THE SHORT HISTORY OF ARIZONA LEGAL ETHICS

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ABSTRACT

This Essay provides a history of Arizona legal ethics: its substance and procedure. A hundred years ago, legal ethics barely existed in Arizona. Fortunately, a century permits significant progress, as captured in this Essay. Following the lead of the ABA (among others), Arizona slowly but surely adopted a modernized system of ethical regulation. And today, Arizona shows increasing signs of autonomy in legal ethics. These signs can be seen in Arizona's independent approach to lawyer screening, prosecutorial ethics, and inadvertent disclosure—to focus on just a few of many examples in this "short history."

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INTRODUCTION

For "white male citizen[s] of the age of twenty-one years" in the Territory of Arizona,[1] being an "ethical" attorney was seemingly simple. They simply had to abstain from two things: (1) committing felonies or misdemeanors involving moral turpitude; and (2) disobeying court orders.[2] But simple is not always synonymous with good, and when bar associations finally came to town in force, they eventually brought with them a form of modern legal ethics.[3] To be sure, progress was slow-moving by today's standards. This is a story of progress nonetheless. By the end, in fact, the

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1. THE COMPILED LAWS OF THE TERRITORY OF ARIZONA, INCLUDING THE HOWELL CODE AND THE SESSION LAWS FROM 1864 TO 1871, at 343 (Coles Bashford ed., 1871) [hereinafter COMPILED LAWS, 1871] ("Any white male citizen of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, shall be entitled to admission as attorney and counselor in all courts of this Territory by the Supreme Court."); *see also* John S. Goff, *William T. Howell and the Howell Code of Arizona*, 11 AM. J. LEGAL HIST. 221, 228–30 (1967). The twenty-one-year-old-white-male requirement was fortunately jettisoned—but at a glacial pace. REVISED STATUTES OF ARIZONA, Title V, ¶¶ 101–02, at 66 (Cameron H. King et al. eds., 1887) (stating that twenty-one-year-old, or older, applicants were no longer required to be white but had to be "m[e]n of good reputation for moral character and honorable deportment"); REVISED STATUTES OF ARIZONA TERRITORY 192–93 (C. W. Wright et al. eds., 1901) (omitting age requirement and referring to "persons"). We apparently owe our gratitude to two commissions comprised of "three competent lawyers" for removing these requirements. *See* REVISED STATUTES OF ARIZONA, Final Title, ch. 2, ¶ 3265 at 582 (Cameron H. King et al. eds., 1887); REVISED STATUTES OF ARIZONA TERRITORY 4 (C. W. Wright et al. eds., 1901). Also in a discriminatory vein, the American Bar Association rescinded the membership of African-American William H. Lewis in 1912 (but reinstated his membership on a "grandfathered" basis later that year), reporting that "'the settled practice of the Association has been to elect only white men as members.'" *ABA Timeline, 1912: ABA Restricts Membership to White Lawyers*, AM. BAR ASS'N, http://apps.americanbar.org/members/history-timeline/timeline-assets/timeline.html#!panel=266694! (last visited July 12, 2013). The ABA waited until 1943 before formally correcting this practice. *See id.*

2. COMPILED LAWS, 1871, *supra* note 1, ch. 38, § 13, at 344.

3. *See generally Our State Bar Associations: The State Bar of Arizona*, 47 A.B.A. J. 809, 809 (1961); *Bar Associations*, 3 AM. LAW. 111, 111 (1895) (mentioning the Arizona Bar Association's meeting); *Bar and Law Library Associations*, 6 AM. LAW. 60, 60 (1898) (stating that the Arizona Bar Association was organized March 4, 1894); Stan Watts, *A Brief History of the Arizona Bar from Its 1895 Beginnings*, MARICOPA LAW., April 2012, at 5; *History*, STATE BAR OF ARIZ., http://www.azbar.org/aboutus/history (last visited Feb. 27, 2012). On bar associations generally: The first "major" bar association (City of New York) formed in 1870, and the ABA formed in 1878. Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1159–60 & n.43 (2009) (citing JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 286 (1950)); Philip J. Wickser, *Bar Associations*, 15 CORNELL L.Q. 390, 396 (1930) ("Almost all bar associations, as we know them today, have been organized since 1870.").

story has progressed to the point that Arizona not only pronounces and enforces legal ethics but does so under its own distinct brand.

In Part I of this Essay, beginning in Arizona's final territorial days, I discuss the (slow) transition from no legal ethics to a critical step toward modern legal ethics: the adoption of a legal ethics code and an official body to interpret it.[4] In Part II, I note some still-relevant conceptions of the Arizona Supreme Court's authority to admit and discipline Arizona lawyers. I then discuss in more detail the discipline of yesterday's lawyers—the process, substance, faults, and progress. The accompanying Appendix, moreover, summarizes the ethical allegations and dispositions of the first fifty years of disciplinary cases. In Part III, I show that Arizona has emerged from the nasty, brutish, and short legal ethics of the Arizona territory and early statehood to a modern, professionalized system. Further, I suggest that Arizona has evolved into a leader in legal ethics, or at a minimum, a state that prides itself on its autonomy and its identity in legal ethics and professional regulation.

I. DAWN: FROM NEXT-TO-NOTHING TO SOMETHING OF ARIZONA LEGAL ETHICS

This short and necessarily selective history begins in the Arizona territorial years.[5] Those early years evidence few public references to unethical conduct or disciplinary proceedings.[6] This brief stop in the Arizona Territory is simply to establish the starting point of professional regulation: zero. Professional regulation was all but nonexistent, and progress in this regard would apparently need to wait until the next century.

