this kind of litigation. In that case, a class of investors sued a New York law firm. The investors alleged that the firm engaged in a number of false or deceptive practices for its corporate client, including failing to disclose material information in documents prepared on the client's behalf. If true, these allegations would undoubtedly constitute a violation of the law firm's professional duty. It is equally clear, however, that in the absence of this kind of lawsuit such misconduct would fall completely outside of the formal enforcement system. Certainly, the New York firm's client would have no incentive to turn in its alleged partner in crime. Additionally, the defrauded investors probably would view the effort involved in helping disciplinary officials "cleanse the profession" as a substantial and not very worthwhile distraction from their main goal of obtaining compensation for their injuries. Allowing them to sue lawyers for their injuries makes this "distraction" coincide with their primary objective.

Moreover, these results are also likely to occur across both hemispheres of legal practice. One of the most striking features of the recent rise in the number of statutory suits against lawyers is the number of blue chip firms whose conduct is being questioned. In re Flight Transportation Corporation, for example, involved a leading New York law firm with over 100 lawyers. Because these firms are usually involved in the kind of transactions that pose a significant risk of harming large numbers of consumers or investors, the volume of third party actions involving leading law firms appears destined to increase during the coming decades. At the same time, lawyers in the individual hemisphere have certainly not been immune from such suits. Third party controls have thus proven to be a very democratic form of regulation.

These benefits, however, must be weighed against the administrative and participant costs associated with opening the courts to these kinds of claims. Litigation is notoriously slow and expensive. In addition, the fear of liability may deter lawyers from legitimate as well as illegitimate conduct. This could be a significant cost to both participants and to third parties. For example, the threat of secondary liability for securities fraud may induce lawyers either to overinvest in safety precautions or abandon some classes of clients altogether. I return to these questions below. Despite these caveats, the basic point remains: liability controls appear likely to address a broad range of claims that would otherwise fall outside the present disciplinary system.

3. Institutional Controls: Breaking the Barrier Between Enforcement and Work. -- Institutional controls, such as rule II and the SEC's rule 2(e), give enforcement authority to the institutions in which lawyers work. This placement has two important consequences. First, unlike disciplinary regulation, enforcement officials do not need to rely entirely on complaints from injured parties to generate information about lawyer misconduct. Second, the actions taken by interested parties (lawyers, clients, judges, regulators, and adversaries) will be strongly influenced by the
background incentives generated by the institution in which the control system is located. Independently, each of these features seems likely to expand the range of conduct coming to the attention of regulatory officials. In combination, however, they are likely to focus these regulatory regimes on certain kinds of externality problems.

(a) Situational Monitoring and Adversary Incentives: The Information Advantages of Institutional Controls. -- In the ordinary course of litigation, judges extensively observe the lawyers' conduct. n149 Although the extent of judicial scrutiny should not be exaggerated, n150 a judge will often be able to form a crude judgment about the lawyers' effort. For example, was the pleading filed? Was the attorney prepared for oral argument? A similar story can be told about enforcement [*836] officials at administrative agencies such as the SEC. In the ordinary course of business, SEC officials review formal submissions and public documents prepared by lawyers. These efforts undoubtedly provide some tentative information about lawyer conduct, such as whether the registration statement was filed on time and in the proper form or whether the information disclosed in the offering documents is consistent with the public information available to investors. Moreover, as part of their normal duties, SEC officials investigate specific market transactions to determine whether the relevant parties have complied with applicable provisions of the securities laws. n151 These investigations also produce a significant amount of information about lawyer conduct. Simply as a result of their participation in an ongoing process, therefore, trial judges and administrative officials are likely to uncover information about lawyer misconduct that would escape the attention of disciplinary officials.

Moreover, because of their stake in the underlying process, these officials have substantial incentives to act on this information. For example, in light of the important role that lawyers play in the administration of the securities laws, n152 it is not surprising that the SEC has been especially vigilant in its investigation and prosecution of lawyers who have allegedly assisted their clients in circumventing relevant statutory requirements. n153 It is also not surprising, however, that these same incentives have sometimes led the Commission to engage in what appears from a compliance perspective to be overzealous enforcement.

Consider In re William R. Carter, n154 in which the SEC first announced its intention to use rule 2(e) to discipline lawyers. Two partners from a major New York law firm advised a publicly held corporation about its disclosure obligations under the federal securities laws. During the course of their representation, these lawyers became aware of material information about the company's finances that, in the subsequent view of the enforcement staff, should have been immediately disclosed to the Commission and to the investing public. n155 [*837] Although the lawyers repeatedly counseled the company to disclose the information, the company refused. Nevertheless, the lawyers continued to assist the company in filing documents and issuing public statements that, in light of what the lawyers knew, conveyed a false and misleading impression of the company's financial condition.

Based on these facts, an Administrative Law Judge concluded that the two lawyers, Carter and Johnson, had knowingly engaged in unethical and improper professional conduct in violation of rule 2(e). n156 He suspended them from practice before the SEC for one year and nine months respectively. n157 The full Commission reversed two years later, however, because it found that the ALJ had improperly held the two lawyers to a standard that went beyond clearly established ethical rules. n158

Carter highlights both the benefits and the costs of institutional controls. On the benefit side, the substantial incentives that government regulators have to see to it that lawyers uphold their obligations to the legal framework seem likely to lead these officials vigorously to pursue externality problems when they would otherwise have little interest in reporting misconduct to disciplinary authorities. n159 As in the Carter case itself, however, there is also a substantial danger that enforcement officials will prosecute conduct that does not in fact violate applicable norms. Although in this case the error was corrected, n160 from the standpoint of compliance, the fact that institutional controls pose and increased danger of overdetering certain kinds of lawful conduct should be counted as a cost of the system. n161

The same point can be made with respect to other participants who are in a position to observe lawyer misconduct. Given the inherent limitations of independent observation and investigation, institutional regulators such as trial judges and SEC officials must rely on other knowledgeable actors to report instances of professional misconduct. [*838] By making the enforcement process a part of an ongoing system of interactions between these knowledgeable actors and the offending lawyer, institutional controls increase the incentive for these parties to participate in the regulatory process. Experience with rule II underscores this conclusion.

Rule II offers a number of formal and informal incentives to lawyers (and their clients) to report misconduct by their adversaries. Rule II specifically states that fee shifting is an appropriate sanction for violations of the rule. n162 This alone provides substantially more incentive than the current disciplinary system. Moreover, because rule II operates during the course of litigation, adversaries may gain a number of strategic advantages from reporting lawyer
misconduct. The fact that these structural differences have altered the incentives of the putative victims of strategic behavior can be plainly seen by the number of sanctions motions that have been filed over the last eight years.

In substance, rule II does little more than spell out the traditional prohibition, contained in both the Model Code and the Model Rules, against asserting frivolous claims or defenses. Not surprisingly, disciplinary action is rarely taken against a lawyer for violating this longstanding professional command. In the eight years since rule II was amended, however, there has been an explosion of activity, most of it initiated by those claiming to be the victims of conduct violating the rule. These same incentives, however, limit the overall effectiveness of this form of control.

[*839] (b) Agency Problems and the One-Shot Player: The Danger of Reifying Institutional Power. -- Each actor in an institutional control system has an agenda. Adversaries in a litigated case want to win on the merits. Trial judges want to dispose of cases efficiently. SEC enforcement officials want to vindicate their ideas about regulatory policy. Moreover, each institution in which such a control system might be located distributes power and information among relevant participants in particular ways. Institutional controls cannot easily escape these preexisting goals and structures. Experience with rule II is again instructive.

In theory, rule II is applicable to agency and externality problems across the entire spectrum of lawyer-client interactions. The actual reach of the rule, however, has been far more restricted. Although there is evidence that the rule has influenced the conduct of all attorneys, every study to date has concluded that plaintiffs (and their lawyers) are far more likely to be the objects of requests for sanctions and to have sanctions imposed. Moreover, it also appears that certain kinds of plaintiffs, most notably those prosecuting civil rights or employment discrimination claims, are especially likely to be disciplined under the rule.

These results are sadly predictable given the institutional dynamics of this form of control. Litigants and their lawyers file rule II motions primarily to gain some economic or strategic advantage in the litigation. Although this motivation encourages these knowledgeable actors to participate in the enforcement process, it also restricts the kind of conduct they are likely to report. Lawyers obviously have very little incentive to report pure agency violations by their adversaries. Nor are they likely to move for sanctions in cases in which the financial or strategic costs of such a move seem likely to outweigh its benefits. This strategic calculus systematically benefits institutional defendants. As sophisticated repeat players, these litigants have both a long-range view of the strategic benefits that might result from obtaining rule II sanctions in a particular case and an ability to shoulder the costs of moving for them. At the opposite end of the spectrum, a lawyer for an individual plaintiff operating under a contingent fee agreement can ill afford to invest in strategic maneuvering that, whatever else it accomplishes, will almost certainly increase the cost of ultimately prevailing on the merits. Taken as a whole, therefore, institutional controls embedded in the litigation process tend to reify the underlying advantages already enjoyed by certain litigants.

Consider Kamen v. AT&T. An employee sued AT&T Communications, Inc., a subsidiary of AT&T, because ATCOM had allegedly failed to make reasonable efforts to accommodate her handicap as required by the Rehabilitation Act of 1973. As required by that statute, the plaintiff's complaint alleged that ATCOM received "federal financial assistance." Nevertheless, upon receiving the complaint and before answering, the defendant's lawyer delivered to the plaintiff's counsel a letter stating that ATCOM did not receive federal funds and that unless the complaint was withdrawn, ATCOM would seek sanctions under rule II. The plaintiff's lawyer responded by stating that he did not have sufficient information to determine whether the defendant's position was correct, but if ATCOM voluntarily turned over documents that verified this allegation, he would withdraw the action. Counsel for ATCOM refused to turn over any documents and instead simultaneously filed a motion to dismiss for lack of subject matter jurisdiction and a motion for sanctions. The district court granted both motions. The plaintiff appealed solely from that part of the judgment awarding sanctions; no appeal was taken from the dismissal.

The Second Circuit reversed. Writing for the court, Judge Oakes held that sanctions were inappropriate because had "any competent counsel" bothered to examine the public record, he would have found sufficient evidence to conclude that an allegation that ATCOM had received federal assistance was "well grounded in fact and . . . warranted by existing law" within the meaning of Rule II." In so holding, the court strongly hinted that it would also have reversed the dismissal of the complaint.

Kamen illustrates both the potential of and the difficulties with institutional controls such as rule II. A large employer, such as AT&T, has a substantial stake in trying to convince the courts and its employees that it is not subject to suit under federal law. It has every incentive to discourage potential plaintiffs from challenging its position on this issue, especially if it realizes that the position is vulnerable. Moreover, a motion for sanctions is a relatively low
stake gambit for this defendant. The plaintiff, a white-collar office worker, is unlikely to have substantial resources to invest in the case. Nor are there substantial damages at stake. It is unlikely that such a plaintiff and her lawyer will want to mount a retaliatory strike. n191

Individual plaintiffs and their lawyers are particularly vulnerable to threats of sanctions. n192 Theoretically, judges can and should intervene [*843] to counteract this vulnerability. Unfortunately, the current emphasis on case management seems likely to discourage judges from correcting this problem. The cases most vulnerable to the kind of scenario represented by Kamen are those involving novel, difficult to prove, or legally marginal (but nevertheless nonfrivous) claims. Yet these cases are the easiest to remove from the system. n193 There is a very real danger that judges will attempt to clear their dockets by allowing such vulnerable cases to be quietly removed from the system.

Because of all of these factors, institutional controls such as rule II seem likely to overdeter individual externality problems while simultaneously underdetering corporate externality problems and ignoring, or perhaps even exacerbating, n194 individual agency problems. Although these are serious concerns, they must be balanced against the likelihood that these controls will have a significant impact on the vast amount of strategic behavior -- by both individuals and corporations -- that falls completely outside the present disciplinary system. Institutional controls can sometimes generate substantial administrative costs as well; n195 yet it is not at all clear that these control systems consume more public resources than comparably effective systems of disciplinary regulation or liability controls. Indeed, because they are located in existing institutions, these control systems can piggyback onto efforts and systems already underway. n196 Thus, despite their [*844] limitations, institutional controls have a number of enforcement advantages over disciplinary regulation.

4. Legislative Controls: Achieving Efficiency Gains Through Political Accountability. -- Underlying the many proposals to transfer some or all of the responsibility for enforcing the rules of professional conduct to a legislatively created enforcement agency is the assertion that politically accountable regulators are likely to be more vigilant in protecting the public than either bar officials or judges. n197 The significance of this claim, however, cannot be measured in the absence of some understanding of the institutional structures within which legislatively appointed officials will carry out their duties. A given state legislature might choose to enact two quite different kinds of regulatory schemes. The first would simply replace the current disciplinary system with an identical or substantially similar set of institutions under public control. The second would create a proactive agency with broad investigatory and reporting powers similar to OSHA or the SEC. Not surprisingly, the actual benefits and costs of a legislative enforcement system will depend upon which of these two regulatory forms a state adopts.

(a) Political Accountability in the Absence of Structural Change. -- In many states, legislatively created administrative agencies have enforcement authority over many professionals, most notably doctors. n198 These agencies are substantially similar to the disciplinary agencies that currently regulate lawyers. Specifically, the typical medical review board is structurally separated from arenas of professional work, acts almost exclusively on the basis of complaints, and has limited power to impose sanctions other than reprimands, suspensions, and license revocation. n199 As a result, these agencies have encountered many of the same problems that plague the disciplinary system.

[*845] As the critics of legislative regulation repeatedly point out, these similarities cast doubt on the claim that simply substituting politically accountable administrators for judicially supervised disciplinary officials will produce large compliance gains. n201 Although there are sufficient differences between the background working conditions and institutional structures of legal and medical practice to raise questions about many of the simple comparisons drawn between the two fields, n202 little reason exists to believe that lawyers and judges would be more willing to report misconduct to legislatively appointed officials or that such a system would make it more likely that injured clients would discover that they have been harmed. In the absence of these changes, legislative regulation is unlikely to discover much more lawyer misconduct than the current disciplinary system.

It might still be argued that legislative controls are preferable because public enforcement officials would be less biased toward lawyers than the lawyers and judges who staff the current disciplinary system. n203 Although this claim clearly has merit, n204 the overall compliance gains from such a move should not be exaggerated. As disciplinary staffs have become more professionalized, they tend to identify less with the lawyers who appear before them and more with the system of rules they are charged to uphold. n205 Moreover, even in [*846] public agencies, a danger always exists that enforcement officials will be captured by regulated interests. n206
Nevertheless, it is plausible that placing the existing process in the hands of publicly accountable officials would produce some modest enforcement gains. n207 To ensure significant gains, however, the existing process would have to be substantially altered.

(b) The Costs of Structural Change. -- There are many forms that a legislatively created administrative agency designed to regulate lawyers might take. n208 Consider, for example, a state that decides to create a lawyer regulatory agency modeled after OSHA. An agency following this model would neither depend upon client complaints nor limit its remedial powers to imposing limitations on the professional license. Instead, like OSHA, such an agency would conduct spot inspections of lawyers' offices, interview clients at random, and examine court records and other public documents to discover misconduct by lawyers. n209 To take another example, consider an administrative agency patterned after the SEC. Instead of spot inspections, such an agency might direct lawyers to submit forms certifying that [*847] they had complied with relevant professional commands, or it might require a yearly compliance audit to be performed by some certified professional. n210

Both the OSHA and the SEC model offer significant enforcement advantages over the current disciplinary system in all four categories of lawyer-client interaction. An active program of spot investigations and random audits would undoubtedly reveal many of the typical agency violations that individual clients (and even corporations) have difficulty detecting on their own. Similarly, detailed reporting requirements and compliance audits should uncover a substantial amount of strategic behavior by even the most sophisticated lawyers and clients.

The administrative, participant, and third-party costs associated with achieving these goals, however, are likely to be quite high. Most administrative agencies, including OSHA and the SEC, have achieved only partial success at best, although they have generated substantial costs and other unintended consequences. n211 Independent investigation is both time consuming and expensive. Although self-reporting may lower administrative costs, it will impose corresponding costs on lawyers. n212 Because state legislatures have not appropriated sufficient funds to operate the much more limited agencies that currently regulate doctors, n213 the expenditures that would be necessary to make these controls truly effective represent a substantial drawback to the practicality of this enforcement model.

Nevertheless, contrary to the contentions of the opponents of this form of control, legislative controls do offer a number of potential compliance advantages. It would therefore be a mistake to exclude these control structures from the efficiency analysis.

C. An Optimal Compliance Strategy

Two general conclusions emerge from the preceding analysis. First, none of the four enforcement systems will efficiently control lawyer misconduct falling within each quadrant of the matrix. Disciplinary [*848] controls are unlikely to deter externality problems by either individual or corporate lawyers. Liability controls will fail to prevent misconduct that does not produce provable damages that outweigh transaction costs. Institutional controls generally ignore -- and perhaps for individual clients even exacerbate -- agency problems. Legislative controls will either replicate the problems of disciplinary enforcement -- if they rely on complaints from injured parties -- or dramatically increase enforcement costs -- if they institute an active program of monitoring and independent investigation.

Second, all four systems offer certain comparative advantages that would be difficult to replicate by simply devoting more resources to any of the other alternatives. For example, even if society were willing to supply every malpractice claimant with a free lawyer, complaints involving low-level negligence would still be more efficiently resolved in the kind of informal dispute resolution setting contemplated by the disciplinary model than by full blown malpractice litigation. Similarly, because of the trial judge's familiarity with the litigation, rule II offers a more efficient means of preventing externality problems than ex post enforcement by either disciplinary officials or a legislatively created regulatory body. Precisely because they are disconnected from the arenas of work, however, these ex post strategies are likely to enforce certain professional norms -- for example those relating to the lawyer's duty to challenge zealously official authority -- more efficiently than trial judges or other institutional monitors who have little incentive to protect these interests. At the same time, because they effectively mobilize private incentives, third party liability regimes will uncover more externality problems at less cost than even the most diligent legislatively created investigative system.

These conclusions strongly suggest that many of the compliance arguments advanced by participants in the various debates over regulatory reform are wrong. For example, the bar's assertion that disciplinary controls can effectively address the full range of lawyer misconduct is unpersuasive in light of the clear compliance gains that can be achieved through liability and institutional controls. Similarly, the claim that these enforcement systems make professional
discipline unnecessary is also wrong, because disciplinary controls have a comparative advantage in addressing low-
level agency problems.

These two conclusions also illuminate the compliance costs of restricting access to any of the four enforcement
systems. Two recent examples illustrate the dangers such limitations pose to the goal of efficient enforcement.

First, in a series of recent decisions, the Seventh Circuit has imposed significantly higher burdens on plaintiffs
seeking to bring third party claims against lawyers for aiding and abetting violations of the [*849] securities laws.
According to the Seventh Circuit, these higher requirements are justified because lawyers and accountants are
unlikely to risk their reputations by covering up a client's fraudulent activity unless they get a greater share of the
proceeds of the illicit scheme than their ordinary fee. **n215** This factual assumption ignores the substantial embedded
pressures on corporate lawyers to satisfy client interests. **n216** Moreover, by requiring that plaintiffs demonstrate not
only that the lawyers knew of the alleged fraud but also that they had a duty to disclose this information, **n217** the new
standard undermines the widely acknowledged professional norm that lawyers, as officers of the court, should refuse to
participate in fraudulent conduct even when they are not at liberty to disclose the wrongdoing. **n218** Although third
party lawsuits are certainly an expensive means of enforcing this duty, there is no reason to believe that any of the other
[*850] control systems will be able to detect and deter corporate externality violations of this type more efficiently.
**n219** Therefore, from the perspective of enforcing the rules of professional conduct, **n220** it is a mistake to place
additional obstacles in the path of this kind of third party enforcement system.

A similar critique can be leveled against the Supreme Court's recent decision in Pavelic & LeFlore v. Marvel
Entertainment Group. **n221** The Court held that rule 11 sanctions can be levied only against the attorney who actually
signs the pleading or motion, and not the law firm as a whole. **n222** Although the Court based its ruling on what it
considered to be the plain meaning of the text, **n223** it also indicated that allowing an individual attorney to divert part
of the sanction to the partnership might not be the best way to enforce the policies underlying the rule. **n224** This
argument ignores the important role that embedded workplace controls play in determining lawyer conduct. As the
court of appeals decision upholding the sanctions against the firm correctly noted, law firm "responsibility for Rule 11
sanctions will create strong incentives for internal monitoring, and greater monitoring will result in improved pre-filing
inquiries and fewer baseless claims." **n225** By failing to account for the differences between lawyers who practice in
firms and solo practitioners, the Supreme Court missed an opportunity to counteract the tendency of these powerful
embedded controls to frustrate enforcement efforts. **n226** Because most corporate lawyers work in firms, this decision
also has [*851] the unfortunate consequence of making it more difficult to sanction corporate lawyers. **n227**

From the standpoint of achieving optimal levels of compliance, therefore, all four regulatory models should be used
freely when they are likely to contribute to enforcement objectives. Such a "multi-door" enforcement system, **n228**
however, is likely to produce its own unique administrative, participant, and third party costs that must be factored into
the efficiency calculus. For example, spreading enforcement authority among many different formally independent
institutions will inevitably produce substantive and jurisdictional conflicts. **n229** Although this problem is muted by
the assumption that formal rulemaking power will remain centralized, the potential for substantive tilt during the
enforcement process effectively means that a lawyer might still find herself confronting two control systems that
express conflicting interpretations of the same professional norm. **n230** Moreover, involving multiple actors in the
enforcement process might cumulatively result in significant overenforcement and thereby increase the costs of
professional liability insurance. **n231** or encourage lawyers to engage in defensive lawyering. **n232** Although these
costs are unlikely [*852] to outweigh the cumulative benefits of controlling lawyer misconduct that would otherwise
escape regulatory action, **n233** they do highlight the efficiency losses that might result from uncritically extending
enforcement authority in each of the four systems. **n234**

From the standpoint of compliance, the sole limitation on any particular enforcement system is the general
command that enforcement activities should not proceed beyond the point at which the marginal benefits obtained from
additional compliance either are outweighed by enforcement costs or can be attained more efficiently by some other
control system. If this were the only constraint, enforcement activity under each of the four systems would dramatically
increase. For example, the Justice Department might establish an institutional control system to detect and deter
strategic behavior by criminal defense lawyers involved in litigation against the government. Courts might remove all
standing requirements and allow anyone with knowledge of lawyer misconduct to sue for punitive damages. Bar
officials might decide to disbar lawyers found to have committed even minor externality violations to compensate for
the fact that such problems are rarely detected.
It is at this point that many would contend that efficiency is not the only value at stake in the enforcement process. For some, the objection to these presumptively efficient enforcement devices might center around the purported connection between a lawyer's freedom from certain types of external restraint and the constitutional structure of government. Others might contend that this kind of efficient regulatory scheme is inconsistent with protecting the rights of citizens in a democracy. Still others might point to the limited usefulness of the assumptions of rationality, self-interest, and clear standards that underlie the compliance analysis and argue that certain forms of control undermine long-term regulatory goals by failing to nurture motivations that encourage lawyers to act in socially beneficial ways in cases beyond the reach of any conceivable enforcement system.