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4. Technically, the modern regulation of legal ethics consists of three essential elements: (1) ethics codes, (2) enforced by disciplinary authorities, (3) using or threatening disciplinary sanctions. Of course, legal ethics cannot and should not be confined to those elements. *See generally* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989) (providing an in-depth, critical account of the Model Rules of Professional Conduct and identifying common legal ethics themes). In this Essay, however, I stick largely to descriptive accounts of legal ethics in this technical but common sense. I rarely make normative assumptions, except (1) that this regulatory structure is better than nothing and (2) that certain specific ethical rules are better than competing rules (or no rules). *See infra* Part III.

5. The Territory of Arizona existed from 1863 to 1912, when Arizona became the forty-eighth state.

6. *See, e.g.*, JAMES M. MURPHY, LAWS, COURTS, AND LAWYERS: THROUGH THE YEARS IN ARIZONA 45 (1970) ("Territorial law did provide for the appeal of all cases to the Supreme Court, including cases of disbarment, but there is no evidence of such an appeal in the first 14 volumes of the *Arizona Reports*.").

In 1906, the then-Arizona Bar Association was incorporated,[7] although membership was not mandatory (or in other words, not integrated).[8] At statehood six years later, the Arizona Bar Association did something more important (or certainly more pertinent) than incorporation: it adopted as its own the American Bar Association's *Canons of Professional Ethics*.[9] This important relationship was finally codified in 1919: attorneys could be disbarred or suspended for "unprofessional or unethical conduct . . . violative of the canons and ethics of the profession of an attorney at law as adopted by the American Bar Association."[10] Interestingly, it was therefore

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7. *Summary of Proceedings of State Bar Associations*, 29 ANN. REP. A.B.A. 734, 735 (1906). Financially, the Arizona Bar Association had existed in a sorry state. The Arizona Bar Association's dues remained at or below $1.00 through 1901, before being raised to $5.00 in 1902. It would have made sense to raise the dues because the Association's treasury balance was less than $3.00 as of March 26, 1900, which prevented it from holding the annual banquet. *News of the Profession*, 4 LAW NOTES 21, 36 (Edward Thompson Co. 1900) (noting a treasury balance of $2.50); MURPHY, *supra* note 6, at 49 (citing a handwritten entry of a $2.20 treasury balance in a ledger book titled "Bar Association of Arizona, 1900-1905").

8. Perhaps not surprisingly, the bar was far from diverse. Even if the bar had been well-intended in this regard, there were, for example, only two women practicing law in the state. *News Items*, 2 WOMEN LAW. J. 57, 57 (1913) ("Miss Alice Birdsall, who graduated with high honors from the Washington College of Law last May passed the Arizona bar examination second and with her partner (another woman lawyer) constitute the only women practicing in that State."); *see also* STAN WATTS, A LEGAL HISTORY OF MARICOPA COUNTY 34 (2007) (noting that Alice Birdsall became the partner of Sarah Sorin in 1912); Jacquelyn Gayle Kasper, *Arizona's First Woman Lawyer: Sarah Herring Sorin*, ARIZ. ATT'Y, Jan. 1996, at 49 (Sarah Herring Sorin, the first woman admitted to practice law in the Territory of Arizona in 1892, also made legal history in 1913 when she became the first woman lawyer to argue an appeal without the aid of male counsel before the United States Supreme Court.). Arizona would later laudably become the home of the first female chief justice of a state supreme court (Lorna Lockwood) and the first female justice of the Supreme Court of the United States (Sandra Day O'Connor). *See, e.g.*, SONJA WHITE DAVID, LADY LAW: THE STORY OF ARIZONA SUPREME COURT JUSTICE LORNA LOCKWOOD (2012); Hon. Michael D. Ryan, *Arizona Trailblazers*, ARIZ. ATT'Y, Nov. 2000, at 23–24. In comparison, women were not admitted to the American Bar Association until 1918. *ABA Timeline, 1918: First Two Women ABA Members*, AM. BAR ASS'N, http://apps.americanbar.org/members/history-timeline/timeline-assets/timeline.html#!panel=266768! (last visited July 13, 2013).

9. MURPHY, *supra* note 6, at 104; *History*, STATE BAR OF ARIZ., http://www.azbar.org/aboutus/history (last visited Feb. 27, 2012); *see generally* ABA, CANONS OF PROF'L ETHICS (1908). Then, and well into statehood, the civil codes governed disbarment proceedings (with the Arizona Supreme Court later asserting concurrent and, in effect, superior authority). *See, e.g.*, ARIZ. REV. STAT., Civ. Code, ch. 2, title 3, ¶¶ 270–83 (1913).

10. 1925 Ariz. Sess. Laws, ch. 32, § 2(7); S.B. No. 152, ch. 158, ¶ 271 (Ariz. 1919) ("[F]or the purpose of determining what is unprofessional or unethical conduct, the canons of professional ethics as adopted by the American Bar Association . . . on the 27th day of August, 1908, are hereby adopted as the standard guide and rules of professional conduct and ethics for attorneys in this State. Provided that no attorney shall be suspended or stricken from the rolls for contempt unless it involves fraudulent or dishonorable conduct or malpractice."). Before the Canons' adoption, attorneys could still be disciplined for "fraudulent or dishonorable conduct,

the Arizona Legislature, not the Arizona Supreme Court, that first adopted a legal ethics code. As with the ABA's *Canons of Professional Ethics*, Arizona also adopted the ABA's *Canons of Judicial Ethics* as its own, although it allowed almost forty years to pass in between.[11]

To be sure, adopting the Canons did not magically transform Arizona's virtually unregulated status quo into a regularly and fairly enforced system of ethical regulation; as I mention in the next Part of this Essay, that outcome would take many years.[12] Other states similarly appeared to move

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or of malpractice, or of contempt, involving fraudulent or dishonorable conduct or malpractice." *See, e.g.*, ARIZ. REV. STAT., Civ. Code, ch. 2, title 3, ¶ 272 (1913). The statute adopting the Canons does not appear to have arisen out of or caused major controversy. *See* J. MORRIS RICHARDS, HISTORY OF THE ARIZONA STATE LEGISLATURE, 1912–1967 110, 122 (Ariz. Legislative Council 1990) (microform) (on file with the Arizona State Library, Archives & Public Records) ("Many of the 402 bills introduced in the Regular Session of the Fourth State Legislature were not of great public interest, though most of those enacted into law were worthwhile," including Senate Bill No. 152 relating to the disbarment of attorneys.).

11. *See* ARIZ. R. SUP. CT. 45 (1956) (adopting the *Canons of Judicial Ethics* in full); Order Adopting the *Canons of Judicial Ethics* of the American Bar Association as Canons of Judicial Ethics Governing Judiciary, 56-01 (Ariz. 1956), *available at* http://www.azcourts.gov/orders/AdministrativeOrdersIndex/1956AdministrativeOrders.aspx. In 1970, Arizona received its Commission on Judicial Conduct (then called the Commission on Judicial Qualification), which among other tasks investigates and prosecutes violations of the Arizona Code of Judicial Conduct. *See* Rebecca White Berch, *A History of the Arizona Courts*, 3 PHX. L. REV. 11, 29–30 (2010); *see generally* Keith Swisher, *The Judicial Ethics of Criminal Law Adjudication*, 41 ARIZ. ST. L.J. 755 (2009) (discussing the growth and power of judicial conduct commissions).

12. This is consistent with the initially ambivalent reception of the Canons nationally. *See, e.g.*, Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 430–32 (2005) ("It is impossible to pinpoint exactly when the Canons first became the basis for disciplinary action in America. The Canons were cited almost immediately by scattered courts around the country, but were persuasive rather than controlling authority. By the 1920s, the line was beginning to blur. Courts still noted that the Canons were not 'binding obligation,' but held that 'an attorney may be disciplined by [a] court for not observing' the Canons.") (footnotes omitted); Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1, 5–6 (2010) ("Early in the history of lawyer regulation, lawyers were disciplined only for egregious misconduct, which was not precisely defined. Courts did not regard lawyer ethics codes such as the 1908 ABA *Canons of Ethics* as constraining their discretion; indeed those codes began as simple statements of ideals that were never meant to be the equivalent of statutes or administrative regulations, or even the specific basis for lawyer discipline. In 1969, with the adoption of the ABA *Model Code of Professional Responsibility* ('*Model Code*'), lawyer ethics codes evolved to contain more stringent language that was designed to be enforced. But it was not until 1983, when the *Model Rules* replaced the *Model Code*, that the legal profession finally advanced to yet a third level in which many of the rules are so specific as to constitute a 'quasi-criminal code.'") (citations omitted); Ted Schneyer, *How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules*, PROF'L LAW., 2008, at 161, 176–77 (noting that doubts about court regulatory authority lasted until the 1940s and lack of regular enforcement lasted until the 1970s); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II the Modern*

slowly and ambivalently down the path of regulatory reform.[13] Scholars writing in other states have partially blamed the Canons, for being difficult to implement,[14] vague, and confusing to bar members.[15]

In the 1920s, the ABA innovated to add a resource now commonly offered by bar associations across the county: ethics opinions. The ABA officially adopted the idea in 1922.[16] As the ABA acknowledged, changes in

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Era, 15 GEO. J. LEGAL ETHICS 205, 206 (2002) ("While the absence of meaningful records precludes the generation of statistics of the extent of lawyer discipline prior to 1970, my distinct impression, in agreement with the bar's self-assessment, is that there was much less regulation compared to today.").

13. *See, e.g.*, Dane S. Ciolino, *Lawyer Ethics Reform in Perspective: A Look at the Louisiana Rules of Professional Conduct Before and After Ethics 2000*, 65 LA. L. REV. 535, 538 (2005) (discussing how "the use of uniform standards to evaluate lawyer conduct is a relatively modern development" in Louisiana); James R. Devine, *Lawyer Discipline in Missouri: Is a New Ethics Code Necessary?*, 46 MO. L. REV. 709, 712–33 (1981) (detailing the history of ethics enforcement in Missouri); David E. Holland, Comment, *The Objectives of Attorney Discipline: A Pennsylvania View*, 79 DICK. L. REV. 558, 559–67 (1975) (discussing the history of attorney discipline in Pennsylvania); Charles S. Potts, *Disbarment Procedure*, 24 TEX. L. REV. 161, 167–75 (1946) (discussing the status of disbarment procedures in Texas in the 1940s); John F. Sutton, Jr., *Guidelines to Professional Responsibility*, 39 TEX. L. REV. 391, 403–06 (1961) (providing some history and the status of legal ethics in Texas in the early 1960s); Valerie Swett, *Illinois Attorney Discipline*, 26 DEPAUL L. REV. 325, 333 & n.45 (1977) (noting that little was published on Illinois common law ethics, that a 1932 publication of disciplinary decisions seemed to be the most current assessment as of the date of her article, and that "[s]ince there [was] no specific code of substantive rules for attorney discipline, a wide variety of vague rules . . . developed").

14. *See* William J. Martin, *Understanding Lawyer Discipline: What Every Illinois Lawyer Should Know*, 26 CHI. B. ASS'N. REC. 36 (2012) (stating that discipline prior to the 1960s was "unwieldy"); Potts, *supra* note 13, at 167–68 (describing the decentralization of the system, the potential for "long and burdensome" hearings, and the trial by jury requirement as contributing factors to "the most cumbersome and unworkable procedure to be found in this country").