[*853] As I stated at the outset, participants in the various debates over professional reform frequently claim that these and similar independence arguments constitute a distinct -- indeed, in the eyes of some, a determinative -- reason for using or failing to use a particular enforcement system. From the preceding analysis, we can now see the costs of accepting such a claim: lawyer misconduct falling within at least one quadrant of the matrix will be less efficiently controlled than it otherwise would be. The next Part examines whether and under what circumstances it is worth paying that price.

IV. INDEPENDENCE ARGUMENTS

Independence arguments have always had a privileged status in professional discourse. For example, the claim that there is an inherent link between the current disciplinary system and the status of lawyers as "independent professionals" is firmly rooted in precedent, practice, and professional mythology. These and similar claims, however, elide two important questions: what does it mean to be "independent," and what does society gain from having an independent legal profession? Section A attempts to answer these questions by examining the many definitions of and justifications for professional independence. Although a great number of claims have been put forward over the years, only one -- the claim that a given regulatory measure will discourage lawyers from resisting external pressure when they construe ambiguous professional norms -- constitutes a separate constraint on the enforcement choices at issue here. Section B investigates whether the optimal enforcement strategy outlined at the end of Part III poses a credible threat to this form of professional independence.

A. The Multiple Meanings of Lawyer Independence

No word in the lexicon of professionalism is more commonly invoked -- and less commonly defined -- than "independence." As a result, participants on both sides of many regulatory debates can invoke versions of this norm without actually agreeing on its scope or content. Before we can evaluate what effect (if any) these claims should have on enforcement choices, we need a more precise account of the meaning and importance of professional independence.

Certain claims can be quickly discarded at the outset. The common assertion that independence is synonymous with self-regulation is, in this context, nothing more than a tautology. Without some justification for why society should value a profession that is self-regulating, the mere assertion that professions in general are thought to have this power is of little consequence. Similarly, without more, the fact that lawyers seek a certain level of control over the terms and conditions of their work is entitled to little weight. Like most other people, lawyers probably value the ability to decide how, when, and on what projects to devote their professional skills. Nevertheless, lawyers must produce some justifications, over and above the general rights every citizen has in a democracy, to explain why society should forgo the tangible benefits of increasing overall compliance with professional norms. Although such a case can sometimes be made, it requires more than demonstrating that a certain level of autonomy is "a good deal for lawyers."

Recognizing either the circularity or the limits of these formal claims, participants in the various regulatory debates often seek to link their arguments about professional independence to some more general conception of the public good. These arguments fall into two categories. The first posits that an independent legal profession is necessary to maintain the separation of powers among the three branches of government. The second claims that an independent legal profession plays an essential role in preserving the rights of citizens in a democracy. Although it is widely assumed that both "separation of powers" and "democratic theory" arguments properly constrain enforcement choices, only arguments of the second kind are relevant to the questions presented here.

I. Efficient Enforcement Will Not Undermine the Separation of Powers. -- Separation of powers arguments are most frequently invoked by supporters of the current disciplinary system. As Professor Charles Wolfram has recently argued, it is important to distinguish between two versions of these arguments. The first, which he refers to as
the "affirmative" aspect of the inherent powers doctrine, posits that "even in the absence of statutes specifically saying that a court may do so, a court nonetheless 'inherently' has the power to regulate the legal profession." n244 The second, which he calls the "negative" aspect of this doctrine, asserts that only courts should be allowed to regulate lawyers. n245

The affirmative claim can be quickly disposed of in this context. There are good compliance arguments for allowing courts to exercise enforcement authority over lawyers even in the absence of express statutory authority. The Supreme Court's reaffirmation of the inherent powers doctrine last Term in Chambers v. NASCO, Inc. n246 underscores this point. In Chambers, a sophisticated corporate client n247 and his well-financed lawyer engaged in "a plan of obstruction, delay, harassment, and expense sufficient to reduce [the plaintiff] to a condition of exhausted compliance." n248 After issuing several warnings, n249 the trial [*856] judge imposed sanctions on both Chambers and his lawyers, including disbarring the lawyer from practice before the federal district court where the case was pending. n250 In imposing this severe sanction, the district court made it clear that it was acting to preserve its core functions from outrageous fraud and abuse. n251 And yet, in the absence of inherent authority, the judge would have been powerless to reach much of the conduct in question because of gaps in the relevant statutes and regulations. Taking this authority away from courts would not contribute to the goal of achieving maximum compliance with professional norms. As a result, the affirmative claim that judges must have the authority to discipline lawyers is not threatened by the kind of efficient enforcement system outlined in Part III.

The negative claim is much more problematic because it would preclude many of the most effective enforcement systems. n252 Once [*857] the premises underlying this version of the argument are laid bare, however, it is clear that efficient enforcement by other branches of government poses no credible threat to either a formalist or a functionalist understanding of the separation of powers. n253

The formalist version of the negative inherent powers argument builds on the affirmative contention discussed above that courts cannot function without lawyers. As a result, it is asserted, regulating lawyers is part of the judicial function, which cannot be invaded by either executive or legislative power. n254 This argument proves too much. Although lawyers are essential to courts, they also play a crucial role in many executive and legislative affairs. n255 With respect to these matters, the formal arguments in favor of giving the legislature or an administrative agency regulatory jurisdiction are as compelling as the parallel claim asserted by courts in the litigation field. n256

[*858] Functionalist arguments are similarly unpersuasive. According to these arguments, courts must retain exclusive control over the regulatory process as a pragmatic buffer to prevent the other two branches from usurping judicial power. n257 These arguments, however, often assume that rulemaking as well as enforcement authority will be transferred to either the executive or the legislature. n258 Although a persuasive argument can be made that certain legislative alterations of professional norms might pose a realistic threat to the integrity of courts, n259 these content claims are largely irrelevant here because of the assumption that all enforcement officials are bound by the current rules of professional conduct. Also irrelevant is the claim that allowing the other two branches to share enforcement authority will produce widespread noncompliance with professional norms essential to the operation of the courts. n260 Each of the enforcement measures endorsed in Part III is justified on the ground that it will increase overall compliance levels. To the extent that those systems prove insufficient, courts can always resort to their affirmative powers to protect themselves from inadequate enforcement.

Properly understood, therefore, separation of powers arguments only limit the range of regulatory authority that may be taken away from courts. They do not provide a compelling reason to limit enforcement actions that can be taken by other branches of government.

2. Independence, Ambiguity, and Democracy. -- Lawyer independence is frequently linked to the preservation of democracy. n261 The [*859] argument takes several forms. In the most familiar claim, opponents of state regulation assert that only an independent legal profession can adequately protect the rights of individuals against state power. n262 The example most frequently invoked is the criminal defense lawyer, who must be able to defend vigorously the rights of accused citizens without fear of retribution by state authorities. n263 At other times, the fact that citizens in a democracy have a right to use the public resources of the state to achieve their private purposes is said to require that lawyers be independent from any source of authority, public or private, that might limit their clients' access to the public goods encoded in law. n264 Here, the example might be a small town lawyer resisting community pressure to assist a local developer in pursuing a controversial project. n265 Still others point to the important role lawyers play in upholding the framework of rules and procedures at the foundation of democratic government. n266 According to this argument, an independent legal profession acts as a mediating force between the interests of private clients and the
public purposes of the [*860] legal order. n267 The paradigm case of this form of independence is a lawyer who
persuades her client not to take advantage of an arguably applicable legal loophole on the ground that it would
undermine the policies of the statute and result in unjustified harm to innocent parties. n268

Each of these "democratic theory" arguments captures important social benefits. The value of a legal profession
that is prepared to defy state authority in the name of individual rights, creatively advocate solutions to complex
problems, and dissuade recalcitrant clients from undermining long-term legal values cannot seriously be disputed. The
relationship between the achievement of these valuable social goals and the shape of the enforcement system, however,
is more complex than most of the proponents of these independence claims generally suppose.

The claim that a particular enforcement system is the first step toward totalitarianism, although generally cloaked in
the language of independence, frequently rests on implicit assumptions about content or compliance. For example,
when opponents of state regulation invoke the image of lawyers in Nazi Germany and other authoritarian regimes who
are nothing but "tool[s]" of the government, n269 their claims are plausible only if one assumes either a radical
redrafting of professional norms or massive noncompliance with current standards. In Nazi Germany, lawyers were
sanctioned -- sometimes even tortured -- for failing to assist the state actively in obtaining convictions. n270 In this
country, active assistance of this kind would violate the rules of professional conduct. n271 Under the assumptions
made at the outset, these rules will remain in place regardless of who is given enforcement authority. Moreover,
although it is theoretically possible that state authorities might ignore, or actively subvert these rules, the kind of
efficient enforcement system outlined at the end of Part III is expressly designed to guard against such
underenforcement. n272 Therefore, [*861] to state a separate ground for rejecting an otherwise efficient, and by
definition reasonably effective, enforcement system, independence claims must contemplate something other than
ensuring that lawyers will comply with clear rules.

There are, however, many obligations in the governing rules of professional conduct that are not clear. In some
areas, such as the decision whether to enter into a specific lawyer-client relationship or to practice in a particular area of
the law, lawyers are given complete discretion to act as they see fit. n273 In other cases, the applicable rules are
specifically cast in permissive terms. n274 Finally, even in cases in which the relevant rules appear on their face to be
mandatory, the presence of arguably conflicting rules or mitigating facts may still give the lawyer substantial freedom to
advance more than one plausible account of what conduct is actually required under the circumstances of a particular
case. n275

Society has an important stake in the content lawyers give to discretionary norms. n276 If lawyers were to comply
only with the literal commands of clear rules, and advise their clients to do likewise, many important societal goals
would be frustrated. n277 For example, when lawyers refuse to represent political dissidents, as many did in the
McCarthy era, n278 they undermine society's commitment to preserving the right to free expression and other
important democratic liberties. By the same token, if tax lawyers systematically choose to exploit the indeterminacy of
the legal standards regarding what constitutes proper tax advice, the entire revenue collection system would be
endangered. n279 [*862] Because these obligations are discretionary, society must rely on something other than
direct enforcement to ensure that a proper content is infused in these norms.

Independence claims properly seek to occupy this discretionary space. To reach solid judgments about how they
should act in ambiguous situations, lawyers must independently assess both their client's "true" (as opposed to merely
articulated) interests and the public purposes underlying relevant legal restrictions. From this somewhat detached
perspective, the lawyer can work to discover creative avenues for harmonizing competing concerns in a manner that
accomplishes as much of the client's purposes as possible while at the same time promoting long-term legal values.

n280 Given the inherent ambiguity of the circumstances under which these decisions will be made, there is no a priori
method for predicting how particular lawyers will resolve these conflicts in specific cases. Instead, the model is of a
person who has fully integrated the values of the legal system -- including all of the conflicts and ambiguities -- and is
honestly struggling to discover and implement the approach that best effectuates its underlying purposes. n281
Independence, therefore, is primarily an "attitude" or a habit of mind as opposed to a structural condition. n282

It is this model of a lawyer who is free to exercise independent professional judgment that many claim is threatened
by the efficient enforcement system outlined at the end of Part III. n283 According to [*863] the traditional view, to
exercise this form of discretionary judgment, lawyers must be "independent" from all potentially corrupting influences
that might cloud or distort their considered assessment of what legality requires. n284 This was generally thought to
require "self-regulation." n285 Once we examine the actual operation of this and other enforcement systems, however,
it is clear that additional controls will often promote, rather than undermine, a lawyer's willingness to take appropriate actions under conditions of uncertainty.

B. Independence and Professional Regulation

It is easy to dismiss the bar's claim that society benefits from self-regulation as nothing more than self-aggrandizing rhetoric. The simplistic claim that the public has always (or generally) benefited from lawyer control over the regulatory process has been repeatedly and persuasively attacked. Nevertheless, it would be a mistake to assume that there is nothing to the traditional argument that links independence and the opportunity for self-governance. By collectively engaging in the process of enacting and enforcing rules of professional conduct, lawyers develop and reinforce the disposition for moral decisionmaking. Surely, society has an interest in cultivating a moral personality in all its citizens, even lawyers.

[*864] This does not mean, however, that disciplinary controls should be the only form of professional regulation. To see why, one must carefully examine the contexts in which independence claims are made.

1. Independence and the Matrix of Controls. -- Those who claim that self-regulation is essential to professional independence emphasize that only under this type of regulation are lawyers completely free from formal state control. They fail to acknowledge, however, that self-regulation does nothing to alleviate the substantial embedded pressures exerted by clients, colleagues, or others with an interest in persuading lawyers to favor one part of the legal framework over another. To exercise independent judgment and to act on the basis of what that judgment appears to require, lawyers must resist both public and client pressures.

[*865] The model for independent professional judgment, therefore, parallels the matrix outlined in Part II. As an advocate, a lawyer must sometimes resist state authority and public opinion to resolve ambiguities in favor of preserving her client's rights. I call this "client motivated" independence. As an officer of the court, on the other hand, the lawyer must sometimes resist any public or private actor, including her client, who seeks to pressure her into resolving an ambiguous legal command in a manner that undermines its fundamental purposes or otherwise damages the legal framework. I call this "publicly motivated" independence. Once this parallel is drawn, it is plausible that the willingness of a particular lawyer to demonstrate one of these two forms of independence will be affected by whether she is representing an individual or a corporate client. Thus, as Figure 3 demonstrates, independence claims can be tested in four distinct contexts: individual/client motivated independence, individual/public motivated independence, corporate/client motivated independence, and corporate/public motivated independence. Not surprisingly, whether a particular independence claim is plausible depends largely upon which quadrant we are examining.

Figure 3

<table>
<thead>
<tr>
<th>Client</th>
<th>Individual/Client-Motivated Independence</th>
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<tr>
<td>Individual</td>
<td>Corporation</td>
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<tr>
<td>Corporate/</td>
<td>Corporate/</td>
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<tr>
<td>Client-Motivated</td>
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<td>Independence</td>
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<tr>
<th>Conduct</th>
<th>Individual/Client-Motivated Independence</th>
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<tr>
<td>Client-Motivated</td>
<td>Public-Motivated</td>
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<tr>
<td>Independence</td>
<td>Independence</td>
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2. Independent Judgment as Balanced Judgment. -- Those who raise democratic theory objections to particular forms of regulation almost always begin with the example of the criminal defense lawyer. This premise is hardly surprising, given the many powerful arguments for allowing these lawyers maximum autonomy from the state. By vigorously defending the rights of their clients, criminal defense lawyers stand as a bulwark against state power, not just for the accused, but for all who might be accused in the future. A regulatory scheme that seriously interferes with a criminal defense lawyer's willingness or ability to raise every available legal claim would undermine one of the principle values of an independent legal profession.
These insights, however, have a limited impact on the general enforcement questions at issue here. The criminal defense bar represents a very small percentage of the total number of lawyers in America. n291 Although more lawyers represent clients involved in disputes [*866] with the government, it is not clear that society has the same stake in providing these claimants with the kind of zealous advocacy that we have come to expect in criminal cases. n292 Nevertheless, the same democratic theory arguments are often used to oppose regulatory measures in this wider context. n293 Even granting his analogy, however, the sweeping claims that are often drawn from this comparison seem strained in light of what we have seen about agency problems in general.

(a) The Failure of Disciplinary Controls to Correct for Market Inequalities. -- Part III demonstrates that disciplinary controls neither deter externality problems nor effectively prevent individual agency problems. Such compliance failures also undermine the disciplinary system's ability to encourage lawyers to resist market pressures when the relevant norms are ambiguous or in conflict. Consider, for example, the prohibition against frivolous litigation. n294 Even though the prohibition against frivolous claims is a standard fixture of a lawyer's duty to assist the court in securing the efficient administration of justice, lawyers who file frivolous claims or defenses are rarely brought before disciplinary officials. Moreover, the definition of frivolousness is notoriously vague. n295 Thus, the only incentive for lawyers to perform this gatekeeping role comes from their internally generated allegiance to the public aspects of legal practice. n296 Internal motivation, however, is more difficult to maintain in the face of strong client pressure to ignore or minimize the importance of systemic constraints. Corporate clients, with their superior ability to formulate goals and monitor compliance, are in a good position to exert this form of [*867] pressure. n297 As a result, corporate lawyers are even less likely to be "independent" in constraining client conduct that violates systemic norms than are lawyers representing individuals, who can exploit the standard information asymmetry to resist or modify their clients' goals. n298 Disciplinary controls do nothing to correct this imbalance.

Nor do these controls promote a defensible vision of independence for lawyers who represent individuals. By condemning only the most flagrant departures from the client service model, the current disciplinary system leaves a regulatory void that may encourage lawyers for individual clients to exploit the indeterminacy of legal rules in ways quite inconsistent with either client or public understandings of professional independence. Sociologists have repeatedly documented instances in which these lawyers have sacrificed the interests of their unsophisticated clients to avoid the powerful embedded controls exerted by colleagues, state officials, or others with whom they share a long-term relationship. n299 Although it is possible that these embedded interests will coincide with a lawyer's independent professional judgment, it is at least as likely that "lawyers may wield a power [they have over individual clients in a manner] that benefits no one so much as themselves.” n300

In short, disciplinary controls do little more than mirror the norms of the marketplace. These norms -- and not the idealized vision of the "independent profession" n301 -- form the baseline against which we [*868] should measure the impact of specific external controls on the norm of professional autonomy.

(b) Balancing the Market Through Enforcement. -- Enforcement systems such as third party liability controls and institutional enforcement efforts by the SEC and the IRS are likely to promote rather than undermine independent judgment. By exposing and sanctioning a broad range of externality problems that would otherwise be hidden from view, these systems ensure that lawyers take seriously their duties as officers of the court when advising clients about matters such as regulatory compliance, even when a plausible argument could be made that compliance was not required. The additional check provided by an enforcement system is particularly needed in the corporate sphere, where lawyers are especially prone to undervalue their duties as officers of the court.

Consider the recent debacle involving Lincoln Savings and Loan. n302 In the two years since Lincoln's billion dollar collapse, hundreds of lawsuits have been filed against virtually anyone connected to the failed thrift. Not surprisingly, much of this activity is directed at Lincoln's former lawyers, many of whom are from some of the largest and most prestigious law firms in the country. n303 Although each lawsuit raises a host of unique factual and legal issues, the gist of these actions is essentially the same -- that these prestigious firms knowingly assisted Keating and others in fraudulently deceiving government authorities and the general public about the true nature of Lincoln's activities. n304 They therefore raise exactly the kind of [*869] corporate externality problems that pose the greatest danger to the fair and efficient administration of justice and the rights of innocent third parties that underlie the publicly motivated professional independence. n305 Similar arguments support institutional controls in these contexts. n306

It is possible, however, that these gains might come at the expense of client motivated independence. Each of the forms of external regulation considered in Part III might induce a lawyer to place his own interest in avoiding sanction ahead of his client's interests and thereby undermine client motivated independence. For example, the threat of
malpractice liability might make a lawyer reluctant to represent certain clients, such as an individual who previously sued another lawyer for malpractice. n307 Similarly, the threat of rule 11 sanctions may lessen the probability that a lawyer will take a case or pursue an argument on behalf of a client with a marginal but nonfrivolous case. n308 To the extent that these enforcement systems have combined to deprive certain citizens of meaningful access to the judicial system for their legitimate claims, n309 these measures have dealt [*870] a serious blow to one of the most important functions of an independent legal profession. n310

Despite protestations to the contrary, there is very little evidence that corporate lawyers have been unduly "chilled" by these same regulatory measures. Consider, for example, the case of Lord, Bissell & Brook, a leading Chicago corporate firm. In the famous National Student Marketing case in the 1970s, the SEC sued Lord, Bissell and alleged that the firm aided and abetted its client's violations of the federal securities laws. n311 This suit was criticized by many leading members of the bar and other commentators on the ground that subjecting lawyers to suits by their adversaries would chill zealous advocacy and deprive corporate clients of the full protection of the law by driving a wedge between lawyer and client. n312 Partially as a result of this widespread outcry, the district judge, who concluded that the attorneys had failed to advise their clients to comply with applicable disclosure requirements, declined to enjoin the lawyers from committing future violations. n313

Subsequent events support the conclusion that fears of a chilling effect were greatly exaggerated. According to the allegations contained in two lawsuits that Lord, Bissell recently settled for twenty-four million dollars, shortly after the decision in National Student Marketing, the firm began aggressively representing National Mortgage Equity Corporation (NMEC), a controversial venture designed to capitalize on the newly emerging market in second mortgages. n314 Whether or not the firm's activities on behalf of this new client violated [*871] statutory and common law fraud rules, n315 there is no question that the firm zealously pursued the client's interest. n316 Indeed, according to the deposition testimony of the firm's managing partner, the firm changed virtually none of its practices as a result of the SEC's prosecutions in National Student Marketing. n317 Because of the financial and other rewards of a "cutting edge" corporate legal practice, n318 the fear of liability in this context is not sufficient to deter even clearly questionable conduct, let alone legitimate advice that might be made to appear questionable after the fact.

The picture looks quite different, however, from the perspective of the typical individual client trying to convince her lawyer to pursue a marginal but viable claim despite the threat of external sanctions. If the lawyer is operating under a contingent fee agreement, she must weigh the already speculative possibility of winning on the merits and recovering a substantial fee against the danger that she will lose the case and be sanctioned. For these lawyers, sanctions may make an already risky legal practice economically infeasible. n319 If the client is paying by the hour, she will have difficulty determining whether certain actions -- such as massive discovery requests, extensive legal research, consulting with experts -- are being taken for her benefit or the lawyer's. In either case, the individual client with a plausible legal claim is likely to be the loser.

Of course, the fear of personal liability will undoubtedly chill some corporate lawyers from pursuing legitimate client projects. Indeed, one can easily imagine a legislatively created administrative agency similar to OSHA adopting a set of procedures -- for example, giving [*872] administrative officials substantial discretion to disbar lawyers for initiating "frivolous" claims against the state -- that would significantly cool the ardor of even the most highly paid and closely monitored corporate advocate. n320 Nevertheless, the risk that the threat of sanctions will chill creative advocacy is a much greater problem for individuals than for corporations. n321 Broad condemnation of external regulatory schemes that focus on corporate conduct, therefore, is unwarranted.

C. The Proper Constraining Effect of Independence

The majority of independence arguments, like the compliance arguments examined in Part III, are wrong as general statements about the effects of the various control systems. Some forms of external regulation, such as rule 11 and rule 2(e), are expressly intended to promote the values underlying separation of powers claims. Others, such as legal malpractice, are intended to safeguard the rights of individuals in a democracy. Moreover, the actual effect that any given enforcement system is likely to have on a lawyer's independent professional judgment is largely a function of whether the embedded pressures make the lawyer more or less likely to abandon the client's legitimate interests. Thus, corporate clients, with their superior ability to monitor and control lawyer conduct, have the power both to press their lawyers to act in ways that jeopardize systemic norms and the rights of third parties, and to protect themselves against any loss of zealous advocacy or individual autonomy that might otherwise follow from an increase in external regulation. On the other hand, individual clients, although no less willing to press their lawyers for strategic gain, are
less able to do so in the face of strong competing pressure, just as they are generally less capable of ensuring that their lawyers zealously pursue their goals in the first instance.

Rather than stating universal truths that successfully trump various forms of regulation, independence arguments capture only one important aspect of the debate over professional reform. Even if these [*873] claims do not provide a reason to reject outright any of the four enforcement systems, they do highlight the dangers of uncritically applying any single enforcement regime to all lawyering contexts. The next Part offers some tentative thoughts about how enforcement officials might utilize these arguments to produce an efficient enforcement system compatible with legitimate aspects of lawyer independence.

V. RETHINKING PROFESSIONAL REGULATION

The analysis in Parts III and IV makes it clear that many of the premises underlying the current debate over regulatory reform need to be rethought. Contrary to much of the rhetoric in this area, neither compliance nor independence arguments can fairly be evaluated in the abstract. Each of the four regulatory models is capable of producing efficient compliance, but only in certain quadrants of the matrix. Some of these efficient systems do pose a credible threat to professional independence as that term has been defined in Part IV, but only for some lawyers in certain discrete professional settings. Under these conditions, a unified enforcement system that employs only one of the four models will heavily favor the interests of some participants at the expense of others. Both compliance and independence arguments, therefore, highlight the value of a multi-door enforcement strategy.

To be effective, such a strategy must be carefully constructed. Without proper coordination, enforcement officials in the four control systems may needlessly duplicate the efforts of other regulators or spend resources inefficiently and generate minimal gains. Moreover, if enforcement officials are unsupervised, they may operate their regulatory domains in ways that will undermine professional autonomy by reinforcing the pressures on certain lawyers to sacrifice long-term legal values for short-run economic and political goals. Finally, because by definition there is no unitary scale for evaluating both compliance and independence concerns, enforcement officials must be given some criteria for deciding when one set of interests will take precedence over the other.

Creating and operating an efficient and normatively acceptable multi-door enforcement system will require a great deal of cooperation and coordination among bar officials, judges, administrators, and legislators. Although designing such a system is beyond the scope of this Article, the preceding analysis does offer some important insights that should guide policymakers once they begin this difficult but necessary task.

A. Matching Solutions to Problems

Each of the four sanctioning systems generates unique compliance and independence effects. Targeting the systems at specific quadrants [*874] of the matrix should increase the benefits of certain forms of control and avoid some of the drawbacks that would result from applying a single sanctioning system in all contexts. n322

For example, individual clients complaining about inattention, low-level negligence, overpayment, or conversion of trust funds will often be better served by the kind of flexible, informal, and relatively inexpensive procedures found in many disciplinary agencies than they would be by malpractice suits. Although the responsibility for enforcing these violations might be transferred to a new, legislatively created OSHA- or SEC-inspired regulatory agency, the case has yet to be made that this agency would be any more aggressive in ferreting out complaints or developing innovative solutions than the kind of independent disciplinary agency that now exists in most states. Moreover, because individual clients are also the group most vulnerable to the chilling effect of state controls, the wholesale transfer of regulatory jurisdiction to state authorities should await more persuasive evidence of the effectiveness of legislative controls than the record of most consumer protection agencies currently provides.

Recognizing that disciplinary agencies should focus primarily on individual agency problems n323 also suggests the need for further reforms. Because of the difficulty that most individual clients have in recognizing agency problems, disciplinary authorities must concentrate more of their limited resources on investigation and prevention. Although there are structural limits on how zealous agencies can be in this regard, much more could be done. Building on the model of random audits of client trust accounts endorsed by the ABA, disciplinary counsel could conduct random "quality audits" to determine whether a lawyer provided competent, professional services in a particular case. n324

Moreover, these organizations could do much more to standardize the expectations of both clients and lawyers about the quality, timing, and cost of legal services. As Steele and Nimmer [*875] argued more than fifteen years ago, "[s]tandardization of expectations, obligations and forms of expression, and routinization of legal tasks are complex but
ultimately unavoidable regulatory tasks." n325 It is time that the judicial regulatory system started taking this responsibility seriously. n326

Institutional controls, on the other hand, will be specialized simply as a result of where they are located and the stratification within the bar. Thus, SEC or OTS enforcement systems will by definition apply only to corporate lawyers. Moreover, because of the growing specialization within the bar, lawyers who do securities or banking work are likely to spend a majority of their time in these areas. n327 Therefore, specialized rules and enforcement practices can be tailored to the unique requirements of these regulatory contexts without undue confusion or contradiction. n328 For present purposes, this specialization means that agencies can develop a wide spectrum of sanctioning procedures designed to control corporate externality problems without chilling zealous advocacy. Such efforts will be particularly effective when applied to the advising phase of these corporate relationships. n329

For example, consider OTS's efforts to discipline lawyers who fail to advise their federally insured clients to comply with the legal obligation to operate in a safe and sound manner. n330 Although critics of OTS's proposal do not dispute that lawyers should counsel their clients to obey the law, the critics vehemently object to giving the agency the authority to punish lawyers for giving other advice. n331 But these arguments ignore the substantial incentives that these lawyers [*876] have to be overzealous in their construction of applicable limitations and the fact that a lawyer's failure to carry out his admitted obligation is likely to go unnoticed in the absence of agency monitoring and investigation.

A quite different situation is presented in areas in which achieving greater compliance through institutional controls poses a credible threat to professional independence. For example, the IRS has recently brought a wave of enforcement proceedings against criminal defense lawyers who refuse to disclose the identity of clients from whom they have received more than $10,000 in cash. n332 The express purpose of these actions is to force lawyers to comply with the terms of a recent federal statute that makes it a crime for anyone to fail to report such a transaction. n333 Not surprisingly, many criminal defense lawyers claim that these enforcement efforts "undermine the attorney-client privilege, threaten the integrity of the criminal justice system and gut important constitutional rights, including the right to counsel." n334

These claims deserve serious consideration. Although the terms of the disclosure statute are relatively clear, there is a dispute over whether its command is consistent with a lawyer's duty of confidentiality. n335 Because the clients in question, most notably those allegedly involved in narcotics trafficking or organized crime, are among the most unpopular in contemporary society, the claim that their lawyers should not be subjected to government pressures that might cause them automatically to resolve their ambiguity in favor of disclosure is quite strong. n336 This concern may not be sufficient to stop these enforcement actions altogether, but it does underscore the importance of providing defense lawyers with a neutral forum for challenging the government's actions. n337

[*877] Finally, in areas such as protection proceedings for abused children or commitment hearings for the mentally ill, institutional controls aimed at preventing externality problems might not be appropriate at all. Because of the potential for agency problems in these settings, n338 the risk of further disadvantaging already underserved client populations outweighs any likely enforcement gains. Government authorities should instead institute proceedings designed to deter client-centered misconduct. n339

Substantial progress can be made by tailoring regulation to particular lawyering contexts. Yet it is neither practical nor desirable to turn every sanctioning system into a specialized locus of control. Therefore, the next section considers the question how a generally applicable control system should take account of contextual differences.

B. Contextualized Enforcement

Although trial court sanctioning systems such as rule 11 are specialized because they govern only conduct during litigation, these systems are designed to apply equally to all lawyers. As experience with rule 11 demonstrates, this general application has had devastating consequences for particular clients. As a result, courts should consider the likely effect of embedded controls when they decide whether to impose sanctions and in what amounts.

The often cited case of *Golden Eagle Distributing Corp.* v. *Burroughs Corp.* n340 is instructive. The district court found that the size and stature of the defendant's law firm was relevant both to the court's determination of acceptable conduct, n341 and to the fashioning [*878] of appropriate relief. n342 The court suggested that those with a greater ability to operate inside the system should be held to a higher standard of conduct. The court of appeals rejected the district judge's attempt to take context into account and argued that such considerations needlessly increased the cost of litigation and blurred traditional conceptions of the adversarial role. n343 The court reasoned that it was improper to
inquire into the actual practice of law firms because such inquiry would create "two ladders for after-the-fact review of asserted unethical conduct: one consisting of sanction procedures, the other consisting of the well-established bar and court ethical procedures." n344 Similarly, the appellate court concluded that lawyers should not be required to monitor their clients' conduct as the district court suggested, because such monitoring would "blur[] the role of judge and advocate" by requiring a lawyer "in addition to advocating the cause of his client, [to] step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable." n345

The preceding analysis shows that the district judge was correct. Chilling zealous advocacy below acceptable levels does not appear to be a major concern in this context. Corporate lawyers have ample incentive to discover and present every colorable argument on behalf of their client. n346 What is in danger, however, is the desire or indeed the ability of these lawyers to exert any moderating influence on their legally sophisticated client. By failing to consider these embedded controls, the court of appeals undermined professional independence in the sense of freedom from client domination in precisely the context in which this goal is most in need of support.

There are costs associated with allowing enforcement officials to take context into account. Determining contextual differences takes time and can lead to the point where it becomes necessary to treat every case as unique. Moreover, there is always the possibility that trial judges or others will abuse their discretion to consider contextual differences in ways that undermine rather than reinforce the system's [*879] legitimate goals. n347 Finally, contextualized enforcement cannot affect cases that never enter the system. To affect these cases we must return to the content issues bracketed in Part II.

C. Revisiting Content: Legislative Approaches to Equalizing Embedded Controls

The main difference between individual and corporate clients is the latter's superior ability to monitor and control lawyer conduct. This ability allows these sophisticated consumers to control effectively most agency problems without substantial regulatory intervention, and to influence their lawyers to adopt a relatively client-centered understanding of professional independence. Individual clients, on the other hand, are doubly vulnerable -- first to the self-interest and incompetence of their lawyers, and second to the chilling effects of lawyer controls. Rulemakers should ensure that professional regulation counterbalances, rather than reinforces, this disparity. n348 Although no set of regulatory measures, especially measures aimed primarily at lawyers, could ever equalize the embedded powers of the "haves" and the "have nots," n349 some progress can be made.

First, measures should be taken to increase the ability of individual clients to monitor and control lawyer conduct. Such measures might take several forms. For example, prepaid legal service plans offer one solution to the evaluation and monitoring problems caused by the fact [*880] that most individuals are "one shot" users of legal services. n350 These plans effectively make the sponsoring organization -- usually a union, consumer cooperative, or insurance agency -- a "repeat player" who can act as a sophisticated intermediary between the individual and the lawyer. Thus, the plan can standardize terms of engagement (including fees), monitor client complaints, collect information about outcomes, perform random audits, and generally engage in the kind of detailed evaluation and review that corporations use to protect themselves against agency problems. n351 Although such plans have often been attacked on the ground that they restrict "professional autonomy," n352 this argument seems hollow in the context of clients who are otherwise relatively powerless to protect themselves against misconduct.

Similarly, efforts should be taken to strengthen the capacity of other sophisticated intermediaries, such as public interest organizations and grass roots community groups, to aid their constituents in obtaining quality, low cost legal services. As Professor Roy Simon has cogently argued, to further this goal the bar and the courts should remove artificial impediments -- such as the ban on fee sharing between lawyers and public interest groups -- that tend to frustrate the efforts by these organizations to secure competent counsel. n353 Again, the argument has been raised, this time more compellingly, that these market intermediaries may not always have the best interests of their constituents at heart. n354 Although the potential for "political conflicts" in these circumstances is both real and important, their danger should not obscure the benefits that individual clients can [*881] obtain by being taken under the wing of more sophisticated legal actors.

The advantages that individual clients can gain by improving their access to embedded controls underscores the fact that the bar has indeed been correct to oppose some of the reform proposals emanating from the legislative and executive branches. For example, Vice President Quayle's "Agenda for Civil Justice Reform" recommends imposing a "moratorium on statutes that award attorney fees only to the party who initiated the lawsuit and subsequently prevails." n355 These statutes, however, are one of the most important mechanisms for the poorest individual clients to prevent
the most devastating agency problem -- the refusal of any lawyer to take their case. The argument that these statutes are suspect -- because they do not "compensate the party who has to defend itself from nonmeritorious allegations" n356 -- ignores the disparity in embedded power that the statutes were designed to ameliorate.

At the opposite end of the spectrum, reforms that reinforce the power of corporations to control their lawyers over and above the substantial embedded power they have by virtue of their access to resources and expertise are also misguided. Consider the effect of legal malpractice rules on the conduct of corporate lawyers. Although corporations rarely sue their lawyers for malpractice, the threat that such a suit might be filed plausibly decreases the willingness of corporate lawyers to do anything that might be perceived as less than one hundred percent, no holds barred zealous advocacy. n357 Because these lawyers already have a substantial market incentive to satisfy their client's needs, this extra motivation is likely to result in a further devaluation of the lawyer's public commitments. Although this effect is probably not a sufficient reason to ban malpractice actions by corporations altogether, it does argue against recent proposals that would make it easier for these clients to sue and, more importantly, threaten to sue their lawyers. n358 Thus, the courts generally do not [*882] hold sophisticated clients to a higher duty to monitor lawyer conduct. n359 Because of their superior capacities, however, these clients should be required to meet a higher burden of proof when alleging that their lawyers took advantage of them. n360 Similarly, lawyers for sophisticated corporate clients should be allowed to defend themselves if the challenged actions were intended to (and did) restrain unjustified client goals. n361 And, equally important, lawyers who are dismissed for failing to follow unlawful or unethical client directives should be allowed to sue either their former employer or the client for their losses. n362

Indeed, there is a strong argument for adopting a higher standard for disqualifying a corporate lawyer on the basis of an alleged conflict of interest, even though conflicts are difficult for even the most sophisticated client to detect and control. For example, many courts and other commentators have suggested that the standard presumption of vicarious disqualification, under which every lawyer in a firm is disqualified if any one lawyer has a conflict, should be modified in the case of large multi-city law firms servicing sophisticated corporate clients. n363 By the same token, these clients should not be given additional power to prevent their lawyers from advocating "positions" [*883] that, although not formally adverse to any claim or project currently being pursued by the corporation, are nevertheless inconsistent with the overall interests of the organization. n364

Again, the effect of these formal changes should not be overstated. Regardless of the system's attempt to equalize the ability of individual and corporate clients to exert direct control over lawyer conduct, substantial disparities will remain. Moreover, because of the fundamental tension between the lawyer's roles as advocate and as officer of the court, whatever rules are adopted will have to be constantly reevaluated in light of the shifting consensus about which of these competing goals should take precedence in particular circumstances. Therefore, the final criteria for choosing an enforcement system is whether it helps policymakers reach sound judgments about what the regulatory system's actual priorities are and what they should become.

D. The Role of Publicity

Enforcement proceedings are an important arena for debating conflicting visions of the lawyer's role. n365 Consider again Golden Eagle Distributing Corp. v. Burroughs Corp. n366 At one level, Golden Eagle simply represents a disagreement between the district judge and the appeals panel over the literal command of rule 11. Such an interpretation, however, masks the importance of the disagreement expressed in the opinions. The district court's opinion, based squarely on the need to protect the court's ability to reach accurate decisions, argues that candor to the court must take precedence over "creativity" in advancing client interests. n367 The court of appeals opinion, on the other hand, rejects the view that rule 11 was designed to protect the integrity of the court, and instead characterizes the conflict as between a "lawyer's duty zealously to represent his client . . . and the lawyer's [*884] own interest in avoiding rebuke." n368 Not surprisingly, it concludes that the former duty must take precedence. n369

The opinions in Golden Eagle, therefore, represent a fundamental disagreement about the proper balance between public and private understandings of professional independence. What is most significant is that this debate is taking place at all. For the first time, judges are actively debating the proper balance between client and systemic interests. And, because these discussions occur around the decisions of actual cases, these debates confront issues of institutional competence and the significance of context.

Whatever sanctioning systems we employ, therefore, must do more than efficiently control a static set of professional norms; they must also help us choose among competing conceptions of the lawyer's role. At a minimum, enforcement proceedings should presumptively be open and accessible to ensure that information about the conduct in question and the standards being applied can be reviewed and critiqued. n370 Although lawyers will undoubtedly
complain about potential damage to their reputations, there is no reason why as long as they are accorded elemental due process, their concerns should receive any more weight than those of the average litigant who asserts that he is being unjustly accused of wrongdoing. By examining and debating the results of these enforcement proceedings, we can begin to construct a more precise picture of how lawyers should actually reconcile their competing responsibilities.

[*885] Careful observation of these proceedings should also allow policymakers to make better judgments about the system's priorities. Consider, for example, the charge that judges are using rule II sanctions to express a substantive bias against certain kinds of claims. Unfortunately, it is far too easy to find examples that tend to support this charge. Nevertheless, the argument that such abuses favor repealing the rule seems misplaced.

Even in the absence of rule II, judges have a great variety of embedded weapons at their disposal to punish lawyers and clients who bring claims to which the judge is substantively opposed. It is certainly plausible that judges were using these weapons to disadvantage certain claimants unfairly long before "sanctioning" attorneys became an accepted practice in the federal courts. By bringing this biased treatment to the surface, rule II and other trial court sanctioning systems have highlighted the difficulty of successfully litigating certain kinds of cases in the federal court.

Nevertheless, if these disparities continue, policymakers should consider exempting certain categories of cases from the rule's reach. For example, the rule might be amended to prohibit fee shifting when a plaintiff sues under a one-way fee shifting statute such as title VII or section 1988. These statutes are specifically designed to encourage claims by those who believe that they have been the victims of racial discrimination or other infringements of their constitutional rights. Moreover, these statutes expressly limit the circumstances in which prevailing defendants are allowed to collect fees. As many opponents of the rule have noted, shifting fees under rule II is inconsistent with this basic statutory framework. When one takes into consideration the substantial legal and factual hurdles already faced by these claimants, as well as their limited ability to protect themselves against the chilling effects of trial court sanctions, the argument for exemption is quite strong.

Corporate lawyers, however, should not be allowed to bootstrap this argument into a call for the rule's repeal. Both compliance and independence arguments support retaining rule II as a check against corporate externality problems. Repealing the rule under these circumstances, therefore, would be a tacit admission of the low priority that society places on controlling those problems.

VI. CONCLUSION

This Article does not provide definitive answers to many of the difficult questions that policymakers must confront when they choose a particular sanctioning system. There may be, for example, good reasons unrelated to either compliance or independence for preferring one enforcement system over another in particular cases. The analysis presented here does, however, underscore the fact that many of those seeking to make or influence these decisions are asking the wrong questions.

Implicit in the many claims about how lawyers should be regulated is the assumption that a single enforcement structure will be appropriate for all lawyers in all contexts. This unitary vision, however, fails to account for the diversity in both the structure of the legal marketplace and society's expectations of the profession. Corporate clients are substantially different from individual consumers of legal services. Duties to the legal framework require different kinds of maintenance than obligations owed to clients. As a result, the question to be asked is not who should regulate lawyers, but rather how should policymakers coordinate the various resources at their disposal to increase the likelihood that all segments of society can benefit from a competent and independent legal profession.