15. *See* Ciolino, *supra* note 13, at 540; Devine, *supra* note 13, at 726–29; Sutton, *supra* note 13, at 406 ("The ambiguities and opaque provisions are particularly unfortunate since the statutory purpose of the Texas canons is to specify minimum requirements of professional conduct. As long as there continues to be a lack of indication in the canons with regard to the levels of professional responsibility, their interpretation will remain difficult."); Swett, *supra* note 13, at 333 (arguing that rules for attorney discipline were vague).

16. ABA, *Draft of Amendment to By-Law VII*, 8 A.B.A. J. 379, 379 (1922); ABA, *Largest Meeting in Association's History*, 8 A.B.A. J. 533, 554, 568 (1922); Thomas Francis Howe, *The Proposed Amendment to the By-Laws*, 8 A.B.A. J. 436, 436–37 (1922) (noting that members had requested that the ABA issue ethics opinions). In part, the amendment authorized the committee "in its discretion, to express its opinion concerning proper professional conduct and particularly concerning the application of the Canons of Ethics thereto, when consulted by officers or committees of State or Local Bar Associations." ABA, *Draft of Amendment to By-Law VII*, 8 A.B.A. J. 379, 379 (1922). Prior to the amendment, the "sole duty of the committee [was] to collect information concerning the subject and report it to the Association." Howe, *supra*, at 436 ("The name of the committee has been a misnomer and has led to much embarrassment and the necessity of constant explanation, to both members and the public, of the limited scope of its activities.").

"business climate," the inherent vagueness in the Canons, and the need for uniformity in interpreting the Canons all called for an official ABA body to issue ethics opinions to guide lawyers.[17] The first five ethics opinions were reported in 1924.[18] Arizona issued its first ethics opinions exactly thirty years later, which addressed somewhat similar issues.[19] These first sets of national and state ethics opinions reveal that the more things have changed, the more they have stayed the same: the opinions are consumed by

17. Howe, *supra* note 16, at 436; *Report of the Committee on Professional Ethics*, 4 A.B.A. J. 480, 487–92 (1918) (proposing the need for a "central authoritative body" to answer ethical inquiries and eliminate the risk of conflicting rulings that might emerge when an inquirer poses his question to more than one local committee).

18. Standing Comm. on Prof'l Ethics & Grievances, *Report of the Standing Committee on Professional Ethics and Grievances*, 47 ANN. REP. A.B.A. 466, 471–78 (1924); ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 1 (1924) (stating that "Canon 27 . . . disapproves all forms of solicitation as unprofessional" and includes letters from a lawyer to other lawyers); ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 2 (1924) ("[I]t would seem desirable that some committee of the local bar association have authority on its own judgment and initiative to [investigate charges of professional misconduct] without requiring any specific complaints to be filed."); ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 3 (1924) (depending on the jurisdiction of the Grievance Committee, a separate committee may be desirable for performing investigation on matters undertaken by the Association's own initiative when no charges have been filed); ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 4 (1924) (stating that customary use of letters to solicit employment does not justify violating Canon 27); ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 5 (1924) (stating that a letter seeking compensation from non-clients that would benefit from a decision "amounts to the solicitation of professional employment contrary to Canon 27").

19. The first five Ethics Opinions were issued between June 29 and November 10, 1954. Ariz. Ethics Op. No. 1 (1954) (counseling that an attorney representing an insurance company by advising its clients on pension and profit-sharing plans should avoid any lawyer-client relationships with the insurance company's clients, even with full disclosure and consent of all parties); Ariz. Ethics Op. No. 1A (1954) (finding that the practice of using distinctive type to place an attorney's name or firm name in the alphabetical section of the phone book is not permitted and is inconsistent with "professional dignity and good taste"); Ariz. Ethics Op. No. 2 (1954) (stating that County Attorneys may not represent defendants in other counties or in federal district courts for violating criminal statutes because it is incompatible with the "honor and dignity of the profession" for a public prosecutor to advocate enforcement of a criminal statute one day and then to advocate for a person charged with violating a criminal statute the next day); Ariz. Ethics Op. No. 3 (1954) (finding that Canon 27 does not permit an attorney advertising in the local newspaper to announce dates and hours of availability in a part-time office); Ariz. Ethics Op. No. 4 (1954) (concluding that a collection agency's requirement for creditors' attorneys to file suit and serve process on defendants and then direct all further contact regarding the matter directly to the collection agency is a violation of Canon 5 as well as Paragraph 9 of the State Bar of Arizona and Arizona Collectors' Associations' statement of rules (collection agencies may not intervene between the attorney and client such that it controls the attorney's service)).

advertising, solicitation, and professional independence problems—all of which still consume ethics debates and opinions today.[20]

Notwithstanding the vagueness, the under-enforcement, and the slow motion, this was progress in the following sense: the state had been an early adopter of an ethics code, and it eventually began using the Code to give guidance to Arizona lawyers.

II. YESTERDAY: THE POWER, PROCEDURE, PECULIARITIES, AND PROGRESS OF EARLY ARIZONA DISCIPLINE

This Part narrates the disciplinary power, procedure, and oddities of young Arizona, ultimately painting a picture of progress. Not long after Arizona received its ethics code in early statehood, it received in 1923 its first reported ethics case of sorts: *In re McMurchie*.[21] Although that case dealt only with a summary suspension and preliminary procedure, it nevertheless was and remains pertinent and interesting for four reasons: (1) the court struck down as unconstitutional a legislative act requiring lawyers to be summarily suspended throughout the duration of any formal disciplinary proceedings against them;[22] (2) the court frequently referred to law practice as a "right," not as a "privilege;"[23] (3) the court observed that county attorneys (prosecutors) were subject to discipline under statutory and

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20. For example, the ABA's Ethics 20/20 Commission just finished over three years' worth of work updating the Model Rules, and it devoted considerable attention to these topics. *See* ABA Comm. on Ethics 20/20, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last vistited July 13, 2013) ("Created by then ABA President Carolyn B. Lamm in 2009, the Commission . . . perform[ed] a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.").