If this is the proper inquiry, it should not be surprising that the analytic tools to conduct it are also multiple and diverse. Compliance arguments seek to understand how rational self-interested actors will respond to relatively clear rules. Independence arguments ask what structures will best encourage lawyers to reach socially desirable judgments in areas beyond the reach of effective enforcement. There will be conflict between these two perspectives. After all, the substantive content of the norms underlying both inquiries are themselves in tension. In some circumstances, this conflict can be muted by carefully matching the properties of a given enforcement system with the contextual categories of the matrix. At other times, however, the conflict cannot be avoided and policymakers will have to choose one normative vision of the lawyer's role over another. All that we can ask of our enforcement institutions is that they do not "paper over these contradictions," but instead help us "flush them into the open" where they can be "reconstructed through democratic dialogue."
FOOTNOTES:


n2 See MARTIN MAYER, THE GREATEST EVER BANK ROBBERY: THE COLLAPSE OF THE SAVINGS AND LOAN INDUSTRY 122-23 (1990) ("The failure of Gray's Bank Board to control the egregious crookedness of so many S&Ls must be laid in large part at the doorsteps of the great Washington, New York, Chicago, Dallas and Los Angeles law firms.").

n3 See, e.g., ROBERT V. WILLS, LAWYERS ARE KILLING AMERICA 9-33 (1990) (blaming lawyers for the increased volume and cost of litigation).

n4 See PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 63 (1991) (reporting that many doctors blame contingent fee lawyers for the medical malpractice crisis). Professor Weiler notes, however, that there are several problems with this simplistic line of argument. See id. at 63-65.


n7 PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA i, 1-3 (1991) [hereinafter CIVIL JUSTICE REFORM].

n8 See John T. Curtin, Remarks to the House of Delegates 4 (Aug. 13, 1991) (unpublished manuscript, on file at the Harvard Law School Library) ("[W]e will try to present to you in more detail . . . the reasons why we think you should reconsider the basic assumption that the lawyers of America are the reason why America is not competing effectively in the world.").

n9 COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES iii (1991) [hereinafter MCKAY REPORT].

n10 See id. at iii-iv, 6. For more than a century, bar leaders successfully persuaded legislators, administrative officials, and even judges that they should defer to professional disciplinary bodies regarding most enforcement questions. See Michael J. Powell, Professional Divestiture: The Cession of Responsibility for Lawyer Discipline, 1986 AM. B. FOUND. RES. J. 31, 34 (noting that the "edifice of lawyer discipline constructed by the bar associations . . . stood unchallenged for almost a century").

n11 See FED. R. CIV. P. 11; infra note 29.

n12 See infra note 30.
n13 See infra note 27.

n14 See infra note 27.

n15 See infra note 25.


n17 See infra note 31.

n18 Professor Neal Komesar has observed that, "[l]aw is the outcome of . . . institutions and, as a general matter, is often about the choice among such institutions." Neal H. Komesar, Injuries and Institutions: Tort Reform, Tort Theory and Beyond, 65 N.Y.U. L. REV. 23, 24 (1989). As Komesar argues, institutions tend to distribute information and power among relevant actors in ways that are both predictable and difficult to change. See id. at 27-31 (defining the institutional characteristics of the tort system, criminal law and administrative regulation, and the market). Identifying these institutional features is a necessary prelude to understanding how the system is likely to work. See id. at 24 (criticizing reform proposals "based on 'black box' institutions vaguely assumed to work in an ideal fashion").

n19 It is somewhat misleading to speak of the disciplinary system as if there were a universally followed approach to this form of control. Practices among disciplinary agencies vary tremendously from state to state. See MCKAY REPORT, supra note 9, at 69 (describing the various state practices regarding the use of professional and volunteer staff). Moreover, the McKay Report suggests many important reforms of widely accepted practices. See id. at 23-26 (recommending the abolition of the widely followed practice of keeping complaints confidential prior to the filing of formal charges). Because the McKay Report presents this form of control in its best light, I assume for purposes of this analysis that its recommendations have been formally adopted. By making this assumption, however, I do not mean to endorse the Report's claims about the likely results of implementing its proposals.

n20 See MCKAY REPORT, supra note 9, at 20 ("Elected bar officials, their appointees and employees should have no investigative, prosecutorial, or adjudicative functions in the disciplinary process."). The separation between enforcement and work is not absolute. For example, the McKay Report suggests that the voluntary mediation programs it recommends will be useful in preserving ongoing relationships between attorneys and their clients. See id. at 13-14. It seems doubtful, however, that many clients or lawyers will want to continue a relationship in which one side has invoked the assistance of this kind of third party.

n21 See Geoffrey C. Hazard, Jr. & Cameron Beard, A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings, 96 YALE L.J. 1060, 1066-67 (1987) (describing the system as a "relatively formal version of administrative law procedure").
n22 The traditional goal of professional discipline is to cleanse miscreants from the profession. See, e.g., In re Echeles, 430 F.2d 347, 349 (7th Cir. 1970) (stating that a purpose of disciplinary proceedings is "to protect the courts and the public from the official ministration of persons unfit to practice"). As a result, sanctions were limited to official reprimands, which could be either public or private, or the restriction of the professional license by means of suspension or disbarment. Cf. Stephen G. Bene, Note, Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions, 43 STAN. L. REV. 907, 913 (1991) (noting that "courts seem to agree on an incapacitative role for attorney discipline").

n23 The McKay Report rejects the sharp distinction between punishment and compensation. Instead, it recommends that disciplinary agencies establish programs to help clients obtain compensation, such as mandatory arbitration of fee disputes and voluntary arbitration for malpractice charges. See McKAY REPORT, supra note 9, at 13. The specific programs endorsed in the Report, however, are limited to cases in which the lawyer either agrees to participate (voluntary malpractice arbitration) or to cases in which some portion of an excessive fee can be returned to the client (mandatory fee arbitration).

n24 See RONALD E. MALLEN & JEFFREY M. SMITH, 1 LEGAL MALPRACTICE §§ 1.2-1.5, at 9-17 (3d ed. 1989).


n28 See MALLEN & SMITH, supra note 24, § 16.1, at 889-92.

n29 In 1983, Federal Rule of Civil Procedure 11 was amended to provide, inter alia, that the signature of an attorney on a pleading or motion filed in connection with a lawsuit warrants that, to the best of his knowledge, the paper is "well grounded in fact and is warranted by existing law or a good faith argument" for a change in the law and that it is not interposed to harass or delay the proceedings or for any other improper purpose. FED. R. CIV. P. 11. The advisory committee's note states that the rule is intended to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." Id. advisory committee's note. As one commentator has argued, as a result of the change, "[r]ule 11 offers the federal courts
an opportunity to enforce professional responsibility rules that state disciplinary bodies have been unable or unwilling to enforce." Victor H. Kramer, Viewing Rule 11 as a Tool to Improve Professional Responsibility, 75 MINN. L. REV. 793, 798 (1991); see also Neal H. Klausner, The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility, 61 N.Y.U. L. REV. 316-17 & nn.131-33 (1986) (comparing rule 11 to the Model Rules of Professional Conduct). Since rule 11 went into effect, federal judges have shown an increasing willingness to make use of this opportunity. See, e.g., Kramer, supra, at 793 (noting that "in the seven years since Rule 11 was amended, it has generated well over a thousand judicial opinions"); see also STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 59 (noting that less than 10% of the decisions resolving requests for sanctions in the Third Circuit's study were published).

n30 See, e.g., In re George C. Kern, Jr., 49 S.E.C. Dock. 3 (Release No. 29356) (June 21, 1991) (announcing the SEC’s intention to renew its efforts to discipline securities lawyers who "cause" their clients to violate applicable disclosure requirements or otherwise aid and abet violations of the securities laws); Edward A. Abrams, Kaye Scholer Agrees to Settle with RTC for Up to $22 Million, N.Y.L.J., Aug. 6, 1991, at 1, 2 (noting that OTS may seek to bar Kaye, Scholer from representing thrift institutions even though the firm already had agreed to pay the Resolution Trust Corporation $22 million to settle claims growing out of the firm’s representation of Lincoln Savings and Loan); cf. Howard A. Massler, IMPACT Holds Lawyers Liable as Tax Preparers; Let the Attorney-Adviser Beware, N.J.L.J., Dec. 13, 1990, at 58 (noting that lawyers may be subject to sanctions and penalties as "return preparers" under the Improved Penalty Administration and Compliance Tax Act, Pub. L. No. 101-239, § 7701, 103 Stat. 2388 (1989)). One source has reported that, at least in the securities field, "[a]ttorneys . . . can probably expect this demand for accountability in one form or another to continue." McLucas, DeTore & Colachis, supra note 5, at 846.

n31 See MCKAY REPORT, supra note 9, at 1-7 (discussing "[l]egislatively created regulatory agencies" such as those that regulate doctors in several states). California, for example, has established a full-time "Bar Court" to hear lawyer discipline cases. See Philip Hager, Proposal Aims to Revamp Lawyer Discipline Rules, L.A. TIMES, July 24, 1990, at A3. California also legislatively created a "State Bar Discipline Monitor." CAL. BUS. & PROF. CODE § 6086.9 (West 1975).

n32 Advice on How to Exploit Loopholes May Be Unethical, OTS' Weinstein Says, 56 BNA BANKING REP. 616, 616 (Apr. 1, 1991) [hereinafter Exploiting Loopholes]. Specifically, Weinstein has argued that lawyers representing federally insured thrift institutions owe a fiduciary duty to the insurance fund as the real party in interest when an institution approaches insolvency, and therefore may have to take affirmative actions to prevent misconduct by current management. See Bank, Thrift Attorneys React to Duties Outlined by OTS Chief Counsel Weinstein, 55 BNA BANKING REP. 547, 547 (Oct. 1, 1990) [hereinafter Attorneys React].

n33 Attorneys React, supra note 32, at 547 (remarks of Scott Schreiber). As another lawyer argued, "[l]awyers are not cops. . . . They have an obligation to their clients. They are not business advisers. There is no independent duty to the deposit insurance fund as such." Id. (remarks of Jerry Hawke).

For example, one could favor giving OTS the authority to enforce the rules of professional conduct but specifically prevent this agency from imposing substantive standards that go beyond what these rules require. Indeed, on some occasions, Weinstein claims that OTS is limiting itself in exactly this way. See Exploiting Loopholes, supra note 32, at 617 (denying that "OTS is . . . in the business of setting standards for legal representation of thrift clients").

This assumption, although obviously exaggerated, is not completely unrealistic. Over the years, the ABA has been quite successful in convincing judges, legislators, and administrative officials to consider its codes as authoritative. For example, several state and federal courts, as well as a handful of state legislatures, have formally adopted either the Code or the Rules. See CHARLES WOLFRAM, MODERN LEGAL ETHICS 56-57 (1986) (discussing the adoption of the Code by state legislatures, supreme courts, and local bar associations). These rules are also influential even in jurisdictions in which they have not been formally ratified. See, e.g., In re Friedman, 392 N.E.2d 1333, 1335 (Ill. 1979) ("Although this court has not formally approved the Code . . . it frequently serves as a guide for standards of professional conduct."). Even officials at the SEC, who traditionally have shown the most interest in exercising rulemaking as well as enforcement power, have shied away from imposing substantive obligations that directly contradict those found in the Model Code or the Model Rules. See In re Carter, Exchange Act Release No. 17,597, [Current Binder] Fed. Sec. L. Rep. (CCH) P82,847, at 84,150 (Feb. 28, 1981) ("[T]he traditional role of the lawyer as counselor is to advise his client, not the public, about the law. Rule 2(e) does not change the nature of that obligation.").


See Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685, 1690 (1976) (arguing that vague or conflicting standards give judges more power to supply their own content to a given legal command than relatively specific rules).

See, e.g., Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 TEX. L. REV. 639, 642 (1981) (claiming that "the Model Rules are drafted with an amorphousness and ambiguity that render them virtually meaningless" (footnote omitted)).

For example, even if chief counsel Weinstein were to concede that his agency does not have the authority to impose obligations not found in the Model Code, many lawyers might plausibly believe that OTS enforcement officials would establish a lower threshold than bar officials for how much information a lawyer must have before he can be sanctioned for "knowingly" assisting client fraud. Cf. Judith R. McMorrow, Rule 11 and the Federalization of Ethics, 1991 B.Y.U. L. REV. 959, 970-76 (1991) (noting the practical difference between the way federal courts interpret obligations under rule 11 and the way state ethics committees interpret similar language).

For example, over the course of a series of enforcement proceedings, OTS might conclude that a lawyer who fails to discover easily accessible information indicating that his client is engaged in a fraud can be sanctioned for "knowingly" assisting his client's illicit scheme. If the ABA, which I have assumed retains rulemaking authority, disapproves of this construction, it can rewrite the applicable rules to make it clear that actual knowledge is required.
Of course, OTS might dispute the bar's power to overturn the agency's interpretation. As with the question of rulemaking authority itself, I bracket this potential jurisdictional dispute by assuming that all enforcement officials concede the ABA's power to render binding interpretations of ambiguous professional norms.

n42 See infra pp. 812-14.

n43 See SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS'N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 136-37 (1970) [hereinafter CLARK REPORT].


n45 See Bene, supra note 22, at 926-37 (noting several advantages of monetary over nonmonetary sanctions); Kramer, supra note 29, at 802-07.


n47 See infra pp. 819-21.

n48 See, e.g., MCKAY REPORT, supra note 9, at 5.

n49 Powell, supra note 10, at 32-33.

n50 See MCKAY REPORT, supra note 9, at 5.


n52 See, e.g., MALLEN & SMITH, supra note 24, § 6.8, at 300 (noting that many courts have refused to extend third-party liability for malicious prosecution on the ground that "[f]ew attorneys would be willing to prosecute close and difficult matters, and virtually none would dare challenge the propriety of established legal doctrine" if they could be freely sued by their former adversaries (citations omitted)).

n53 See, e.g., Abel, supra note 39, at 653-67 (arguing that the professional rules contribute to market control of the legal profession).

n54 See infra pp. 853-63.
n55 See MODEL RULES, supra note 25, Preamble ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination.").

n56 See MCKAY REPORT, supra note 9, at 1-6 (endorsing the system of "[e]xclusive judicial regulation of lawyers [that] has developed since colonial times").

n57 By "external" regulation, I mean any form of control other than the professional disciplinary process. See Michael J. Powell, Developments in the Regulation of Lawyers: Competing Segments and Market, Client, and Government Controls, 64 SOC. FORCES 281, 281 (1985) (noting that "freedom from external review and self-regulation came to be regarded by sociologists as definitional characteristics of the professions").

n58 For example, in declaring its opposition to the SEC's efforts to discipline lawyers practicing before the agency, the ABA noted:

Efforts by the government to impose responsibility upon lawyers to assure the quality of their clients' compliance with the law or to compel lawyers to give advice resolving all doubts in favor of regulatory restrictions would evoke serious and far-reaching disruption in the role of the lawyer as counselor, which would be detrimental to the public, clients and the legal profession.


n59 See, e.g., William Gaetke, Lawyers as Officers of the Court, 42 VAND. L. REV. 39, 40 (1989) (noting that lawyers are expected to fulfill both roles even though the roles are inherently in conflict); L. Ray Patterson, Legal Ethics and the Lawyer's Duty of Loyalty, 29 EMORY L.J. 909, 969 (1980) (concluding that, although a lawyer is primarily concerned with his client's welfare, he is also an officer of the court).

n60 These duties are no less distinct because they are allegedly harmonious. According to the traditional view, lawyers simultaneously fulfill both sets of obligations when they zealously represent their clients "within the bounds of the law." MODEL CODE, supra note 25, Canon 7. Moreover, clients often benefit from efforts to preserve the legal framework, just as the system is in some sense vindicated when individuals are able to pursue their private projects effectively. Nevertheless, both the specific actions that the lawyer is likely to take in the two spheres, and the motivations behind those actions, will often diverge. As I argue below, these differences have important consequences for the choice among enforcement systems. See infra pp. 815-16.

n61 See MODEL RULES, supra note 25, Rule 1.4.

n62 See id. Rule 1.6.

n63 See id. Rule 1.2; id. Rule 1.3; id. Rule 1.5.

n64 See id. Rule 1.2.

n65 See id. Rule 1.2(d).
n66 See id. Rule 3.1.

n67 See id. Rule 3.4(c).

n68 See id. Rule 3.2.

n69 See id. Rule 4.4.

n70 See, e.g., AMERICAN BAR ASSN, COMMISSION ON PROFESSIONALISM, "... IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 13-15 (1986) [hereinafter STANLEY COMMISSION] (arguing that lawyers must be somewhat independent from clients in order to fulfill their role as officers of the courts and members of a public profession dedicated to upholding the rule of law).

n71 See Jack R. Bierig, Whatever Happened to Professional Self-Regulation, B. LEADER, Mar.-Apr. 1983, at 18. Bierig argues:

The fact that a professional serves people by bringing highly specialized training to bear upon their problems lies at the root of professional self-regulation. Lacking this specialized training, lay persons cannot fully understand what professionals do and cannot evaluate the judgments that professionals make. Lay persons must, therefore, trust professionals to make decisions in their best interest.

Id.

n72 See, e.g., GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 140 (1978) (pointing out that relations between corporate clients and their attorneys often differ significantly from the stereotypical interactions contemplated in the traditional model of legal ethics); WOLFRAM, supra note 36, § 4.1, at 148 (noting that "[c]orporate clients, the poor, clients with disabilities, those accused of serious crime, government agencies, and other clients are as much unlike the [standard model of the lawyer-client relationship] as they are unlike each other").

n73 See Deborah L. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 TEX. L. REV. 681, 716 (1981) (noting that many clients have little experience with lawyers and therefore have no baseline from which to measure lawyer conduct).

n74 See Mark Green, The Gross Legal Product: "How Much Justice Can You Afford?", in VERDICT ON LAWYERS 63, 77-78 (Ralph Nader & Mark Green eds., 1976) (reporting that 70% of all lawyers service 10% of the population).


n77 See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 322 (1982) ("[E]ven the wealthiest [individuals] will not devote any substantial portion of their time and energy to direct supervision of their lawyers' work. . . . [T]hey have better things to do.").

n78 See WOLFRAM, *supra* note 36, § 2.1, at 22. Wolfram has observed that:

The most widely effective form of regulation of lawyers . . . [is] the network of informal sanctions that are brought to bear against lawyers who offend accepted norms of professional behavior. . . . Those include sanctions such as negative publicity and other expressions of peer disapproval, the cutoff of valuable practice opportunities (firm membership or referral business), denial of access to centers of power and prestige (bar association committee membership and officership), and preclusion from judicial posts.

*Id.; see also* Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 17 (1981) (noting the importance of "indigenous" norms that are created as an integral part of the actual performance of work).


n80 See *id.* at 53-56.

n81 See *id.* at 319-22 (arguing that the identity of the client represents the most significant variable for understanding the differences among various lawyers).

n82 The nature of the system, therefore, is analogous to what Professor Sally Falk Moore refers to as a "semi-autonomous social field." Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC. REV. 719, 720 (1973). As she explains, this kind of field:

can generate rules and customs and systems internally, but that . . . is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance.

*Id.*

n83 The reverse can also be true. Even if the corner Ma and Pa grocery store is incorporated, it is unlikely to be more legally sophisticated than Ma and Pa themselves. See LUBAN, *supra* note 34, at 217-18 (noting that small corporations often are little different from their individual participants).

n84 This assumption is standard in efficiency analysis. See, e.g., Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 567, 570 (1989) (employing rational actor analysis); see also Stephen McG. Bundy & Einer R. Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 315, 321 (1991) (making a similar set of assumptions to investigate the social utility of legal advice). The assumption that the participants act rationally undoubtedly fails to capture the full range of concerns that
motivate actors in the real world. There is some reason, however, to suspect that lawyers engage in the kind of cost-benefit calculations contemplated by these models. See Bene, supra note 22, at 924-25 (arguing that lawyers are more likely to weigh the costs and benefits of misconduct rationally than is the average wrongdoer). In any event, it would clearly be inappropriate to design an enforcement system on the assumption that everyone intended to comply with its terms. See generally Eric H. Steele & Roger T. Nimmer, Lawyers, Clients, and Professional Regulation, 1976 AM. B. FOUND. RES. J. 917, 967 (criticizing disciplinary officials who believe that most complaints are frivolous).

n85 Three features of the enforcement system discussed below justify this assumption. First, given the legal system's background commitment to fair notice, enforcement officials will hesitate to impose sanctions when a plausible argument can be made that the lawyer did not have reason to know that his conduct violated the applicable rule. Such arguments are more likely to be persuasive in cases in which either the rule itself is sufficiently vague that it is difficult to determine exactly what conduct is proscribed or when the claim that certain conduct is within the purview of a relatively clear prohibition would be considered novel or controversial. See Geoffrey C. Hazard, Jr., Legal Ethics: Legal Rules and Professional Aspirations, 30 CLEV. ST. L. REV. 571, 571-74 (1982) (noting that the vagueness of many of the Model Code's provisions hampers disciplinary enforcement). Second, to the extent that each of the control systems under consideration provide some mechanism for appellate review, marginal or controversial decisions will tend to be screened out at higher levels. See, e.g., Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538-42 (9th Cir. 1986) (reversing a district court's novel construction of rule 11, which required a lawyer to identify whether an argument is based on existing law or the extension of existing law). But see Sam D. Johnson, Byron C. Keeling & Thomas M. Cortois, The Least Severe Sanction Adequate: Revisiting the Trend in Rule 11 Sanctions, 61 MISS. L.J. 39, 45-47 (1991) (complaining that the Supreme Court's adoption of an abuse of discretion standard in rule 11 cases has made it more difficult for appellate courts to screen out excessive fee awards). Finally, under the assumptions made in Part II, rulemakers can limit controversial applications of ambiguous norms by further specifying the content of the applicable norm. See id. at 48 (describing proposed amendments to rule 11 as designed to "refocus the federal courts' attention" away from the trend of using the Rule as a fee shifting device). Of course, all of these factors will not prevent enforcement officials from imposing sanctions on the basis of unexpected or controversial constructions of ambiguous norms. To the extent that these decisions can be viewed as erroneous, either from the perspective of the enforcement officials' own prior decisions or because of a subsequent clarification by the rulemaker, they are part of the substantive tilt discussed above and should be counted as part of the costs of using this particular method of control. See supra pp. 810-11. However, these costs will only be important in a comparative framework if there is some reason to believe that a particular enforcement system is likely to produce more of these errors (or more serious errors) than its plausible rivals.

n86 See MCKAY REPORT, supra note 9, at xxiv ("The Commission can report that most states discipline serious misconduct effectively."); id. at 29 ("In general, disciplinary agencies give fair and adequate consideration to the complaints.").

n88 See, e.g., Rhode, supra note 73, at 708; David O. Webster, "Still in Good Standing": The Crisis in Attorney Discipline, A.B.A.J., Nov. 1, 1987, at 61, 68 (describing "fear of retaliation" as a major disincentive to reporting violations); Ramage-White, supra note 87, at 526 (reporting that a survey of Arizona lawyers suggests that "fear of retaliation plays a role in some lawyers' decisions not to disclose knowledge of misconduct"). Moreover, an adversary who gains a reputation as someone who reports other lawyers for failing to pursue their clients' interests with sufficient vigor might face a heightened level of opposition from other lawyers in the future. There are exceptions, of course, to the hesitancy of lawyers to report misconduct, most of which can be explained by self-interest. For example, a disproportionate percentage of disciplinary complaints filed by lawyers involve claims of solicitation and improper advertising. See SHARON TISHER, LYNN BERNABEI & MARK GREEN, BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS 84 (1977).

n89 Thus, a lawyer might complain to the judge, file a retaliatory motion, withhold cooperation, or spread negative information among other lawyers and potential clients.

n90 Judges sometimes express the view that matters of professional conduct are none of their concern. See MCKAY REPORT, supra note 9, at 41 (noting and criticizing this attitude).

n91 Trial judges have a number of means at their disposal to punish lawyers for conduct they consider inappropriate, which range from setting stringent deadlines and imposing procedural obstacles to publicly commenting on a lawyer's competence. See United States v. Ofshe, 817 F.2d 1508, 1516 n.6 (11th Cir. 1987) (explicitly criticizing, in an opinion that refused to dismiss charges against a criminal defendant, the ethics of prosecutor author Scott Turow).

n92 See, e.g., Steele & Nimmer, supra note 84, at 973 (finding that, in 1972, only 8.1% of the complaints in Michigan came from lawyers or judges); E. Wayne Thode, The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession, 1976 UTAH L. REV. 95, 99 (finding that, in Utah, approximately 13% of complaints filed before the state bar disciplinary committee in 1974 and 1975 originated from lawyers); Ramage-White, supra note 87, at 512 n.23 ("The overwhelming majority of complaints filed with the State Bar of Arizona are from clients."). The ABA has repeatedly acknowledged this dismal record. See, e.g., CLARK REPORT, supra note 43, at 167 (noting the "reluctance on the part of lawyers and judges to report instances of professional misconduct"); MCKAY REPORT, supra note 9, at 41 (noting that the "National Organization of Bar Counsel informed the Commission that judges and lawyers comprise a very small percentage of all complainants").

n93 See, e.g., John Leubsdorf, Three Models of Professional Reform, 67 CORNELL L. REV. 1021, 1027 (1982) ("[C]lients typically hire lawyers to protect their own interests by limiting those of others."). Of course, strategic behavior by counsel is undoubtedly not always in fact in the client's best interest, even in the narrow sense utilized here. Not only are there downside risks (such as the potential for being sanctioned), but strategic behavior may also increase the cost of litigation. A client sensitive to these risks may therefore have an interest in controlling certain types of attorney behavior even if he might conceivably benefit from their use.