21. McMurchie v. Super. Ct. of Yavapai Cnty., 221 P. 549 (Ariz. 1923).

22. *Id.* at 550 ("In effect, the Legislature has said that whenever an investigating committee recommends the filing of a complaint, and that complaint is filed, then and thereupon the accused attorney stands suspended. His suspension is not based upon any judgment or finding of the court, and is without trial or notice to the accused. . . . This is contrary to one of the cardinal principles of the administration of justice, that no man can be condemned or divested of his rights until he has had the opportunity of being heard.").

23. *Id.* at 550–51 ("The license which an attorney holds to practice his profession is not a mere indulgence, revocable at the pleasure of the court, but it is a right with which he has been invested, to hold during good behavior, and cannot be lightly or capriciously taken from him. It is acquired by order and judgment of a court, after examination into his moral and intellectual qualifications. He can only be divested of that right by a like judgment of court, entered after due notice and inquiry and opportunity to be heard, and based upon some conduct on his part which makes him unworthy further to engage in the practice of law."). The court later referred to practicing law as a "right and privilege." *Id.* at 552.

judicial authority—just like any other attorney;[24] and (4) the court suggested its "inherent power" to discipline attorneys even in the absence of a statute.[25] The court did not, however, explicitly answer the separation-of-powers question of whether the legislature could control the regulation of lawyers (qua lawyers), but the court spared us suspense by answering that question in its next ethics case.

Shortly after *McMurchie*, Arizona's first, full-blown reported disciplinary case arrived: *In re Bailey*.[26] The case was a landmark not only because of its primacy, but also because the court proclaimed its inherent powers to deny admission to applicants and to discipline attorneys unfit to practice law.[27] The court declared firmly that "a statute cannot limit the

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24. *See id.* at 551 ("No reason can be found, and none has been suggested, for relieving county attorneys from those restraints dictated by good morals, and required for the successful and orderly administration of justice, which courts from time immemorial have exercised. We are not willing to assume that the Legislature regarded county attorneys as superior to the frailties common to human nature, or that they should be placed beyond and above the courts in which they practice.").

25. *Id.* ("The assumption that the court's jurisdiction is limited to the express provisions of this statute is based upon totally false premises. All courts exercising general and common-law jurisdiction possess the inherent right to require lawyers practicing at their bar to so conduct themselves that they shall neither bring reproach upon their profession nor in any way impede the due administration of justice. This is a right not derived from statute, nor held at the will of the Legislature. It is essential to the orderly administration of justice."). Courts nationally have asserted inherent power (in varying strength and scope) over the admission and discipline of attorneys. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c; Laurel A. Rigertas, *Lobbying and Litigating Against "Legal Bootleggers"—the Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65 (2009) (discussing the history of the inherent powers doctrine and the bar's efforts to influence it); Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 373–77 (1998) (discussing "affirmative" and "negative" uses of the doctrine).

26. *In re* Bailey, 248 P. 29 (Ariz. 1926). Reported territorial cases revealed nothing of note. Volume 1 of the Arizona Reports, while not cumulative, covered cases from 1866 to 1884. ARIZONA LEGAL RESEARCH GUIDE 96 (Kathy Shimpock-Vieweg et al. eds., 1992). The court reporter for Volume 2 of the Arizona Reports inserted a troubling note:

> In the earlier years the (Supreme) court held its session in various parts of the Territory, at Tucson, Prescott and Phoenix, and doubtless this largely accounts for the regrettable lack of completeness in the files prior to 1894 . . . and a few opinions which appear in the first volume of these reports, as well as in the later Pacific Reporters, cannot now be found.

ARIZONA LEGAL RESEARCH GUIDE, *supra*, at 96.

27. *Bailey*, 248 P. at 30 ("It is therefore held by the best-considered cases . . . that the requirements prescribed by the Legislature are merely restrictive of the rights of the applicant, and that they do not, and cannot, compel the courts to admit any one to practice. . . . Such being the law in regard to admission to the bar, it equally not necessarily follows that, whenever a practitioner by his conduct shows that he no longer possesses the qualifications required for his admission, he may be deprived of the privilege theretofore granted him, and such deprivation may be either under the authority of a statute prescribing the cause therefor, and the manner of

inherent power of the court which admitted [the lawyer] to also disbar him for any additional reason which may satisfy the court he is no longer fit to be one of its officers."[28] The court limited itself only to due process: "The only absolutely necessary requirement [before the court may discipline an attorney] is that he may have an opportunity of appearing and being heard in his own defense on charges which are made known to him."[29]

Interestingly, in the court's first opportunity to apply the *Canons of Professional Ethics*, the court was purposely dismissive of the Canons. To be sure, the court acknowledged in passing that the Canons *might* prohibit Bailey's conduct (namely, cashing for himself, and later lying about, his client's claim check).[30] In a classic, *Marbury v. Madison*-like moment,[31] however, the court needed to disregard the possible applicability of the Canons so that it could make the larger point that—even without the Canons or the legislative statute through which the Canons had been adopted—the court itself possessed inherent authority to take disciplinary action.[32]

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procedure, or the court of its own inherent power may act."). To be sure, three years earlier, the *McMurchie* case contained a similar (albeit shorter) display of power. *See McMurchie*, 221 P. at 551 ("The assumption that the court's jurisdiction is limited to the express provisions of this statute is based upon totally false premises. All courts exercising general and common-law jurisdiction possess the inherent right to require lawyers practicing at their bar to so conduct themselves that they shall neither bring reproach upon their profession nor in any way impede the due administration of justice. This is a right not derived from statute, nor held at the will of the Legislature. It is essential to the orderly administration of justice.").

28. *Bailey*, 248 P. at 31. The court did not, however, declare exclusive authority, which can have unintended consequences. *See, e.g.*, Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem That Won't Go Away*, 34 ARIZ. ST. L.J. 585, 603–04 (2002) (noting that the court's "reliance on [Article III of the Arizona Constitution] raises another issue since the Court has repeatedly asserted that Article III grants it exclusive power. Such an assertion may pose a problem if the . . . court's reliance on article III means that it not only has power over non-lawyers, but that such power is exclusive. If so, it is arguable that the legislature lacks the power to reenact a statutory prohibition on the unauthorized practice of law.").

29. *Bailey*, 248 P. at 31. Bailey misappropriated a client's government-issued check. For that and other misconduct, he was disbarred the following year. *See In re* Bailey, 254 P. 481 (Ariz. 1927).

30. *Bailey*, 248 P. at 32.

31. 5 U.S. (1 Cranch) 137 (1803).

32. At the time, the Canons were incorporated by statute and thus through a legislative, not judicial, act. As the court noted:

> If the facts [of Bailey's alleged misconduct] do not fall within any of the prohibitions of chapter 32, no proceeding thereunder could, of course, be predicated upon them. It is undoubtedly true, however, that, if as a matter of fact respondent did receive funds which belonged to his client, and for a period of nearly three years retained the same, during all of which period he repeatedly denied to his client that he had ever received them, it was both

The court thus firmly asserted its inherent authority, but this first *Bailey* opinion just decided, essentially, a motion to dismiss. When the merits of the matter reached the court a year later, the court in fact relied on the Canons (and the court and the Canons have enjoyed a harmonious relationship ever since).[33] In particular, the court cited Canon 11, which then read as follows: "'Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and, except with the client's knowledge and consent, should not be commingled with his private property or be used by him.'"[34]

In essence, this first published disciplinary case involved a lawyer who failed to deliver (and indeed later lied about) the client's money: a sad but still persistent phenomenon.[35] *Bailey* is unique, however, in that it clearly established the inherent authority of the supreme court over both the *substance and procedure* of disciplinary cases.[36] In a similar vein, the court later took an expansive view of the potential targets of its disciplinary

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> contrary to the professional standards of an attorney, viewed from any standpoint, and to the general moral standards of society, and is ample ground for disbarment under the inherent powers of the court.

Bailey, 248 P. at 31.

33. *Bailey*, 254 P. at 481, 484.

34. *Id.* at 484 (quoting CANONS OF PROF'L ETHICS Canon 11 (1908)).

35. Table Two of the Appendix abstracts the first fifty years of published disciplinary cases (sixty-eight cases). The most common misconduct involved misappropriation (40%), failing to return unearned fees and other funds (25%), misrepresentation (25%), and lack of competence and diligence (25%). The preceding percentages are approximate, and the categories of misconduct are not mutually exclusive.

36. The court issued several critical propositions:

> [F]irst, that this court has original jurisdiction to hear any proceeding for the disbarment of an attorney who is admitted to practice before it. Second, that the power of disbarring an attorney for bad character or unprofessional conduct is inherent in the court, and is not, and cannot, be limited or taken away by the Legislature, though the latter may provide such other grounds of disbarment as it may see fit, and the court will accept them as sufficient. Third, that, where it appears the attorney has been guilty of unprofessional or immoral conduct of such nature that in the opinion of the court he is unfit to continue as a practitioner, it is not necessary that the proceeding by which the matter is brought to the attention of the court shall comply with any particular form.

Bailey, 248 P. at 31; *see also* ARIZ. R. SUP. CT. I (1937) ("The Supreme Court may also suspend or revoke the license of an attorney whenever it is satisfied such attorney is not mentally or morally qualified to practice law, even though none of the specific grounds for disbarment set forth in [the statutes] may exist.").

authority, holding that both judges and retired members of the bar could be disbarred for what the court considered misconduct.[37]

An understanding of the court's admission and disciplinary authority remains timely and important. For example, the court today requires (and has long required) that bar applicants graduate from an ABA-accredited law school before admission and maintain membership in the State Bar of Arizona after admission.[38] In the last legislative session, however, State Representative Allen and Senator Murphy introduced bills: (1) to eliminate the court's admission requirement of graduation from law school;[39] and (2) to eliminate the court's membership requirement in the State Bar of Arizona.[40] The court has historically stated that the legislature may impose additional requirements on bar applicants, but the legislature cannot constitutionally remove or dilute either the court's admission requirements or its disciplinary authority.[41] Under the court's long-expressed authority,

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37. *In re* Spriggs, 284 P. 521, 522 (Ariz. 1930) (concluding that judges who commit misconduct may face disbarment proceedings and be disbarred); *In re* Sullivan, 170 P.2d 614, 615 (Ariz. 1946) (holding that retired members of the bar may still be disciplined).

38 ARIZ. R. SUP. CT. 34(b)(1)(D) (requiring bar applicants to have graduated from an ABA-accredited law school, unless they have been actively practicing law in another state for at least five of the last seven years); ARIZ. R. SUP. CT. 32(a) ("The Supreme Court of Arizona does hereby perpetuate, create and continue under the direction and control of this court an organization known as the State Bar of Arizona, . . . and all persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this court."); ARIZ. R. SUP. CT. 31(b) ("[N]o person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar."). The court also requires annual bar dues. ARIZ. R. SUP. CT. 32(c)(7) ("An annual membership fee for active members, inactive members, retired members and judicial members shall be established by the board with the consent of this court and shall be payable on or before February 1 of each year.").

39 S.B. 1415, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (permitting anyone who passes the bar and character examinations to practice law in Arizona).

40 H.B. 2480, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (forbidding mandatory membership in an organization, including the State Bar of Arizona, to become or remain licensed to practice law in Arizona); S.B. 1414, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (same).