n94 See Ronald J. Gilson & Robert H. Mnookin, Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits, 37 STAN. L. REV. 313, 381 (1985) (noting that "[g]eneral counsel for major corporations are creating a revolution and are the primary agents of change"); Robert E. Rosen, The Inside Counsel Movement, Professional Judgment and Organizational Representation, 64 IND. L.J. 479, 481-82 & n.7 (1989) (documenting the growth in the number of lawyers working inside corporations). Ronald Gilson has argued that this move may simply relocate the client's problem from controlling the "outside" lawyer to controlling the "inside" lawyer. See Ronald J. Gilson, The Devolution of the
Legal Profession: A Demand Side Perspective, 49 MD. L. REV. 869, 914 (1990). Although Gilson's insight is important, there are reasons to suspect that corporate counsel are less likely to commit agency violations than their outside counterparts. Because in-house lawyers work directly within the institutional structure of the client, they are subject to the full range of organizational controls. See NELSON, supra note 75, at 263 (arguing that the corporate legal department is the "most constrained organizational environment"). Corporate employers directly control the pay, working environment, record keeping, and organizational structure of these lawyers. Moreover, the fate of these lawyers is directly tied to the survival of the organization. Thus, even if in-house lawyers have an agenda that diverges in important respects from the goals of their corporate clients, the resulting agency problems are likely to be quite different from those occurring in the traditional lawyer-client relationship.

n95 For example, insurance companies have traditionally used non-lawyer adjustors to monitor the progress of litigation conducted on their behalf. Other companies have increasingly turned to outside sources such as litigation consultants, accountants, investment bankers, and strategic planners to help them monitor and control the work of their lawyers. Needless to say, employing any of these other professionals may create its own set of agency problems.

n96 This complaint can take many forms. For example, the lawyer may have billed for services not performed, or spent an inordinate amount of time doing the work, or performed the services efficiently but incompetently. In addition, the lawyer's billing rate may have been too high, or the cost of the services may have been out of proportion to their importance to the case. Any or all of these diverse complaints may be submerged in a "fee dispute" between lawyer and client.

n97 See, e.g., Nader Offers Business Legal-Fee Tips, N.Y. TIMES, Apr. 13, 1981, at D1 (describing a seminar conducted by Ralph Nader that teaches corporate executives how to reduce outside legal fees).

n98 See Rosen, supra note 94, at 508 (discussing the economic impact of in-house counsel on outside rates). Even when a particular job is not brought in-house, the threat of doing so may encourage outside counsel to lower prices.

n99 See NELSON, supra note 75, at 57-59 (discussing the role of inside counsel in the selection of outside lawyers). Reputational information is one of the primary ways in which market actors assess quality and dispense sanctions. See Lewis A. Kornhauser, Reliance, Reputation, and Breach of Contract, 26 J.L. & ECON. 691, 695 (1983) (noting the impact of reputation on market outcome). Although a considerable amount of such information exists, it is seldom made available to interested persons. See, e.g., Bates v. State Bar, 433 U.S. 350, 375 n.30 (1977) ("Information as to the qualifications of lawyers is not available to many. . . . And, if available, it may be inaccurate or biased."); WOLFRAM, supra note 36, § 16.5.4, at 906 (observing that "urbanized [clients] clearly lack any reliable reputational basis for choosing a lawyer"); Leonard E. Gross, Contractual Limitations on Attorney Malpractice Liability: An Economic Approach, 75 KY. L.J. 793, 800 (1987). Gaining access to this information provides corporate clients with an important hedge against agency problems.

n100 See NELSON, supra note 75, at 59.

n101 See Abram Chayes & Antonia H. Chayes, Corporate Counsel and the Elite Law Firm, 37 STAN. L. REV. 277, 292 (1985) (describing how in-house counsel often scrutinize billing records for conformity with initial expectations and criteria for reasonableness, and reporting that some in-house counsel consider themselves lead lawyers on their cases and have fired outside firms for failing to follow directions).
n102 See Alberta I. Cook, Hourly Rates Still the Key, NAT'L L.J., Nov. 7, 1988, at S2 (noting that despite the recent changes in the legal profession, most corporate lawyers continue to base client bills largely on hourly rates).

n103 See Earl Johnson, Jr., Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions, 15 LAW & SOC'Y REV. 567, 583 (1980-1981) (noting that lawyers who are paid by the hour have little incentive to stop before finishing promised work). Johnson points out, however, that in some circumstances these same lawyers have an incentive to "overinvest" time beyond the amount that a fully informed client would authorize. Id. at 576. It is precisely this ability to run the meter, however, that is constrained by the client controls discussed above.

n104 See GALANTER & PALAY, supra note 75, at 67-68 (describing increased pressures on partners to be economically productive or face decreased compensation); cf. Gilson & Mnookin, supra note 94, at 340 (contrasting "marginal productivity" and "lock-step" methods of compensating partners).

n105 See NELSON, supra note 75, at 225. Significantly, Nelson predicts that "the trend toward bureaucratic organization will continue and probably accelerate." Id.

n106 See id. at 224-25. For example, this form of monitoring may help overcome the short-term incentives that some lawyers may have to pad their hours or insufficiently investigate all available channels for achieving the client's goals.

n107 See Rosen, supra note 94, at 511-12 (describing a broad range of concerns addressed by corporate counsel in outside counsel monitoring). Monitoring incentives may be particularly reduced when the matter in question is unusually large or complex, such as an important public offering or a "bet the company" piece of litigation. In these cases, inside counsel may be either unwilling or unable to exert much direct control and might prefer to let the "specialists" make the decisions -- and take the blame if something untoward happens. As I argue below, however, imperfect monitoring by corporations does not mean that detecting and deterring such abuses should be a high priority of the formal enforcement system. See infra pp. 874-75.

n108 See, e.g., Steele & Nimmer, supra note 84, at 952-54 (noting that fee disputes make up a substantial portion of client complaints).

n109 The same is probably true for many other common complaints by individual clients, such as not returning phone calls, devoting insufficient time to the case, and failing to meet deadlines. See Bene, supra note 22, at 911 (reporting statistics compiled by the State Bar of California demonstrating that the most frequent allegations of lawyer misconduct involve "failure to perform, delay, abandonment" and "lack of communication"). Unlike attorneys who work primarily for individuals, corporate lawyers are paid quite handsomely for keeping up with both clients and their cases. Moreover, the likelihood that a satisfied client will bring the lawyer more business gives corporate lawyers a powerful incentive to go the extra mile that is not present in many individual contexts. As David Charny notes, this type of "relationship-specific prospective advantage" can be a potent weapon for convincing contractors to honor their commitments. David Charny, Nonlegal Sanctions in Commercial Relationships, 104 HARV. L. REV. 373, 392-93 (1990). Available evidence indicates that the potential for continuing business has an important impact on the quality of legal services. See Jerome E. Carlin & Jan Howard, Legal Representation and Class Justice, 12 UCLA L. REV. 381, 385 (1965) ("The quality of service rendered poorer clients is . . . affected by the non-repeating character of the matters they typically bring to lawyers (such as divorce, criminal, personal injury): this combined with the small fees encourages a mass processing of cases.").
See MODEL CODE, supra note 25, DR 5-105; MODEL RULES, supra note 25, Rule 1.7.

n111 See, e.g., Harvey L. Pitt & Karl A. Groskaufmanis, Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, 78 GEO. L.J. 1559, 1626 & n.401 (1990) (linking the rising number of conflicts cases to the growth of firms and the increasing mobility of lawyers); Developments in the Law: Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1285 (1981) [hereinafter Developments in the Law] (noting that the majority of conflict cases involve corporations); Donald R. McMinn, Note, ABA Formal Opinion 88-356: New Justification for Increased Use of Screening Devices to Avert Attorney Disqualification, 65 N.Y.U. L. REV. 1231, 1231 (1990) (noting that the increase in large firms and lawyer mobility will force firms to address conflict issues more often).

Consider International Business Machines Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978). From time to time, IBM retained the law firm of Carpenter, Bennett & Morrissey to handle routine labor work. Unbeknownst to IBM's labor lawyers, however, Carpenter was simultaneously representing a client in an antitrust suit against IBM. Because IBM's inside labor lawyers had little or no contact with the inside counsel who handled the antitrust litigation, IBM was unaware (until a chance remark by one of Carpenter's attorneys at a law school reunion) that it was being represented and sued by the same firm. See id. at 275-77. These problems are exacerbated when the conflict involves a former client. Not only are these clients cut off from information about who their lawyer is currently representing, but all of the powerful incentives discussed above seem likely to push lawyers in the direction of subordinating the interests of former clients to the purposes of their current paymasters. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 213, at 155 (Tent. Draft No. 3, 1990) [hereinafter RESTATEMENT] (noting that one of the reasons for a rule against successive representation is that "a lawyer's incentive to serve a present client might cause the lawyer to compromise the lawyer's continuing duties to the former client").

See Developments in the Law, supra note 111, at 1500 (noting that aggrieved clients find disqualification motions and civil suits "more attractive" than the disciplinary system).

See Dennis M. O'Dea, The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability, and Disqualification, 48 GEO. WASH. L. REV. 693, 718-25 (1980) (describing techniques firms can use to avoid disqualification, such as collecting information about existing clients, keeping track of all new matters, and requiring new lawyers to disclose the identity of clients they may have represented in the past). For example, it is common for firms to "screen" lawyers who may have a conflict of interest by prohibiting them from working on certain matters, denying them access to confidential information, or physically separating them from lawyers working on a particular matter. See McMinn, supra note 111, at 1255-59 (describing the use of screening devices). Not all courts agree that these measures provide an adequate solution to conflicts problems. See id. at 1265 (noting that courts in the First, Fourth, Fifth, Ninth, and Tenth Circuits have not approved the use of screening devices).

Ted Schneyer, Professional Discipline for Law Firms, 77 CORNELL L. REV. 1, 7-8 (1991) (suggesting that regular business clients may not view the disciplinary process as a 'governance mechanism' for their relations with lawyers, and may instead rely on their ability to take their business elsewhere to protect themselves" (citations omitted)).

Because corporate clients have so little incentive to report their lawyers, it is not surprising that these lawyers are rarely subject to professional discipline. The number of elite lawyers from major corporate firms who have ever been disciplined is exceedingly small. See, e.g., Deborah L. Rhode, Ethical Perspectives on
Legal Practice, 37 STAN. L. REV. 589, 641 n.168 (1985) (reporting the results of a survey of 125 disciplinary actions in three jurisdictions in which 81% of attorneys sanctioned were solo practitioners and none were members of firms with more than seven lawyers). There is plenty of evidence that disciplinary officials may have discriminated against certain non-elite lawyers in the past. See JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 102-29 (1976) (documenting the bar's discrimination against low status lawyers during the 1920s). However, the growing independence of disciplinary counsel and the current heterogeneity of the bar, see Powell, supra note 10, at 48, cast doubt on the continuing validity of Auerbach's conspiracy theory. If no one reports corporate lawyers to the bar, they will continue to be underrepresented among the lawyers who are sanctioned, regardless of the impartiality of the regulators.

n117 See Gilson, supra note 94, at 889. Gilson contrasts this state of affairs with the situation facing sophisticated corporate clients. See id. at 900-03.

n118 In 1988, for example, the bar spent a combined total of $74.4 million on the disciplinary system. See MCKAY REPORT, supra note 9, at 49 n.15. Presumably, if these agencies became more active, these costs would increase substantially.

n119 See id. at xxii (noting that "funding and staffing have not kept pace with the growth of the profession" and that "some agencies are so underfunded and understaffed that they offer little protection against unethical lawyers").

n120 See id. at 35.

n121 For example, the McKay Commission recommends an expedited procedure for handling cases involving allegations of "minor misconduct." In such cases, in exchange for disciplinary counsel's promise not to seek either suspension or disbarment, the lawyer would agree to forego some of the elaborate due process protections that currently make most disciplinary proceedings so time consuming and expensive. See id. at 35.

n122 See id. at 13-18 (advocating mandatory arbitration of fee disputes, voluntary arbitration of malpractice cases, mediation, practice assistance, and substance abuse counseling).

n123 Several factors contributed to this limitation. First, courts were reluctant to grant standing to anyone other than injured clients. See Dennis J. Horan, Thomas L. Browne & George W. Spellmire, Practical Tips in Handling a Legal Malpractice Case: Complaint Through Trial, 9 AM. J. TRIAL ADVOC. 381, 392 (1986). Moreover, those actions available to third parties (such as malicious prosecution) have been narrowly limited in scope and construction. See Stephen W. Cavanaugh, Note, Countersuit: A Viable Alternative for the Wrongfully Sued Physician?, 19 WASHBURN L.J. 450, 454-57 (1980); Sandra C. Segal, Comment, It Is Time to End the Lawyer's Immunity from Countersuit, 35 UCLA L. REV. 99, 105-06 (1987).

n124 See Abel, supra note 39, at 648 & n.55.

n125 Most malpractice claims involve relatively straightforward harms to clients, such as allowing the statute of limitations to run or failing to obtain the client's consent or to keep the client informed. See, e.g., William H. Gates, Lawyers' Malpractice: Some Recent Data About a Growing Problem, 37 MERCER L. REV. 559, 562 (1986).
n126 See Charles W. Wolfram, The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation, 30 S.C. L. REV. 281, 291 (1979) ("Spurred by the outrage of injury and the need for compensation, the person directly injured by an attorney violation can be expected to respond more readily with a damage action than the attorney disciplinary agency can with effective enforcement proceedings.").

n127 Clients filing malpractice suits face the usual direct costs associated with litigation, such as legal fees, court costs, and time away from productive work. The client must decide whether the expected benefits from the litigation outweigh these costs. See Steven Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. LEGAL STUD. 55, 58 (1982). In addition, a malpractice plaintiff faces several indirect costs unique to this kind of litigation, including the risk that their former attorney will reveal confidential information to establish his defense and the possibility that it will be more difficult to obtain legal services in the future. See, e.g., MODEL RULES, supra note 25, Rule 1.6(b)(2) (allowing lawyers to reveal confidential information to defend against claims of professional misconduct); Duke N. Stern, Mitigating the Risk of a Malpractice Claim by Qualifying Your Client, R.I.B.J., Nov. 1984, at 18 (cautioning attorneys to avoid clients who have previously been "dissatisfied" with legal services).

n128 Current evidence supports this conclusion. Because of the substantial transaction costs associated with litigating these kinds of claims, only the most serious injuries are actually pursued. See Carl S. Hawkins, Retaining Traditional Tort Liability in the Nonmedical Professions, 1981 B.Y.U. L. REV. 33, 48.

n129 As of 1984, more than two thirds of all malpractice actions ended in no payment to the client. See William H. Gates, The Newest Data on Lawyers’ Malpractice Claims, A.B.A. J., Apr. 1984, at 78, 81. Other studies show similar results. See Susan K. Robin, Special Issues and Topics, Attorney Malpractice and Preventative Lawyering: Are Attorneys Safer in Large Firms?, 40 U. MIAMI L. REV. 1101, 1101 (1986) (reporting that in "a recent ABA study . . . of the 29,227 malpractice claims reported to insurance companies throughout the country between January 1981 and September 1985, only 32.6% resulted in indemnity payments").

n130 For example, a lawyer who intends to overcharge her client can fabricate her time records in advance, and, if that does not work, construct a plausible explanation to justify the bill after the fact. Cf. Gilson, supra note 94, at 880-81 (arguing that formal rules against strategic litigation will not result in optimal deterrence because "[w]hatever criteria are developed by courts as indicia of the prohibited intent can be incorporated into the plaintiff's planning process and more or less avoided").

n131 See, e.g., Stricklan v. Koella, 546 S.W.2d 810, 814 (Tenn. Ct. App. 1976) (holding that there "can be no cause of action against an attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of the facts"). See generally Leo Berman, Jr., Legal Malpractice in the Area of Litigation, 17 MEM. ST. U. L. REV. 541, 542-43 (1987) (advocating that courts return to the English practice of holding trial lawyers immune from suit for harms resulting from the exercise of their professional judgment). Juries, on the other hand, are likely to be much less sympathetic toward lawyers.

n132 The presence of insurance complicates this effect. If injured parties believe that they can obtain a quick settlement from the insurance company before incurring substantial costs, smaller claims become more viable. See Steele & Nimmer, supra note 84, at 1014 & n.117 (stating that insurance often provides an alternative forum for negotiation); cf. Patricia Danzon, The Frequency and Severity of Medical Malpractice Claims, 27 J.L. & ECON. 115, 134 n.31, 138 (1984) (noting that small claims account for a large portion of all medical malpractice claims filed and tend to settle the fastest). If the insurance company is liable for defense
costs, quick settlements of small claims may be in its long-run economic interest, provided the company can keep this practice from becoming generally known. See Stewart R. Reuter, Physician Countersuits: A Catch-22, 14 U.S.F. L. REV. 203, 206 (1980). Because such settlements may also coincide with the reputational interests of the defendant lawyers (provided they are accomplished quietly), one might expect a fair number of such settlements to occur. Available, albeit impressionistic evidence, confirms this intuition. See, e.g., Segal, supra note 123, at 124 nn.153-54 (citing telephone conversations with unidentified claims managers who reported that up to 75% of all abuse of process and malicious prosecution cases are settled before trial, often at the urging of the defendant's lawyer, even though the plaintiff's probability of ultimate success is very low).

n133 Some of the indirect costs of filing suit, however, are likely to be more substantial for corporate clients. The danger that confidential information will be revealed during the course of a malpractice suit may pose a significant cost to a corporation involved in a long-term relationship with a single law firm. Indeed, in cases in which the lawyer's malpractice has also damaged third parties -- for example, in a case in which the lawyer has negligently drafted a proxy statement used in connection with a securities offering -- the risk that defrauded investors will discover that they have a claim against the company itself may very well outweigh any potential monetary gain to be obtained from filing suit against the lawyer.

n134 The vast majority of malpractice claims are filed against solo practitioners or lawyers in very small firms. See Robin, supra note 129, at 1102 (citing the results of an ABA study in which 78.5% of all malpractice claims reported to insurance companies involved solo practitioners or attorneys who worked in firms with five or fewer attorneys). As noted above, these lawyers are very unlikely to spend much of their time representing corporate clients. See supra p. 817. On the other hand, the lawyers in large firms, the ones most likely to be representing large corporations, are almost never sued for malpractice. See Robin, supra note 129, at 1102 (noting that the same ABA survey showed that less than 2.2% of all malpractice claims were filed against lawyers working in firms with more than 30 lawyers).

n135 See Robin, supra note 129, at 1103.

n136 See id. at 1104. Robin reports that:

The average deductible under malpractice policies held by large firms is approximately $50,000. That leaves a lot of room for settlement. There is also plenty of incentive to settle. . . . [F]irms with financial clout and a concern for future insurability will make every effort to settle for less than their policy deductibles in order to prevent the filing of formal claims, thereby avoiding premium increases or cancellation. Moreover, a large firm with a reputation for servicing impressive institutional clients will do whatever is necessary to settle the matter before the financial community disseminates such damaging news.

Id.

n137 Corporate lawyers, therefore, are in a position analogous to that of doctors, whose income increases in direct proportion to the number of precautionary procedures they prescribe. See WEILER, supra note 9, at 87 (noting that the “fee-for-service” payment system encourages doctors to perform expensive, but arguably unnecessary, services). Indeed, as Weiler argues, it is possible that the effect of the method of payment dwarfs the impact of the threat of liability itself:

It is easy to understand obstetricians saying that it is fear of malpractice litigation that has produced the sharply increased rate of . . . cesarean deliveries. But if greater expense to the patient's insurer also means greater income to doctors . . . perhaps the desire to increase physician income is a sufficient explanation for the trends we observe. . . .