41 *In re* Bailey, 248 P. 29, 30–31 (Ariz. 1926) ("The Legislature may, and very properly does, provide from time to time that certain minimum qualifications shall be possessed by every citizen who desires to apply to the courts for permission to practice therein, and the courts will require all applicants to comply with the statute. This, however, is a limitation, not on the courts, but upon the individual citizen, and it in no manner can be construed as compelling the courts to accept as their officers all applicants who have passed such minimum standards, unless the courts are themselves satisfied that such qualifications are sufficient. If they are not, it is their inherent right to prescribe such other and additional conditions as may be necessary to satisfy them the applicants are indeed entitled to become such officers. . . . Following the principle applying in the case of admission to practice, the court will disbar an attorney for any reason and in any manner prescribed by the Legislature. But a statute cannot limit the inherent power of the court which admitted him to also disbar him for any additional reason which may satisfy the court he is no longer fit to be one of its officers."); *see generally* State Bar of Ariz. v.

then, both bills (if enacted) would likely be unconstitutional.[42] Perhaps for this reason, one of the bills' sponsors also introduced a proposed constitutional amendment to eliminate the court's law school graduation requirement.[43]

Ariz. Land Title & Trust Co., 366 P.2d 1, 14 (Ariz. 1961), *opinion supplemented on denial of reh'g,* 371 P.2d 1020 (Ariz. 1962) (noting, consistent with its long-standing precedent, that "although the legislature may impose additional restrictions which affect the licensing of attorneys, it cannot infringe on the ultimate power of the courts to determine who may practice law"); *supra* note 25 (citing "inherent powers" research). *Miller* addressed an example of an arguably permissible (and still timely in several states) additional restriction. *In re* Miller, 244 P. 376, 380 (Ariz. 1926) ("Whether it is a wise policy to require those who have practiced for years in other states to pass an examination before being admitted is not a matter for the courts to decide, but one which the Legislature alone must determine. We are of the opinion that under its police power the Legislature has the right to say what qualifications a citizen must possess in order to be permitted to practice law the same as it may determine the requirements for practicing medicine, dentistry, pharmacy, or any other profession, vocation, or calling.").

42. With respect to eliminating the law school requirement, see *State ex rel. Ralston v. Turner*, 4 N.W.2d 302, 312 (Neb. 1942) (holding a statute purporting to authorize an applicant to take the bar examination without graduation from an ABA-accredited law school "unconstitutional in that it directly usurps the inherent power of this court to fix and determine the qualifications of an applicant for admission to the bar in this state on a subject which naturally falls within the orbit of the judicial branch of government"); *In re* Sedillo, 347 P.2d 162, 164 (N.M. 1959) (holding unconstitutional a "legislative act [that] established educational requirements . . . less than those provided for by the rule" because "[l]egislation of this type is held to be an invasion of the power of the judiciary"); *see generally In re* Bailey, 248 P. 29, 30 (Ariz. 1926) (citing *In re* Splane, 16 A. 481, 483 (Pa. 1889)) (noting the court's inherent power to determine admission requirements). With respect to eliminating mandatory bar membership, see *Bridegroom v. State Bar of Ariz.*, 550 P.2d 1089, 1091 (Ariz. Ct. App. 1976) ("There is no question but that the Supreme Court has inherent power to integrate the bar of this state."); N.M. ATT'Y GEN. OP. 135 (1977) ("The power which inheres in the New Mexico Supreme Court, as the highest authority within the judicial department of state government, to regulate the practice of law and the legal profession includes the right to require the integration of the bar and to compel the payment of fees for the support of the affairs of an integrated bar association."); *cf.* Lathrop v. Donohue, 367 U.S. 820, 843 (1961) ("We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers . . . . Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association."); *In re* Shannon, 876 P.2d 548, 575, *modified*, 890 P.2d 602 (Ariz. 1994) (declaring virtually exclusive authority over the practice of law and lawyers and noting that "the imposition of costs and expenses plays an important and necessary function in our disciplinary process").

43. *See* S. Con. Res. 1018, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (referring to the voters whether to amend the state constitution to permit anyone to practice law who has passed the bar and character examinations). The infamous *Arizona Land & Title* dispute illustrates how an amendment might work. *See* State Bar of Ariz. v. Ariz. Land Title & Trust Co., 366 P.2d 1 (Ariz. 1961), *opinion supplemented on denial of reh'g,* 371 P.2d 1020 (Ariz. 1962) (declaring that various transactional activities of title companies and real estate professionals constituted the unauthorized practice of law). *Arizona Land & Title* provoked a state constitutional

Having described the conception and growth of the court's disciplinary power, I now turn toward the specifics and the distinguishing factors of early disciplinary proceedings. I note, with interest but without surprise, that early disciplinary cases do not look identical to modern disciplinary cases. For example, the court was generally unconcerned whether discipline followed any particular procedure: if the conduct warranted discipline, the court would not be bothered by procedural irregularities in getting there.[44] The court similarly did not let the rules of evidence distract it from protecting the public from clearly bad attorneys.[45] Furthermore, although the court was periodically "appalled" by the long length of the disciplinary process, it did not fix the problem.[46]

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amendment permitting certain real estate professionals to engage in what the court had determined would constitute the (unauthorized) practice of law. *See, e.g.*, Morley v. J. Pagel Realty & Ins., 550 P.2d 1104, 1108 (Ariz. Ct. App. 1976) (citing ARIZ. CONST. art. 26, § 1) ("Having achieved, by virtue of this [constitutional] provision, the right to prepare any and all instruments incident to the sale of real property, including promissory notes, real estate brokers and salesmen also bear the responsibility and duty of explaining to the persons involved the implications of these documents. Failure to do so may constitute real estate malpractice."); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3 (1981) (noting Arizona voters' "overwhelming endorsement of a state constitutional amendment permitting real estate brokers to prepare legal documents").