Id. (emphasis in original).
n138 The client would almost certainly consider such an effort wasteful because many of the legal issues will never actually be litigated.


n140 See id. at 617-18.

n141 See MODEL RULES, supra note 25, Rule 1.2(d) (stating that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent").


n143 See Gillers, supra note 27, at 9 (noting that third party liability tends to be most important in areas where lawyers "tend to congregate, such as settlements of litigation and transactions in securities").

n144 See, e.g., Jeska v. Mulhall, 693 P.2d 1335 (Or. Ct. App. 1985) (permitting the buyer in a real estate transaction to sue the seller's lawyer for allegedly making fraudulent statements about the value of the property and for failing to disclose consent requirements relating to the sale).

n145 This form of regulation is democratic in another sense: ultimate decisionmaking authority rests in the hands of the jury. See Wolfram, supra note 126, at 292 (noting the importance of juries in improving lawyer discipline).

n146 See, e.g., Lewis D. Lowenfels, Expanding Public Responsibilities of Securities Lawyers: An Analysis of the New Trend in Standards of Care and Priorities of Duties, 74 COLUM. L. REV. 412, 436-37 (1974) (arguing that increased liability will cause lawyers to avoid small or speculative firms).

n147 See infra pp. 869-72.


n149 Much of what the judge "sees" is refracted through the lens of law clerks, bailiffs, student interns, and a host of other intermediaries who act as the judge's eyes and ears in many judicial chambers. The interests and incentives of these intermediaries will undoubtedly have an important effect on actual outcomes.

n151 The SEC has authority under the Securities Exchange Act of 1934, 15 U.S.C. § 78u(a) (1988), to conduct investigations "to determine whether any person has violated, is violating, or is about to violate any provision of this chapter." Id.

n152 See In re Fields, 45 S.E.C. 262, 266 n.20 (1973) (describing the "task of enforcing the securities laws [as] rest[ing] in overwhelming measure on the bar's shoulders").

n153 See, e.g., Touche Ross & Co. v. SEC, 609 F.2d 570, 581 (2d Cir. 1979) (justifying rule 2(e) on the ground that it is necessary to protect the integrity of the SEC's process). See generally L. Ray Patterson, The Limits of the Lawyer's Discretion and the Law of Legal Ethics: National Student Marketing Revisited, 1979 DUKE L.J. 1251, 1253-54 (predicting that once regulators and the public recognize the power that lawyers exercise in the course of advising clients, they will increasingly demand that lawyers be held accountable for how that power is used).


n155 See id. at 314 (summarizing the Administrative Law Judge's findings that both lawyers knew that their client's serious financial troubles were material and should have been disclosed).


n157 See id. at 82,187.


n159 Indeed, the SEC rejected a proposed compromise with bar officials that would have given state bar disciplinary committees exclusive jurisdiction to investigate and prosecute similar allegations of lawyer misconduct. See LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 1064 n.28 (2d ed. 1988) (discussing the SEC's rejection of this compromise).

n160 This case therefore supports the general assumption that controversial interpretations of ambiguous rules tend to be screened out by the appeals process. See supra note 85.

n161 As I argue below, however, from the standpoint of independence, the fact that rule 2(e) may discourage lawyers such as Carter and Johnson from continuing to represent a client who they believe is defrauding the public is a benefit of this form of control. See infra pp. 868-69.

n162 See FED. R. CIV. P. II ("[A]n appropriate sanction . . . may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."). Empirical studies have repeatedly shown that this is in fact the
most common sanction awarded for violations of the rule. See, e.g., BURBANK, supra note 29, at 36; Nelken, supra note 51, at 1333; Vairo, supra note 46, at 227.

n163 Substantial anecdotal evidence suggests that these informal benefits are at least as important to those seeking (or threatening to seek) sanctions as the possibility of obtaining compensation. See Mark S. Stein, Rule II in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments, 132 F.R.D. 309, 312-13 (1990) (arguing that litigation advantages, particularly persuading an opponent to drop a dangerous argument, are the dominant reason most lawyers seek or threaten to seek rule II sanctions).

n164 Compare MODEL CODE, supra note 25, DR 7-102(A)(2) (directing that a lawyer shall not "[k]nowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law") and MODEL RULES, supra note 25, Rule 3.1 (stating that "[a] lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous") with FED. R. CIV. P. II (requiring that the lawyer also conduct a pre-filing inquiry).

n165 See GEOFFREY HAZARD, JR. & SUSAN P. KONIAK, THE LAW AND ETHICS OF LAWYERING 428 (1990) (noting that "disciplinary action is rarely taken against a lawyer for frivolous litigation").

n166 As of December 1987, there were in excess of 500 reported opinions discussing rule II. See RULE II AND OTHER POWERS, supra note 46, at I (reporting that more than "564 cases . . . have analyzed Rule II since the amendment became effective on August 1, 1983"). As Professor Burbank argues, these statistics represent only the "tip of the iceberg" because, at least in the Third Circuit, most decisions discussing rule II are not reported. See BURBANK, supra note 29, at 59.

n167 See Stein, supra note 163, at 311-12 (asserting that the "primary purpose" of a lawyer seeking rule II sanctions is to "prevail on the merits" and concluding that this will lead the lawyer "to make different use of Rule II than he would were he motivated by the purposes that motivated the drafters of the Rule").


n169 See Monroe H. Freedman, A Civil Libertarian Looks at Securities Regulation, 35 OHIO ST. L.J. 280, 282 (1974) (noting the tactics regulatory officials have used in pursuit of preexisting goals).

n170 See Rhode, supra note 116, at 598 (discussing the difficulty of escaping the "incentive and information structures that impede judicial oversight").

n171 The advisory committee's note makes it clear that the drafters of the amended rule were primarily interested in preventing certain kinds of strategic behavior by lawyers and clients. See FED. R. CIV. P. II advisory committee's note (stating that the amended rule was intended to "discourage dilatory or abusive tactics
and help to streamline the litigation process by lessening frivolous claims or defenses”). As indicated in Part II, however, such "abusive tactics" or "frivolous" claims may also constitute agency violations in cases in which the client neither authorized nor benefited from the misconduct. In theory, therefore, nothing prevents a court from using Rule II to warn clients about laywer underinvestment.

n172 For example, the Third Circuit task force concluded, on the basis of a survey of lawyers on both sides of various sanctions motions, that "many attorneys ... reported that they took greater care in pre-filing factual and legal inquiries as a result of the amended Rule. ... [M]any of these attorneys regarded the changes in their practice with satisfaction." Burbank, supra note 29, at 76.

n173 The Third Circuit task force has reported that:

Although the data from our sanction survey are not as striking as statistics based on published decisions, ... they nonetheless tend to confirm much more frequent invocation of Rule II against plaintiffs than against defendants (66.7% vs. 33.3%) and more frequent impositions of sanctions on plaintiffs than defendants (15.9% vs. 9.1%). ... [In addition] 77.8% ... of all sanctions imposed [by the court sua sponte] were imposed on plaintiffs. ... Id. at 65; see also Yamamoto, supra note 168, at 363 (citing studies indicating that rule II is "used disproportionately against plaintiffs" (quoting Vairo, supra note 46, at 200)).

n174 Several studies of published opinions have concluded that civil rights plaintiffs are disproportionately sanctioned under Rule II. See, e.g., Nelken, supra note 51, at 1327 (reporting that civil rights cases constituted 22.3% of all rule II cases decided between 1983 and 1985); Vairo, supra note 46, at 200 (reporting that 28.1% of Rule II cases involved civil rights and employment discrimination cases). The Third Circuit task force study of Rule II casts some doubt on these numbers. It concluded that, once unreported sanctions cases were included, civil rights cases constituted only a slightly higher percentage of cases involving Rule II than their percentage of the case load as a whole. See Burbank, supra note 29, at 69. The task force nevertheless concluded that these plaintiffs were disproportionately affected by Rule II because sanctions were actually imposed at a much higher rate than in the general population of all cases in which sanctions were sought. See id. (noting that sanctions were imposed 47.1% of the time in civil rights cases as opposed to only 8.5% of the time in all cases).

n175 Indeed, to the extent that a motion for sanctions alerts the other side to a failure that can be remedied, it may have the exact opposite effect of that intended by the moving party.


n177 Cf. Galanter, supra note 76, at 98-103 (listing the many advantages enjoyed by repeat institutional players in the litigation system, including their ability to build a record, to make use of economies of scale, and to hire experts, their long-term relationships with decisionmakers, their willingness to "play the odds," their knowledge of and ability to exploit institutional limitations, and their highly qualified counsel who are better able to employ optimizing strategies). Because of these multiple and overlapping advantages, repeat players can
insulate themselves from many of the costs of pursuing a motion for sanctions. As a result, claims that the underlying incentives of litigation encourage lawyers to seek sanctions against nonfrivolous positions that are "simultaneously dangerous and vulnerable," while they do not seek sanctions when a claim is truly meritless, Stein, supra note 163, at 313, are only partially correct. Repeat institutional players may seek sanctions against truly frivolous as well as merely dangerous positions, because for them the costs of such an all-out strategy, either in terms of dollars or relations with opposing counsel, are not that significant.

n178 See BURBANK, supra note 29, at 67 ("When lawyers are not paid by the hour, the investment calculus may change. . . . Assuming lawyers are more reluctant to spend their own than their clients' money, contingent fee lawyers have additional incentive to file a Rule II motion only when it is cost-justified.").

n179 791 F.2d 1006 (2d Cir. 1986).


n181 Kamen, 791 F.2d at 1008.

n182 See id.

n183 See id. at 1008-09.

n184 See id. at 1009.

n185 See id. at 1009-10.

n186 See id. at 1009.

n187 See id.

n188 Id. at 1012-13 (citations omitted).

n189 See id. at 1014 ("[T]he law on '[f]ederal financial assistance' . . . is quite unsettled; and the plaintiff is very likely a 'handicapped individual' under section 504. . . . [J]ust as summary judgment or a 12(b) motion cannot be boot-strapped onto a finding of a Rule II violation, an improper grant of dismissal cannot be the basis for Rule II sanctions." (emphasis added)).

n190 Kamen therefore appears to be a classic example of the first part of Stein's thesis, with which I agree, that lawyers are likely to threaten sanctions against arguments that are dangerous, in the sense that they might be accepted if pressed by a skillful advocate. See Stein, supra note 163, at 313.
n191 Filing a counter motion for sanctions would only embroil the plaintiff in a costly battle that she could probably not afford. Nor is it likely that the defendant's lawyer is worried about antagonizing plaintiff's counsel. Because of the wide gulf between the hemisphere inhabited by corporate lawyers such as those who represent AT&T and the world occupied by lawyers who primarily represent individuals such as Ms. Kamen, there is relatively little that the defendant's lawyer would have to fear from prolonging or escalating the dispute. The same cannot be said for the plaintiff. Ms. Kamen, like most plaintiffs, probably wants a quick settlement that would allow her to work in an environment that minimizes the potential damage to her health. Raising the level of antagonism by charging the defendant's lawyer with unethical conduct is obviously inconsistent with that goal.

n192 This does not mean that corporations and their lawyers are immune from rule II sanctions. On the contrary, one of the most significant accomplishments of this form of control is that, for the first time, a significant number of corporate clients and lawyers are being required to account for their abusive behavior. See, e.g., Inspiration Leasing, Inc. v. U.S. West Fin. Servs., No. 87 Civ. 6287, 1991 WL 2791, at *1 (S.D.N.Y. Jan. 8, 1991); Phoenix Airway Inn Assocs. v. Essex Fin. Servs., Inc., 741 F. Supp. 734, 738 (N.D. Ill. 1990). In many of these cases, the party seeking sanctions was also an institutional litigant. See, e.g., Clark Equip. Co. v. Lift Parts Mfg. Co., No. 82 C 4585, 1990 WL 8690, at *10-*14 (N.D. Ill. Jan. 22, 1990). These litigants obviously face far fewer obstacles when pursuing sanctions.

n193 Cf. Yamamoto, supra note 168, at 363-64 (noting how case management concerns have made judges less attentive to the rights of litigants).

n194 Under certain circumstances, the threat of rule II liability may deter lawyers from presenting legitimate arguments for individual clients. See infra note 308.

n195 Rule II has been frequently criticized for encouraging costly "satellite litigation." RULE II AND OTHER POWERS, supra note 46, at 10. The Third Circuit task force's report raises an important cautionary note to the claim that collateral proceedings associated with the rule impose significant costs on either litigants or the judicial system. See BURBANK, supra note 29, at 83 ("[S]atellite litigation on Rule II issues does not seem to us a serious problem for either litigants or district judges in the Third Circuit."). Rule II has also been criticized for increasing costs by fueling tension between lawyers and judges. See William W. Schwarzer, Rule II Revisited, 101 HARV. L. REV. 1013, 1018 (1988) ("[Rule II] carries with it the potential for increased tension among the parties and with the court. . . . [This makes] it more difficult to conduct the litigation in a rational manner and reach accommodation.").

n196 Because of a trial judge's familiarity with a case, she is likely to be in a better position to impose these sanctions accurately and efficiently than even the most motivated disciplinary official, who would have to rely entirely on ex post reconstruction. See Reinier H. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 J. L. ECON. & ORGANIZATION 53, 75 n.67 (1986) (discussing the economies of scale that can be achieved when a gatekeeper enforcement strategy is superimposed on ongoing enforcement efforts against primary wrongdoers); cf. NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 707 (5th Cir. 1990) (noting that the district court was justified in conducting only a relatively brief one-day hearing before disbarring the attorneys and that, because "the misconduct alleged occurred in the court, there was no need for elaborate proof of the facts"), aff'd, Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991).

n197 See generally Martin Garbus & Joel Seligman, Sanctions and Disbarment: They Sit in Judgment, in RALPH NADER & MARK GREEN, VERDICT ON LAWYERS 47, 50 (1976) (arguing that disciplinary regulation is ineffective because of the "general impulse [among lawyers and judges] . . . to protect a brother at the bar . . . rather than protect the public").
n198 See MCKAY REPORT, supra note 9, at 5.

n199 See id. at 3 (asserting that most legislative regulatory agencies rely upon complaints and only act against the professional license).

n200 For example, a recent report by the Department of Health and Human Services summarizing the findings of a comprehensive investigation of state disciplinary regulation of physicians, noted the relatively small number of disciplinary referrals made by physicians, the backlog of cases in many jurisdictions, the pervasive shortages of staff and funding, the overly restrictive and burdensome procedures, and the fact that quality of care cases constitute a small percentage of the total number of disciplinary actions. See Physician Discipline: Can State Boards Protect the Public?: Hearing Before the House Subcomm. on Regulation, Business Opportunities, and Energy of the Comm. on Small Business, 101st Cong., 2d Sess. 61, 66-74 (1990) [hereinafter Physician Discipline] (statement of Richard Kusserow, Inspector General for the U.S. Department of Health and Human Services). This list parallels the standard complaints about lawyer discipline. See MCKAY REPORT, supra note 9, at xx-xxiv.


n202 For example, doctors currently confront a much more extensive set of embedded, institutional, and liability controls than the average lawyer confronts. See, e.g., WEILER, supra note 4, at 79-80 (describing the practice of allowing a committee of physicians to evaluate claims and advise insurance companies of the risk presented by a particular physician); Thaddeus J. Nordzenski, A Critical Analysis of the Self-Governing Medical Staff, 43 OKLA. L. REV. 591, 591 (1990) ("Today the doctrine of hospital corporate negligence has caused hospital boards to take a much more active role in monitoring the clinical activities of their respective institutions."). Malpractice claims against doctors currently are estimated at 13 claims filed per 100 doctors; these suits reached a threshold of 17 per 100 doctors in the mid 1980s. See WEILER, supra note 4, at 2. In comparison, an estimated 8 in 100 attorneys were facing malpractice claims in 1986. See Paul Marcotte, Suing Lawyers, A.B.A. J., Apr. 1, 1986, at 25.

n203 See Lehan, supra note 201, at 22 (reporting that advocates of legislative regulation assert that the current disciplinary system is "inherently ineffective because judges are lawyers in robes" and therefore are biased against claimants).

n204 See Geoffrey C. Hazard, Jr., Disciplinary Process Needs Major Reforming, NAT'L L.J., Aug. 1, 1988, at 13, 14 (arguing that reviewing judges in a public enforcement agency would "recognize that lawyer discipline deals with white-collar crime and miscreancy instead of simple waywardness within a fraternity").

n205 See Powell, supra note 10, at 48 & n.68 (noting that the professionalization of the disciplinary staff has increased enforcement efforts). Indeed, many of these lawyer-regulators have become active advocates for expanding the scope and effectiveness of the disciplinary process. See, e.g., Michael A. Gentile & Sarah D. McShea, Automatic Disbarment: A Convicted Felon's Just Desserts, 13 HASTINGS CONST. L.Q. 433, 440-41 (1986) (arguing against the relaxation of the rules requiring automatic disbarment for attorneys convicted of a felony); Allen B. Zerfoss, Revision, Not Rejection, Is the Way to Modernize the Code of Professional Responsibility, 26 VILL. L. REV. 1177, 1180-82 (1981) (reporting the National Organization of Bar Counsel's opposition to the Model Rules on the ground that they would hamper disciplinary enforcement).
n206 See, e.g., Ian Ayers & John Braithwaite, *Tripartism: Regulatory Capture and Empowerment*, 16 LAW & SOC. INQUIRY 435, 436-37 (1991) (describing the evolution of capture); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARY. L. REV. 1667, 1685 (1975) (discussing the concept of agency capture). Indeed, the McKay Commission's claim that most other professions are "as 'self-regulating' as the legal profession or more so" indicates that many legislatively created professional regulatory agencies may have been captured by regulated interests. MCKAY REPORT, supra note 9, at 3.

n207 For example, the Inspector General's report indicates that "[t]hrough mandatory reporting laws, immunity protections, and self-reporting laws, State governments and their medical boards have facilitated the identification of physicians who may warrant disciplinary action." *Physician Discipline*, supra note 200, at 84 (draft report of *State Boards and Medical Discipline*, April 1990). Thus, more than 30 states have instituted programs designed to collect information from courts, hospitals, addiction and drug abuse centers, professional societies, insurance companies, or federal authorities. See id. at 84-85. Not even the new initiatives proposed by the McKay Commission come close to matching this effort.

n208 See WALTER GELLHORN, CLARK BYSE, PETER L. STRAUSS, TODD RAKOFF & ROY A. SCHOTLAND, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 658 (8th ed. 1987) ("Administrative agencies having to command disclosure do so: (1) by requiring information in application forms or in reports; (2) by themselves inspecting records or premises; (3) by issuing subpoenas which direct the recipient to testify or to produce documents it possesses.").

n209 There are several potential constitutional and statutory impediments to this kind of broad investigatory authority, including the Fourth Amendment and the attorney-client and work product privileges. Although these problems are significant, a combination of client consent and strict confidentiality requirements for regulators would minimize much of their practical significance.


n211 See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 74 (1990) (noting that many regulatory regimes "have produced benefits that are dwarfed by the costs, had unanticipated adverse side effects, or have in any case been far less successful than their advocates had hoped").


n213 See MCKAY REPORT, supra note 9, at 3 n.4 (noting that state regulatory agencies in charge of other professions are typically underfunded).

n214 See, e.g., *Dileo v. Ernst & Young*, 901 F.2d 624, 628-29 (7th Cir. 1990) (reaffirming additional requirements for aiding and abetting liability, including that the abettor have the scienter necessary for the primary violation), cert. denied, 111 S. Ct. 347 (1991); *First Interstate Bank v. Chapman & Cutler*, 837 F.2d
775, 780 & nn.4, 5 (7th Cir. 1988) (applying this standard to a law firm); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 495 (7th Cir. 1986) (announcing the requirement). According to many defense lawyers, the standard announced in these decisions will make it much easier to dismiss third party suits against professionals before trial. See Sherry R. Sontag, Harder to Sue, NAT'L L.J., June 17, 1991, at 1 (noting that "[d]efense lawyers across the country are using a series of 7th Circuit decisions as a shield, blocking the litigation barrage waged against attorneys, accountants and other professionals for aiding and abetting securities frauds").

n215 See In re VMS Sec. Litig., 752 F. Supp. 1373, 1401 (N.D. Ill. 1990) (noting that "[t]he Seventh Circuit has twice acknowledged that the potential injury to a defendant's reputation far outweighs any possible gain from retaining a client"); see also Dileo, 901 F.2d 629 (noting that fees and other possible gains from retaining clients "could not approach the losses [the defendant accountant firm] would suffer from a perception that it would muffle a client's fraud").

n216 See Rhode, supra note 116, at 627-28 (arguing that, even though a reputation for honesty remains profitable in many circles, lawyers face strong market pressures to overlook misconduct, especially "in matters involving securities or health and safety regulations, where the price of propriety may be unravelling major transactions or impeding highly profitable product distributions").

n217 See Barker, 797 F.2d at 497.

n218 See MODEL RULES, supra note 25, Rule 1.2(d) (directing that "[a] lawyer shall not . . . assist a client, in conduct that the lawyer knows is criminal or fraudulent"). As the commentary to the rule makes clear, this prohibition applies even in circumstances in which the rule prohibits the lawyer from revealing the wrongdoing. See id. Rule 1.2(d) cmt. (stating that "[t]he lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose. . . . Withdrawal from representation . . . may be required."). In the case in which the Seventh Circuit first articulated its new requirement, the plaintiffs alleged that the lawyers deflected the inquiries of a trustee investigating the solvency of the project in question by concealing material information. See Barker, 797 F.2d at 493. Although the court may have been correct in concluding that the lawyers were under no duty to disclose what they knew to the trustee, see id. at 497, the lawyers should not have continued to assist the client if the information in their possession demonstrated that the scheme was fraudulent.

n219 Institutional control by the SEC is the only plausible alternative in this context. In light of the substantial incentives that liability controls create for injured parties to discover and prosecute these kinds of corporate externality problems, however, it is not at all clear that institutional monitors will be able either to detect as many violations or prosecute them successfully for less cost.

n220 Of course, a strong argument can be made that in the actual Seventh Circuit cases, the court did not consider enforcing the rules of professional conduct to be its primary goal. Cf. Barker, 797 F.2d at 497 (noting that "an award of damages under the securities laws is not the way to blaze the trail toward improved ethical standards in the legal and accounting professions"). Under the terms of the optimal compliance strategy discussed in the text, however, courts would be directed to consider the enforcement of ethical standards a primary objective.

n222 See id. at 125-27.

n223 See id. at 125 ("Where the text establishes a duty that cannot be delegated, one may reasonably expect it to authorize punishment only of the party upon whom the duty is placed. We think that to be the fair import of the language here.").

n224 See id. at 126-27.


n226 As Justice Marshall noted in dissent, "encouraging individual accountability and firm accountability are not mutually exclusive goals. Indeed, individual accountability may be heightened when an attorney understands that his carelessness or maliciousness may subject both himself and his firm to liability." Pavelic & LeFlore, 493 U.S. at 127 (Marshall, J., dissenting).

n227 One commentator has remarked that:

Given the evidentiary problems of pinning professional misconduct on one or more members of a lawyering team, the reluctance to scapegoat some lawyers for sins shared by others in their firm, and especially the potential importance of a law firm's ethical infrastructure and the diffuseness of responsibility for creating and maintaining that infrastructure, a disciplinary regime that can target only individual lawyers, in an era of law firms, is no longer sufficient.

Schneyer, supra note 115, at 11.

n228 I borrow the phrase from Professor Frank Sander, who advocates giving disputants a variety of options (formal adjudication, mediation, negotiation, arbitration) for processing their claims. See Frank E. A. Sander, Alternative Methods of Dispute Resolution: An Overview, 37 FLA. L. REV. 1, 12 (1985).

n229 Cf. Kennedy, supra note 38, at 1690 (arguing that a complex system of overlapping controls creates "jurisdictional" disputes over which rule should apply in borderline cases).

n230 For example, a securities lawyer might be placed in the uncomfortable position of having to decide whether to follow a series of SEC precedents that appear to require him to resign from representing a client whom he strongly suspects is involved in a fraudulent scheme, or a line of judicial precedents that suggests that resigning under these circumstances constitutes malpractice.

n231 Liability insurance rates for lawyers have risen sharply in recent years. See Tom Locke, Colorado Malpractice Claims Rise, DENVER BUS. J., May 17, 1991, at 1 (reporting that "lawyers were subject to premium increases of 100 percent to 300 percent per year between 1983 and 1986" and current increases "on the average of 30 percent").

n232 The charge that excessive liability risks encourage doctors to engage in "defensive medicine" has become a standard feature of the malpractice debate in the medical arena. See Roger A. Reynolds, John A. Rizzo & Martin L. Gonzalez, The Cost of Medical Professional Liability, 257 JAMA 2776, 2776 (1987)
(reporting that practice changes prompted by the risk of claims increased overall medical costs by $12.1 to $13.7 billion in 1984). As Paul Weiler notes, these statistics should be approached with extreme care because encouraging "defensive" tactics that increase the overall level of safety may be exactly what the law was intended to achieve. See WEILER, supra note 4, at 88 (arguing that "[t]o merit its intended pejorative connotations, the 'defensive' label must be confined to medical practices that, in addition to being costly and even risky, have little therapeutic utility but are undertaken by doctors nonetheless simply because they wish to avoid legal liability").

n233 Any assessment of the systemic costs associated with increasing enforcement activity, of course, must be balanced against the damage that an unchecked legal profession is currently doing to the legal framework. If the savings and loan debacle is any indication, that cost is quite substantial.

n234 I return to this question in Part V, which argues that particular enforcement systems should be targeted at specific aspects of legal practice. See infra pp. 873-77.

n235 In countless judicial opinions, articles, and after-dinner speeches, a wide array of distinguished voices have echoed the basic theme that "[a]n independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice." MODEL RULES, supra note 25, Preamble.


n237 See id. at 17 (noting how groups of lawyers that "often oppose each other" are most likely to invoke the rhetoric of independence from state control).

n238 See, e.g., Archibald Cox, The Conditions of Independence for the Legal Profession, in ROBERT S. ALEXANDER, PETER M. BROWN, ARCHIBALD COX & ROBERT B. MCKAY, THE LAWYER'S PROFESSIONAL INDEPENDENCE: PRESENT THREATS/FUTURE CHALLENGES 53, 53-55 (1984) [hereinafter PRESENT THREATS/FUTURE CHALLENGES]. Professor Cox does not view this as being the only, or even the most important, meaning of independence. See id. at 55.

n239 It is sometimes argued that in return for receiving the privilege of self-regulation, the legal profession provides society with the benefit of competent and faithful services. See, e.g., Robert B. McKay, The Future of Professional Independence for Lawyers, in PRESENT THREATS/FUTURE CHALLENGES, supra note 238, at 42. This argument, of course, simply begs the question whether self-regulation will in fact encourage lawyers to comply with stated professional norms. There are important reasons to doubt this claim.

n240 Cf. ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE 110-230 (1986) (describing and critiquing this definition of autonomy); DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 13-17 (1977) (describing and critiquing the claim that lawyers should be "independent" from the direction of clients).

n241 See Gordon, supra note 236, at 9.
n242 Id. (expressing similar views about the social utility of lawyers' having control over their own work).

n243 See, e.g., MCKAY REPORT, supra note 9, at 4-5 (arguing that giving the judiciary control over the enforcement system protects the independence of courts); WOLFRAM, supra note 36, § 2.2.3, at 27 (citing cases in which this claim has been made).


n245 Id. at 6-7.


n247 The petitioner in the Supreme Court was G. Russell Chambers, the sole shareholder and director of Calcasieu Television and Radio, Inc., which owned and operated a television station in Lake Charles, Louisiana. See id. at 2128. Although the corporation was small, the district court found that Mr. Chambers was an experienced litigant and was, in fact, the strategist for the case. See NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 132 (W.D. La. 1989) (rejecting Chambers's assertions that "he knows nothing of courts or the law," and finding that Chambers "has been involved frequently in the preparation of defenses in many lawsuits" and that he "is completely at home in court"), aff'd, 894 F.2d 696 (5th Cir. 1990), aff'd, 111 S. Ct. 2123 (1991). The fact that Mr. Chambers's actions would probably have been the same if the station were run as a sole proprietorship instead of a corporation suggests that the categories of "individual" and "corporate" on the client axis of the matrix are simply useful heuristics for much more nuanced factors such as access to resources and legal expertise.

n248 NASCO, 124 F.R.D. at 136. For example, the district court found that Chambers and his attorneys had fraudulently attempted to deprive the court of jurisdiction, filed false and frivolous pleadings and motions, taken needless depositions, and repeatedly sought continuances and extensions. See id. at 125-28. The Supreme Court did not disturb these findings. See NASCO, 111 S. Ct. at 2138.

n249 In addition to several verbal warnings, the trial judge gave counsel for Chambers a copy of a recent article by Judge William Schwarzer, which urged trial judges to use their newly expanded powers under rule II to impose sanctions when appropriate. See NASCO, 111 S. Ct. at 2129 n.3 (citing William W. Schwarzer, Sanctions Under the New Federal Rule II -- A Closer Look, 104 F.R.D. 181 (1985)).

n250 See NASCO, 124 F.R.D. at 145. The court also sanctioned two other attorneys. The first, a Louisiana attorney, was suspended from practice before the district court for six months. See id. The second, a Massachusetts attorney, was disbarred from practicing in the federal courts of Louisiana for five years, and a copy of the court's opinion was forwarded to the Massachusetts disciplinary authorities. See id. at 145-46. The court of appeals asked the district court to reconsider the latter sanction in light of the fact that the Massachusetts authorities subsequently disbarred the second attorney. See NASCO, 894 F.2d at 708.

n251 The importance that the district court placed on the lawyer's duty as an officer of the court is clear from the rhetoric of the opinion:
The Court has a right to expect [a lawyer], as an officer of the Court, to lend his assistance in preserving order and decorum in the Court; to be truthful and forthright with the Court and other counsel; to be truthful and not mislead the court or other counsel. . . . He is bound to preserve the integrity of the law and the Constitution of the United States and the several states and to seek justice in his representation of clients before the Court. In his conduct in this case, [the attorney] has actively violated almost every one of these ethical and professional responsibilities.

*NASCO, 124 F.R.D. at 144.*

n252 This is particularly true if, as is sometimes asserted, separation of powers concerns mandate that state supreme courts have sole control over the disciplinary process and thereby preclude trial courts from exercising direct control. See, e.g., *Graham v. State, 427 So. 2d 998, 1007 (Ala. Crim. App. 1983)* (holding that a trial court lacks the authority to suspend a lawyer from practice before it); *Esch v. Superior Court, 577 P.2d 1039, 1043-44 (Alaska 1978)* (same). This extreme form of the negative inherent powers doctrine is flatly inconsistent with the affirmative claim that courts must be able to control lawyers if they are to function effectively. See, e.g., *WOLFRAM, supra* note 36, § 2.2.4, at 31 ("If . . . lawyer regulation is an aspect of judicial power, one would imagine it to be an aspect of the powers of trial courts as well."). Similarly, liability controls such as legal malpractice should not be prohibited by this doctrine because they can also be understood as assisting courts in protecting the integrity of their processes. See James E. Lehan, The Case for Judicial Regulation and Against Legislative Regulation of Lawyer Discipline 147 (Mar. 21, 1988) (unpublished manuscript, on file at the Harvard Law School Library) (arguing that legal malpractice is a form of judicial regulation because "[t]he basic nature of malpractice suits and disciplinary proceedings is the same -- determining whether a lawyer has violated the appropriate standard of conduct"). Many institutional controls and all legislative controls, however, are flatly prohibited.


n254 *See WOLFRAM, supra* note 36, § 2.2.3, at 27. As Wolfram explains:

The separation of powers argument runs as follows. Each of the three branches of government -- executive, legislative, and judicial -- is separately empowered to act by the state's constitution and is supreme within its assigned sphere. Moreover, no branch may attempt to exercise a power devolved upon a coordinate branch. Regulation of the practice of law is part of the judicial function, as history shows. Therefore, at least in the radical statement of the doctrine, any attempt . . . to entrench on that exclusively judicial power is an unconstitutional usurpation.

*Id.*

n255 *See, e.g., In re Fields, 45 S.E.C. 262, 266 n.20 (1973)* (justifying SEC enforcement efforts on the ground that "the task of enforcing the securities laws rests in overwhelming measure on the bar's shoulders"); *Exploiting Loopholes, supra* note 32, at 617 (justifying OTS's enforcement efforts on the ground that lawyers play a crucial role in ensuring the "safety and the soundness of banks and thrifts").

n256 *See WOLFRAM, supra* note 36, § 2.2.3, at 30 (noting that under the traditional separation of powers approach, "it would be just as logical to claim that the conduct of prosecutors may be regulated solely by the executive branch and not by the judiciary"). For example, consider the SEC's recent decision in *In re Kern, 1934 Exchange Act Release No. 34-29356, 49 S.E.C. Dock. (CCH) 422 (June 21, 1991)*. The enforcement staff charged that Kern, a partner in one of New York's oldest and most prestigious law firms, "caused" his client to violate the securities laws by failing to make certain required disclosures during the course of a takeover fight. *See SEC ALJ Moves to Discontinue Proceedings Against Allied's Kern, 20 Sec. Reg. & L. Rep. (BNA) No. 45, at 1747 (Nov. 18, 1988).* The staff brought an action to enjoin Kern from engaging in similar conduct in the
future. See id. The Commission ultimately determined that such relief was not authorized by the governing statute. See In re Kern, 49 S.E.C. Dock. (CCH), at 425. In 1990, Congress expressly granted the Commission the authority to issue the kind of order at issue in Kern. See McLucas, DeTore & Colachis, supra note 5, at 847 (citing Pub. L. No. 101-429 § 203, 104 Stat. 931, 939-40 (1990)). In light of the central role that lawyers play in the administration of the securities laws, it seems clear that this express grant of enforcement authority will promote, rather than undermine, the separation of powers and the proper functioning of government.

n257 See, e.g., WOLFRAM, supra note 36, § 2.2.3, at 29 (noting that some state courts invoke the doctrine to prevent usurpation of their powers by other branches).

n258 When courts strike down legislation under this branch of the inherent powers doctrine, their actions often can be explained as preventing the legislature from altering the content of a lawyer's professional obligations. See, e.g., Idaho State Bar Ass'n v. Idaho Pub. Utilities Comm'n, 637 P.2d 1168, 1173 (Idaho 1981) (striking down a statute that altered the unauthorized practice rule); Archer v. Ogden, 600 P.2d 1223, 1223-24 (Okla. 1979) (striking down a statute that imposed an additional residency requirement); cf. People ex rel. Conn v. Randolph, 219 N.E.2d 337, 342 (Ill. 1966) (ordering the state to compensate a court appointed lawyer above the statutorily imposed limits).

n259 For example, a statute that prohibited lawyers from raising constitutional challenges to government conduct or that allowed lawyers to introduce perjured testimony would certainly undermine the court's ability to carry out its core functions. See WOLFRAM, supra note 36, § 2.2.3, at 29 (arguing that a statute requiring all litigants to appear pro se violates the separation of powers).

n260 Cf. MCKAY REPORT, supra note 9, at 3-4 (arguing that the failure of legislative regulation to control lawyer misconduct effectively was a motivating factor in the creation of the disciplinary system).


n262 MCKAY REPORT, supra note 9, at 5 ("[P]eople's respect for individual rights can sink dangerously low. . . . During such times, an independent judiciary and legal profession are necessary to protect those rights.").

n263 Lord Brougham's famous speech in defense of Queen Caroline is perhaps the most renowned statement of this manifest: "[A]n advocate . . . knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty." 2 JOSEPH NIGHTINGALE, TRIAL OF QUEEN CAROLINE 8 (1978).

n264 See Pepper, supra note 34, at 617 ("[I]n a highly legalized society such as ours, autonomy is often dependent upon access to the law. . . . For most people most of the time, meaningful access to the law requires the assistance of a lawyer."). If lawyers are to help their clients achieve this positive moral good, lawyers must
remain free from external influences, including those of their own consciences. See id. at 617-19 (objecting to any "filter," moral or otherwise, that would deny citizens free access to the public goods of law).

n265 See Austin Sarat, Ideologies of Professionalism: Conflict and Change Among Small Town Lawyers, in LAWYERS' IDEALS AND LAWYERS' PRACTICES: PROFESSIONALISM AND THE TRANSFORMATION OF THE AMERICAN LEGAL PROFESSION (Robert Nelson, David Trubek & Rayman Solomon eds., forthcoming 1992) [hereinafter LAWYER'S IDEALS AND LAWYERS' PRACTICES] (noting that a number of lawyers he interviewed in a small New England town believed that a local lawyer acted "professionally" when he assisted a client in pursuing a controversial but legal project in the face of community pressure). Professor Sarat also reports, however, that other lawyers in the same community condemned these same actions as "unprofessional" on the ground that the lawyer was not sufficiently independent from his client. See id. The simultaneous existence of these two perceptions of professional independence within the same community underscores the ambiguous and contested nature of this term.

n266 See Gordon, supra note 236, at 17 (arguing that no plausible account of the liberal democratic state can "manage without some notion that lawyers must be committed to helping to maintain the legal framework").

n267 See LOUIS D. BRANDEIS, The Opportunity in the Law, in BUSINESS -- A PROFESSION 313, 321 (1914) (arguing that lawyers should "hold[] a position of independence, between the wealthy and the people, prepared to curb the excess of either").

n268 See Lon L. Fuller & John D. Randall, Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958) ("[T]he lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose.").

n269 See, e.g., MCKAY REPORT, supra note 9, at 6; Gordon, supra note 236, at 11 (noting, but not endorsing, the comparison to Nazi Germany).


n271 For example, revealing confidential client information to help the state gain a conviction, presumably even after being tortured, constitutes a clear violation of Model Rule 1.6. See MODEL RULES, supra note 25, Rule 1.6 ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. . . .").

n272 For example, lawyers who violate express duties to clients can be sued for malpractice or referred to disciplinary authorities. Of course, if lawyers were actually being tortured by state officials, these other correctives would undoubtedly fail to persuade lawyers to comply with their professional obligations. In that case, however, the system of state controls should be rejected on simple compliance grounds. There would be no need to consider independence concerns at all. In any event, a state that tortures lawyers is so remote from our legal system that the analogy is not especially useful.

n273 See Charles Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060, 1074 (1976) (noting and defending the proposition that lawyers are free to represent whomever they choose to represent).
n274 See, e.g., MODEL RULES, supra note 25, Rule 1.6(b)(1) (directing that "[a] lawyer may reveal [confidential] information . . . to prevent the client from committing a criminal act the lawyer believes is likely to result in imminent death or substantial bodily harm"); id. Rule 1.13(c) (stating that a lawyer for an organization "may" resign if the officers of the company insist upon pursuing a course of conduct that the lawyer believes to be illegal or harmful to the organization).

n275 I have previously argued that this kind of ambiguity gives lawyers substantial room to create plausible legal justifications for conflicting courses of conduct. See David B. Wilkins, Legal Realism for Lawyers, 104 HARV. L. REV. 469, 481-83 (1990).

n276 In this respect, independence claims are actually a way of arguing about normative content.

n277 Cf. Ayres & Braithwaite, supra note 206, at 471 (noting that "[b]usiness executives routinely comply with laws that have such low deterrence payoffs and probabilities associated with them that compliance is almost always economically irrational").

n278 See Rhode, supra note 116, at 630 (noting that "almost all prominent practitioners declined loyalty cases during the McCarthy era").

n279 For example, Professors Wolfman and Holden have persuasively argued that tax lawyers who literally interpreted the ABA's former requirement that they should advise their clients only to take positions on income tax returns that were supported by a "reasonable basis," created an "audit lottery" that jeopardized the health of the tax system. See WOLFMAN & HOLDEN, supra note 6, at 59.

n280 The classic formulation of this approach is Brandeis's famous injunction that lawyers should be "counsel for the situation." PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 96-102 (1984) (describing Brandeis's creative solution to the labor problems of a Boston department store).

n281 See generally Simon, supra note 34, at 1090 (arguing that lawyers should always make an independent assessment of both the client's claim and the multiple purposes underlying relevant legal rules in order to reach a judgment about what actions, under the circumstances of each case, are most likely to produce the legally correct outcome). I have elsewhere argued that rulemakers may legitimately seek to cabin this discretion in certain circumstances, and that lawyers may not have quite as much freedom as Simon asserts even under the existing framework. See Wilkins, supra note 275, at 507-14. Simon is undoubtedly correct, however, that the lawyer who is presented with an ambiguous set of legal materials should choose the interpretation that best furthers the overall goals of the legal system.

n282 See, e.g., Peter M. Brown, The Decline of Professional Independence, in PRESENT THREATS/FUTURE CHALLENGES, supra note 238, at 23, 25 (arguing that "the decline of professional independence . . . essentially reflect[s] the attitudes and lack of vision of a significant group of American lawyers who view the practice of law principally as a source of revenue" (emphasis in original)).

n283 See, e.g., Marvin G. Pickholz, The Proposed Model Rules of Professional Conduct -- And Other Assaults upon the Attorney-Client Relationship: Does "Serving the Public Interest" Disserve the Public
Interest?, 36 BUS. LAW. 1841, 1842 (1981) (arguing against certain changes in the Model Rules on the ground that they disserve the public by undermining professional independence).

n284 See Cox, supra note 238, at 55. As Cox has argued:

[S]ociety is best served by lawyers who see themselves as following an independent public calling... [This] ideal can be nurtured and the pursuit of it in actual practice can be encouraged... only by a profession... whose members are so well guided by their personal sense of professional obligation to the public that the public chooses to leave them largely free from outside regulation.

Id.

n285 See id. In an excellent article, Professor Susan Koniak argues that the bar has sought to protect its right to create its own "nomos" or normative sphere from state enforcement. See Susan P. Koniak, The Law Between the Bar and the State 70 N.C. L. REV. (forthcoming June 1992).

n286 See, e.g., Abel, supra note 39, at 653-57 (characterizing the legal profession's efforts at self-regulation as "supply control" designed primarily to increase the prestige and profitability of law practice). See generally MAGALI S. LARSON, THE RISE OF PROFESSIONALISM 40-52 (1977) (making a similar argument for all professions). Unfortunately, it is far too easy to cite examples that confirm this claim. See Rhode, supra note 73, at 692-706 (arguing that many provisions of the rules of professional conduct, including those relating to advertising, solicitation, and unauthorized practice, are primarily intended to enhance the economic and status interests of the bar).

n287 See Bernard Williams, Professional Morality and Its Dispositions, in THE GOOD LAWYER, LAWYER'S ROLES AND LAWYER'S ETHICS, 259, 266-67 (David Luban ed., 1984) (arguing that self-regulation helps professionals develop a "disposition" not to use their strong personal and financial powers purely for personal gain).

n288 Indeed, because of the prominent role that lawyers have traditionally played in government, business, civic organizations, and other elite institutions -- not to mention the judiciary, which is entirely staffed by former lawyers -- society may have an even greater stake in encouraging these future leaders to develop the capacity for reflection and reasoned judgment. The fondness with which many contemporary lawyers cite de Tocqueville's famous statement that lawyers are the American aristocracy indicates that many lawyers believe this to be the case. See, e.g., Brown, supra note 282, at 24 (citing de Tocqueville in the course of noting that "[f]or 200 years and more, American lawyers have provided the leadership in government, institutions, business, and public opinion"); see also ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 24-25, 72 (1984) (noting the frequent claim by eighteenth-century lawyers that their professional education and training made them uniquely qualified to staff the ranks of the government, business, and cultural elite).

n289 See, e.g., MCKAY REPORT, supra note 9, at 5.

n290 For a general discussion of the importance of zealous advocacy in the criminal defense context, see LUBAN, supra note 34, at 145. Luban has defended a high level of partisanship for criminal defense lawyers. See id.; see also Barbara Babcock, Defending the Guilty, 32 CLEV.-MARSHALL L. REV. 175, 177-79 (1983) (discussing the importance of zealous advocacy in criminal defense cases).
n291 See Rhode, supra note 116, at 606 (noting "the small number of attorneys actively engaged in criminal defense work").

n292 See id. at 607 (arguing that "[w]hen a Wall Street firm representing a Fortune 500 corporation squares off against a woefully understaffed state regulatory agency, it strains credulity to paint the corporate defender as a champion against official tyranny").

n293 See MCKAY REPORT, supra note 9, at 5 (invoking the example of criminal defense lawyers as a basis for opposing legislative control for all lawyers).

n294 See MODEL RULES, supra note 25, Rule 3.1 ("A lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous. . . .").


n296 The importance of this internal motivation should not be minimized. Many students go to law school precisely because they seek a way of life that places public commitments at least on a par with the pursuit of private profit. See generally Robert Stevens, Law Schools and Law Students, 59 VA. L. REV. 551, 622 (1973) (reporting a 1973 survey in which many students stated that they chose to go to law school because they "wanted to be of service to the underprivileged"). This idea is reinforced by the formal rhetoric of legal education and professional virtue. See William H. Simon, Babbitt v. Brandeis: The Decline of the Professional Ideal, 37 STAN. L. REV. 565, 568 (1985) (describing the "progressive-functionalist" strain in which "the most important determinants of the professional's behavior are not self-interest and coercively enforced rules but the goals of perfecting and applying her discipline and, through that discipline, serving clients and society").

n297 As Ronald Gilson has argued: "The consequence [of the growing sophistication of corporate clients] is a dramatic reduction in the switching costs . . . and an elimination of lawyers' market power. The luxury of gatekeeping (and the good life generally) is the casualty." Gilson, supra note 94, at 902-03.

n298 Based upon their study of the Chicago bar, Heinz and Laumann concluded that "[t]he more prestigious [hemisphere of legal practice, that is, the representation of corporate clients] is, ironically, the less independent. It is a patronage type occupation . . . where corporate clients to a large degree dictate the nature of the work done." HEINZ & LAUMANN, supra note 77, at 380. As Gilson notes, the more sophisticated corporate clients become, the more likely this ironic result is. See Gilson, supra note 94, at 903 n.76 (arguing that the "the more prestigious the corporate client, the more likely that it has a sophisticated general counsel, in which event the less likely there is to be any information asymmetry to give the lawyer the power to function as a gatekeeper").

n299 See, e.g., Abraham S. Blumberg, The Practice of Law as Confidence Game: Organizational Cooptation of a Profession, 1 LAW & SOC'Y REV. 15, 20-21 (1967) (arguing that criminal defense lawyers routinely sacrifice the interests of their clients to maintain good relations with police, prosecutors, judges, and other state officials with whom they routinely interact); Robert F. Kelly & Sarah H. Ramsey, Monitoring Attorney Performance and Evaluating Program Outcomes: A Case Study of Attorneys for Abused and Neglected Children, 40 RUTGERS L. REV. 1217, 1220-22 (1988) (arguing that many lawyers for abused children fail to provide adequate service to their clients because the funding agencies and courts that appoint these lawyers have little incentive to challenge inadequate work).


n302 Lincoln Savings and Loan was an Arizona-based thrift under the control of Charles H. Keating, Jr. and others. When Lincoln went bankrupt, allegedly as a result of massive fraud by Keating, the federal government was left with more than two billion dollars worth of obligations to depositors and other insured creditors. *See* Lincoln Savs. & Loan Ass'n v. Wall, 743 F. Supp. 901, 905-19 (D.D.C. 1990) (describing Lincoln's collapse).

n303 Charles Keating apparently saw the wisdom of surrounding himself with the best legal talent money could buy. Two of the firms that did a significant amount of Lincoln's work -- Cleveland's Jones, Day, Reavis & Pogue and New York's Kaye, Scholer, Fierman, Hays & Handler -- are among the most profitable firms in the country. *See Gross Revenue Chart*, AM. LAW., July/Aug. 1991, at 16 (listing Jones, Day as producing the third highest gross revenues and Kaye, Scholer as producing the twenty-third highest).

n304 For example, the RTC's complaint against Jones, Day alleges that the law firm actively aided Keating in deceiving federal regulators about the true financial condition of the thrift by "stuffing" files with supporting documentation prepared long after the loans had been made. *See* Granelli, *supra* note 26, at D7. Although this suit thus charges Jones, Day with a classic externality violation, it does so in the form of an action for legal malpractice, a device almost always reserved for agency claims. The reason for this unusual procedural posture is that the RTC, by virtue of its indemnification obligations to depositors, now controls its former adversary. Therefore, although this designation will undoubtedly have some important ramifications for evidentiary questions such as who is entitled to assert the attorney-client privilege, the basic structure of the dispute between the RTC and Jones, Day is no different from what it would have been if the lawsuit had been filed as a straight third-party action. Nevertheless, the result underscores the ambiguity of the distinction between "agency" and "externality" problems.

n305 *See* ROBERT A. G. MONKS & NELL MINOW, POWER AND ACCOUNTABILITY 3-4 (1991) (arguing that large corporations have considerable power to harm individuals and institutions and that such corporations must be made accountable to society's needs).

n306 One commentator has remarked:

Lawyers whose practices are regulated from the outside -- by the SEC's Rule 2(e) or the IRS's TEFRA regulations of tax shelter opinions, for example -- are less autonomous in some ways but more so in others, for they can convince their clients that their advice is not an exercise in prissy moralizing, but necessary to save the lawyer's license to practice.

Gordon, *supra* note 236, at 19 n.57.

Thus, if the lawyers in *In re Carter*, discussed in notes 154-160 above, had known that the SEC would actively monitor their conduct, they might have refused to continue working until their advice on disclosure was followed. From the standpoint of furthering the underlying purposes of the securities laws, this would have been the preferable result.
n307 See MALLEN & SMITH, supra note 24, § 2.7, at 69 (recommending that clients be screened according to their "relationship and experience with prior attorneys"); cf. WEILER, supra note 4, at 85-86 (discussing the social cost of doctors' refusal to perform certain procedures or their abandonment of practice entirely because they fear sharply rising malpractice costs).

n308 See Arthur B. LaFrance, Federal Rule 11 and Public Interest Litigation, 22 VAL. U.L. REV. 331, 352-54 (1988) (arguing that rule 11 discourages attorneys from taking public interest cases); Carl Tobias, Rule 11 and Civil Rights Litigation, 37 BUFF. L. REV. 485, 503-06 (1989) (noting that rule 11 has chilled lawyers' efforts to pursue civil rights litigation); Yamamoto, supra note 168, at 363 (arguing that rule 11's "disproportionate impact on civil rights and other public interest cases dissuades attorneys and litigants from contemplating these types of lawsuits"). Recall Kamen, discussed above at pp. 841-42. Arguably, the lawyer's error in not appealing the dismissal of his client's case -- even though he appealed the sanctions order -- was caused partly by the lawyer's fear that he might also be sanctioned for appealing the dismissal. See Kamen v. AT&T, 791 F.2d 1006, 1009 (2d Cir. 1986).

n309 Of course, if the threat of sanctions merely dissuades lawyers from pursuing illegitimate claims or defenses, no harm to individual autonomy has occurred, since frivolous arguments have always been considered outside of the system. See BURBANK, supra note 29, at 84 (noting that "Rule 11 is intended to chill some behavior, namely, filing papers without reasonable prefiling factual or legal inquiry, filing papers without an honest (good faith) belief, based on such inquiry, in their factual or legal foundation, and filing papers for an improper purpose").

n310 See Robert L. Carter, The Federal Rules of Civil Procedure as a Vindicator of Civil Rights, 137 U. PA. L. REV. 2179, 2181-82 (1989) (criticizing rule 11 and other efficiency-based procedural reforms on the ground that they imply "that a successful federal court system is one which most effectively excludes certain kinds of substantive claims" (emphasis in original)). One of the primary public duties lawyers have as officers of the court is the responsibility to make legal counsel widely available. See MODEL CODE, supra note 25, Canon 2 ("A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.


n313 See Nat'l Student Mktg., 457 F. Supp. at 687. As Judge Parker reasoned, the risk that such an injunction would have a damaging effect on the securities bar was not worth taking in light of the fact that this kind of violation was "unlikely to recur," because the firm would certainly "take appropriate steps to ensure that their professional conduct in the future comport with the law." Id. at 716-17; see also Tim O'Brien, Some Firms Never Learn: Lord, Bissell's Second Escape from Fraud Charges Cost $24 Million -- And It Could Happen Again, AM. LAW., Oct. 1989, at 63, 64 (quoting Judge Parker).

n314 See O'Brien, supra note 313, at 64.

n315 Predictably, the civil actions were settled without any admission of liability by the firm, and the major participants continue to assert that they acted properly. See id. at 65.
n316 For example, it is undisputed that the firm continued to represent NMEC after the founder of the company was convicted on fraud charges, and that this representation included actively opposing investigations by several public and private entities into the company's affairs. See id. at 64-65.

n317 See id. at 64 (reporting that Lord, Bissell's managing partner testified that "Judge Parker's opinion in the National Student Marketing case was never circulated to the partners, that there was no partnership meeting about the ruling, that no policies were established to guard against a recurrence, and that the partner himself did not remember having read the opinion"). Of course, it is possible that even though there was no formal reaction, lawyers inside the firm were chilled by the prospect that they might be sued by the SEC or others for aggressive, but otherwise proper, legal advice. The firm's involvement in NMEC, however, casts doubt on this theory.

n318 Lord, Bissell, for example, allegedly collected more than one million dollars in fees for NMEC work. See id. at 64.

n319 See Tobias, supra note 308, at 496-97 (noting that rule 11 has an adverse effect on civil rights cases because these suits often "assert new or comparatively untested theories of law" and "are at the cutting edge of legal development"). As Judge Carter argues, rule 11 may be taking its "toll in intimidation from those who are seeking to vindicate novel rights by means of untried strategies." Carter, supra note 310, at 2192.

n320 See, e.g., Locke, supra note 231, at 1 (reporting that "some lawyers have quit doing securities work" because of rising insurance rates). Given the substantial financial rewards associated with this kind of cutting edge corporate practice, there are still many capable lawyers who are willing to set aside their fear of liability and perform these services; cf. Securities Lawyers' Doors Still Open, ILL. LEG. TIMES. Jan. 1991, at 24 (discussing the growth of the securities business in the 1980s and the continued interest of major firms in this work even after the economic downturn). Of course, if the lawyer is deterred from helping her client engage in conduct that the lawyer believes is not lawful, neither the client nor the system has lost anything of value.

n321 See BURBANK, supra note 29, at 71-72 (noting that rule 11 sanctions pose a particular danger to poor litigants and their lawyers because "monetary sanctions may be regarded as punishment, and full expense-shifting may entail massive over-deterrence").

n322 See Geoffrey C. Hazard, Jr., Drawing the Distinctions on Discipline, NAT'L L.J., Jan. 21, 1991, at 13, 14 (arguing that disciplinary procedures for lawyers should be tailored to the seriousness of the type of violation in question).

n323 This should not be taken to mean that these agencies should close their doors to other charges of lawyer misconduct. Certainly, if misconduct falling within the other three quadrants comes to the attention of disciplinary officials, they should not hesitate to act. For example, Ted Schneyer has persuasively argued for professional discipline for law firms, partially as a means of controlling certain externality problems created by corporate lawyers practicing with private firms. See Schneyer, supra note 115, at 13-23. Nevertheless, because these agencies have limited resources and other control systems may be able to address many of these questions more efficiently, the priority should be on controlling individual agency problems.

n324 For example, clients could be contacted and asked to review the handling of their case with a disciplinary official. The official could then review the client's file and discuss the case with the lawyer. Even
this simple form of review would detect many instances of incompetence or neglect that currently escape regulatory scrutiny.

n325 Steele & Nimmer, supra note 84, at 1009.

n326 The McKay Commission has made progress on this front. Building on the suggestion in the Model Rules that fee agreements be in writing, the Commission recommends that lawyers who do not submit written fee agreements bear the burden of proof on all matters in any subsequent dispute with the client. See MCKAY REPORT, supra note 9, at 56 (relying on the MODEL RULES, supra note 25, Rule 1.5). There is little if anything, however, to guide clients or lawyers about either the content of the fee agreement or the nature of the services to be performed. In this respect, Steele and Nimmer's observation that "[t]he typical contract for legal services would . . . be unacceptable to most people when contracting for any other type of goods or services," is as true today as it was when it was written in 1976. Steele & Nimmer, supra note 84, at 1009.

n327 See HEINZ & LAUMANN, supra note 77, at 104-06, 326 (arguing that lawyers who spend more than a minimal amount of time in highly specialized areas such as tax and securities practice tend to spend the majority of their time on these matters).

n328 The tendency for particular lawyers to concentrate the bulk of their attention in one substantive area minimizes the definitional and jurisdictional problems associated with multiple sources of authority. See Wilkins, supra note 275, at 519.

n329 Even in the securities law context, therefore, the Commission should have less authority in cases in which the corporation is actually involved in litigation with the agency.

n330 See supra note 35.

n331 Cf. Mitchell F. Dolin, SEC Rule 2(e) After Carter-Johnson: Toward a Reconciliation of Purpose and Scope, 9 SEC. REG. L.J. 331, 362-70 (1982) (raising similar objections to the SEC's use of rule 2(e)).


n334 Neal R. Sonnett, Stop This IRS Assault on Lawyers, USA TODAY, Mar. 13, 1990, at 10A. Mr. Sonnett is the president of the National Association of Criminal Defense Lawyers. See id.

n335 See Paul Moses, Law Firms Told to ID Clients, NEWSDAY, Mar. 14, 1990, at 8 (noting that, although a federal judge concluded that two New York attorneys were required to disclose the information, the judge
found that the lawyers had acted ethically in challenging the IRS's actions in light of their potentially conflicting ethical obligations to maintain client confidences).

n336 Cf. Michael L. Scheier, Comment, The Bill of Rights Becomes the Latest Casualty in the War on Drugs and Organized Crime -- Surprisingly, Forfeiture of Attorney Fees is Consistent with the Fifth and Sixth Amendments to the United States Constitution, 59 U. CIN. L. REV. 905, 934-36 (1991) (criticizing two Supreme Court cases that upheld the government's use of fee forfeitures of attorney's fees in criminal cases).

n337 Cf. Moses, supra note 335, at 8 (noting that, although a federal judge ordered disclosure of particular names, he refused to enter a blanket order requiring the lawyers to disclose the name of any client in the future). Once it has been definitively determined that the disclosure statute does not conflict with a lawyer's professional duties, however, a blanket enforcement order would not undermine professional independence. See Willcox, supra note 332, at 943 (arguing that there is no conflict because a client's identity is never privileged).


n339 For example, Kelly and Ramsey make a persuasive case that state monitoring and evaluation of attorney conduct in cases involving abused children would substantially raise the quality of advocacy in these cases. See Kelly & Ramsey, supra note 299, at 1250-52 (arguing that such a system should be "self-starting" through random audits and able to impose remedial or punitive sanctions).

n340 103 F.R.D. 124 (N.D. Cal. 1984), rev'd, 801 F.2d 1531 (9th Cir. 1986), reh'g denied, 809 F.2d 584 (9th Cir. 1987).

n341 See id. at 129 (rejecting a law firm's claim that it was unaware of adverse precedent in light of the firm's demonstrated ability to discover obscure supporting authority via means such as computerized research).

n342 The court required that a copy of its opinion be circulated to all members of defendant's firm. See id.

n343 See Golden Eagle, 801 F.2d at 1542.

n344 Id.

n345 Id.

n346 See Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 604 (1st Cir. 1988) (distinguishing between an "understaffed sole practitioner seeking to aid a client" and a lawyer "associated with a major firm with all the attendant resources"); Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions, 100 HARV. L.
REV. 630, 642-43 (1987) (arguing that "[i]f a lawyer has only limited . . . resources . . . prior to filing, it is reasonable for her to conduct less extensive inquiry than she would in the absence of [this] restriction[""]).

n347 This danger can be minimized by requiring judges to act on the record and to state the reasons for their decisions. I return to these protections below. See infra pp. 883-84.

n348 Cf. Ayers & Braithwaite, supra note 206, at 473-74 (arguing that one goal of regulation is to counterbalance inequalities of power). The grounds for this intervention are no different than the traditional reasons generally given for rejecting a purely market approach to the attorney client relationship -- that is, the interests at stake are too important to allow structural imbalances to distort the process. See Leubsdorf, supra note 93, at 1031-32 (rejecting a "market model" of lawyer regulation because it does not take account of the importance of either the service or structural defects in the attorney-client relationship). The only difference is that now we recognize that sometimes it is the lawyer, and, through the lawyer, the public at large, that must be protected from the client.

n349 Galanter shows skepticism about any rule change designed to equalize the position of the "haves" and the "have nots":

Rule change is in itself likely to have little effect because the system is so constructed that changes in the rules can be filtered out unless accompanied by changes at other levels. . . . The system has the capacity to change a great deal at the level of rules without corresponding changes in everyday patterns of practice or distribution of tangible advantages.

Galanter, supra note 78, at 149 (footnote omitted). The effort is not futile, however, especially because the "rule" changes we are discussing come cloaked in the protective armor of enforcement proceedings that do affect actual outcomes and distributions.


n351 There is some empirical evidence that many legal services plans are quite diligent in their efforts to ensure that their members receive competent and cost efficient legal services. See, e.g., id. at 129 ("[C]ommentators have identified several advantages of closed panels, among them better quality control, lower cost, and greater lawyer contact." (footnote omitted)).

n352 See Robert Hermann, Prepaid Legal Services Coming of Age, 48 N.Y. ST. B.J. 438, 443 (1976) (noting lawyers' complaints that such plans unduly restrict independent professional judgment).

n353 See Roy D. Simon, Jr., Fee Sharing Between Lawyers and Public Interest Groups, 98 YALE L.J. 1069, 1124-25 (1989) (arguing that fee sharing arrangements help public interest organizations provide quality, low cost legal services).

n354 This argument was originally raised by Justice Harlan in his dissent in NAACP v. Button, 371 U.S. 415 (1963). Justice Harlan argued that the professional independence of the NAACP's affiliated counsel was compromised because they were paid by the organization and not by the Black families who were their putative clients. See id. at 448-49, 460-63 (Harlan, J., dissenting). These concerns were later echoed by Professor Derrick Bell, a former civil rights lawyer, in a brilliant article. See Derrick A. Bell, Jr., Serving Two Masters:
Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470, 482-93 (1976) (arguing that the political agenda of the NAACP may conflict with the true interests of its clients).

n355 CIVIL JUSTICE REFORM, supra note 7, at 25 (emphasis omitted). In his remarks, ABA President Curtin signaled the bar's opposition to fee proposals that would have a "chilling effect . . . on individuals in enforcing their legal rights." Curtin, supra note 8, at 2 (describing the ABA's opposition to the English rule of two-way fee shifting, which is also recommended in the Competitiveness Council's report).

n356 CIVIL JUSTICE REFORM, supra note 7, at 25.

n357 See WALTER K. OLSON, THE LITIGATION EXPLOSION 321-22 (1991) (reporting that some lawyers feel pressure to file additional claims or conduct more vigorous discovery because they fear malpractice suits).

n358 See, e.g., Robert F. Cochran, Jr., Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation, 47 WASH. & LEE L. REV. 819, 876-77 (1990) (arguing that courts should extend the tort of legal malpractice to force lawyers to allow client control of virtually every aspect of lawyer decisionmaking).

n359 See MALLEN & SMITH, supra note 24, § 17.2, at 7 (noting that "the sophistication may only have limited effect" on the duty to monitor).

n360 In addition, jurisdictions that still follow the Model Code's prohibition against contractual restrictions on malpractice liability should hold that these restrictions do not apply to sophisticated consumers. Compare MODEL CODE, supra note 25 DR 6-102 (prohibiting all waivers) with MODEL RULES, supra note 25, Rule 1.8(h) (allowing waivers when permitted under state law and when the client is represented by independent counsel). See generally Gross, supra note 99, at 838-39 (providing an economic analysis of contractual limitations of malpractice liability and concluding that they should be permitted).

n361 See Competitive Food Systems, Inc. v. Laser, 524 N.E.2d 207, 209 (Ill. App. Ct.), cert. denied, 530 N.E.2d 242 (1988) (holding that a lawyer may defeat a claim for negligently drafting an offering circular if the information supplied by the client would have made the statement false and misleading).

n362 See Kenneth J. Wilbur, Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility, 92 DICK. L. REV. 777, 782-83 (1988) (advocating such a cause of action against the employer and noting its particular usefulness against large firms because "[t]he larger a firm becomes, the greater the chance that its management structure will be unresponsive to the needs of associates for ethical direction" (footnote omitted)); cf. L. Harold Levinson, Ethics Inside the Law Firm, 36 VAND. L. REV. 847, 851 (1983) (book review) (observing that an autocratically managed law firm "rejects any expression of concern by an associate and the firm may deny promotion or discharge the associate from employment if the associate persists in questioning the partner's instructions").

n363 See, e.g., Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1270-71 (7th Cir. 1983) (Coffey, J., dissenting) (attacking the majority's reliance on an irrebuttable presumption of intra-firm sharing of confidences and recommending the use of "Chinese Walls" to screen disqualified attorneys, particularly in large law firms).
See generally McMinn, supra note 111, at 1273 (noting that sophisticated corporate clients would not be harmed by a greater use of screening devices).


n365 See Robert L. Nelson & David M. Trubek, Professionalism and its Discontents: From Arenas of Words to Arenas of Work in LAWYERS' IDEALS AND LAWYERS' PRACTICES, supra note 265 (listing "disciplinary enforcement" as an important arena for the construction of professional norms). This view fits comfortably with the traditional claim that one of the principal goals of disciplinary enforcement is to "demonstrat[e] the type of misconduct which the Court and the legal profession will not tolerate." Attorney Grievance Comm'n v. Marano, 474 A.2d 1332, 1338 (Md. 1984).

n366 801 F.2d 1531 (9th Cir. 1986).

n367 See Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 128 (N.D. Cal. 1984) ("The most elemental rationale of this branch of Rule 11 is that fair decisions cannot be expected if the deciding tribunal is not fully informed, let alone if it is misled.").


n369 This reliance on traditional conceptions of the adversarial role was severely criticized by the dissenting appellate court judges. See Golden Eagle Distrib. Corp. v. Burroughs Corp., 809 F.2d 584, 587-89 (9th Cir. 1986) (Noonan, J., dissenting from the denial of an en banc rehearing).

n370 Cf. Judith Resnik, Due Process: A Public Dimension, 39 U. FLA. L. REV. 405, 420 (1987) (arguing that one of the public goods produced in adjudicatory proceedings is information about normative commitments). Recent proposals to increase the visibility of enforcement proceedings, therefore, are to be commended. See, e.g., Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission, Exchange Act Release No. 6783, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) P84,248, at 1295 (July 7, 1988) (noting the SEC's decision that most rule 2(e) proceedings are presumptively open to the public); MCKAY REPORT, supra note 9, at 23 (recommending that disciplinary proceedings be open to the public from the time of the initial complaint); see also BURBANK, supra note 29, at 36 (recommending that judges state their reasons for granting rule 11 sanctions on the record and in a form that can be reviewed on appeal).

n371 This is not always done today. For example, many judges still issue rule 11 sanctions without prior notice or hearing. See BURBANK, supra note 29, at 27-28.

n372 See Simon, supra note 353, at 1132 (arguing that lawyers who argue for greater protections than are generally applied to the average client "should [not] be heard with much patience").
n373 For example, the ABA litigation section has published a book devoted to helping lawyers and judges understand the way courts have interpreted the various duties imposed by rule 11. After decrying the increase in satellite litigation and otherwise questioning the usefulness of the rule, the book defines conduct that is clearly either acceptable or unacceptable. Such a list would not have been possible before the adoption of rule 11. See RULE 11 AND OTHER POWERS, supra note 46, at 15-25.

n374 See, e.g., Carter, supra note 310, at 2192 (arguing that "Rule II has not been wielded neutrally" and that specific decisions demonstrate "substantive bias" against minority claimants); Yamamoto, supra note 168, at 365-71 (arguing that many rule II decisions demonstrate a substantive bias against minority claimants).

n375 For example, in the course of reversing the district court's refusal to impose sanctions on a minority claimant, Judge Easterbrook went out of his way to opine that minority set aside programs were unconstitutional and to ridicule both plaintiff and defendant for engaging in a game of "we're as black as you are" and attempting to "darken the corporate culture." Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1084 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988). In the judgment of several commentators, these and other similar aspects of the opinion indicate the majority's bias against due process and equal protection claims brought by minority plaintiffs. See, e.g., LaFrance, supra note 308, at 349; Yamamoto, supra note 168, at 366.

n376 See, e.g., Tobias, supra note 308, at 525 (calling for the repeal or amendment of rule II on the basis of its adverse effects on civil rights claims); NAACP Resolutions, THE CRISIS, Dec. 1988, at 27, 29-30 (setting out the NAACP's call for the repeal of rule II because of its adverse effect on civil rights litigation).

n377 For example, judges can impose unreasonable but difficult to overturn discovery restrictions, subtly signal their distaste for the plaintiff's claim to jurors and witnesses, enforce formally justifiable but otherwise unnecessary evidentiary requirements, and, most importantly, rule in favor of the opposing party on the merits.

n378 Even some of the harshest critics of rule II concede that judges have other means at their disposal to exact retribution against civil rights plaintiffs. See Carter, supra note 310, at 2184-90 (noting that judges also manipulate the class action rules in order to make it more difficult for minority claimants to bring suit successfully).

n379 At this point, the evidence concerning rule II's overall effect on civil rights cases is still mixed. For example, a recent study by the Federal Judicial Center concluded that there was insufficient evidence to support the claim that "Rule II has interfered with creative advocacy or impeded the development of the law" in the civil rights area. Elizabeth C. Wiggins, Thomas E. Willging & Donna Stienstra, The Federal Judicial Center's Study of Rule II, in FJC DIRECTIONS, NOV. 1991, at 3, 26.


n382 See Tobias, supra note 308, at 520-21.

n383 Proof of intentional discrimination is often difficult, and the Supreme Court has gradually narrowed the circumstances in which intent is not an issue. Moreover, many courts require civil rights plaintiffs to satisfy
an elevated standard of pleading and proof and thus make it even more difficult to survive an early motion to
dismiss or summary judgment. See Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules
the plaintiff's attorney will be compensated only if she prevails on the merits, these difficulties substantially
reduce -- although they certainly do not eliminate -- the incentive to file strike suits. In light of these existing
barriers, rule II sanctions may not be necessary.

n384 This would not prevent a trial court from imposing sanctions for bad faith conduct under 28 U.S.C. §
1927 (1988). Nor would it preclude a trial judge from referring a plaintiff's civil rights lawyer to the disciplinary
authorities. Indeed, the court should be encouraged to do so, especially when it appears that the client was not
implicated in the lawyer's misconduct, in which case there may also have been an agency violation.

n385 Cf. Gregory Joseph, Redrafting Rule II, NAT'L L.J., Oct. 1, 1990, at 13 (arguing that there is a strong
case to be made for abolishing rule II).

n386 To take only one example, a rational policymaker might choose to limit liability controls as part of an
overall movement away from conflictual methods of dispute resolution.

n387 Ayers & Braithwaite, supra note 206, at 401.