44. *Bailey*, 248 P. at 31. The court made this point—that discipline need not follow any particular procedure except what due process absolutely requires—in several cases. *See, e.g.*, *In re* Myrland, 45 P.2d 953, 954 (Ariz. 1935) ("[W]here it appears the attorney has been guilty of unprofessional or immoral conduct of such nature that in the opinion of the court he is unfit to continue as a practitioner, it is not necessary that the proceeding by which the matter is brought to the attention of the court shall comply with any particular form."); *Spriggs*, 284 P. at 522 ("The charge, if true, is such that under its inherent power this court is not only justified in acting, but under the duty of acting, regardless of the particular form which the petition may assume, so long as respondent is given full opportunity to be heard thereon.").

45. *In re* Wilson, 258 P.2d 433, 435–36 (Ariz. 1953) (noting that, in the disciplinary context, the overarching goal of protecting the public "cannot be defeated by the strict rules of evidence").

46. *See, e.g.*, *In re* Everett, 293 P.2d 928, 931 (Ariz. 1956) ("[W]e want it known that we disapprove of long delays such as occurred here [i.e., five years], in bringing to a conclusion charges against a member of the bar for professional misconduct. It is most unfair to the accused as well as bringing our disciplinary procedure into disrepute."); *In re* Grant, 472 P.2d 31, 32 (Ariz. 1970) ("We are appalled at the length of time [i.e., five years] it has taken for this matter to reach this Court for decision. . . . We are aware that some of the delay was occasioned by our failure to press the matter after it reached this Court. We adjure persons and groups involved in the process of professional discipline to employ all deliberate speed in the resolution of these problems. Delay is unfair to the public, the profession and the individual attorney."). The process gradually became significantly shorter. *See, e.g.*, ARIZ. R. SUP. CT. 58 ("The hearing panel shall hold and complete the hearing on the merits within one hundred fifty (150) days of the filing of the complaint."); *see generally* Donald W. Hart, *Charting a Fair Procedure: Arizona's New Disciplinary Rules*, ARIZ. BAR J., Dec.–Jan. 1985, at 23 (noting that one of lawyers' chief complaints about the then-existing disciplinary process was its length and that

When the supreme court sat in discipline in its early decisions, the court could be notably forgiving. On several occasions, the court, in essence, issued warnings without discipline. In *In re Gibbs*,[47] for example, because respondent agreed not to continue with the conduct in question (i.e., sending solicitation letters to prospective clients), the court found it sufficient to declare such advertising conduct ethically forbidden—"with leave to renew [the disciplinary proceeding] should it become necessary."[48] Similarly, in *In re Myrland*,[49] which is otherwise an important case from which several fundamental disciplinary principles can be traced, the court simply took "this occasion . . . to notify the bar at large that a future offense of the same nature on the part of any attorney, after the warning which we now give, will not be treated so lightly."[50]

Limited sanction options might have partially explained these seemingly forgiving decisions. Until the early 1950s, the court essentially used only two types of sanctions: disbarment or suspension.[51] Thus, the more common, but less severe sanctions today (e.g., censure, reprimand,

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new disciplinary rules adopted in 1985 were designed in part to speed up the process); *infra* note 113 (describing recent procedural changes to "streamline" the disciplinary process).

47. 278 P. 371 (Ariz. 1929).

48. *Id.* at 375 ("It is not necessary at the present time that an order of disbarment, suspension, or, in view of the general good character of respondent, even of censure, be entered. He has stated, both in his answer to the petition, and in open court, that he will desist from this practice in case the court should find it contrary to the canon in question, and the petition will be dismissed on our statement of the law, with leave to renew, should it become necessary."). Gibbs was a "highly respected member of the Arizona bar" who had engaged in the practice of mailing letters to prospective clients soliciting work. *Id.* at 372.

49. 29 P.2d 483 (Ariz. 1934).

50. *Id.* at 484 (reprimanding Myrland not for charging a fifty-percent contingency fee but for taking his full fee out of the first installment payment on the client's judgment). The court may have feared opening up a floodgate of sinners, had it deemed a first offense sufficient to warrant discipline:

> In determining this we consider the age and experience of respondent, the fact that such conduct, although reprehensible and contrary to the ethical standards of the profession, has perhaps been practiced with impunity in Arizona by other and older members of the profession in the past, and the recommendation of the local committee which investigated the case, and some of the more prominent attorneys of the Tucson bar.

Id. For a more recent example of warnings-without-discipline, see *In re Evans*, 556 P.2d 792, 797 (Ariz. 1976) (refusing to discipline an attorney for a conflict of interest in suing a former client because neither the court nor ethics committee had "specifically spoken on this issue").

51. COMPILED LAWS, 1871, *supra* note 1, § 25, at 345. And for cases resulting from felonies or misdemeanors involving moral turpitude, disbarment was the only option. *See id.* Similarly, the Arizona statutes that would later govern disciplinary proceedings concurrently (along with the court's own procedures) listed only disbarment and suspension, and for criminal convictions involving moral turpitude, the statutes listed only disbarment. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 32-201, -206 (1939); 1925 Ariz. Sess. Laws, ch. 32, §§ 2, 11.

admonishment, and the like) were not formally used.[52] Indeed, it was not until 1949 that the court formulated the principle that, in cases not warranting disbarment or suspension, the "court owes a duty both to the public and to the profession to the extent at least that such things shall not go unnoticed . . . without censure."[53] After growing into its "censure" authority, the court issued a "severe reprimand" a few years later.[54] Disciplinary procedures soon thereafter were officially adopted to include not just disbarment and suspension but also "reproval" and simply "discipline."[55]

Another interesting difference between modern and pre-modern discipline, although not one that generated much recorded history, is that several ethical transgressions that still occur today were misdemeanors back then. On the books were misdemeanors criminalizing a lawyer's "deceit or collusion . . . with intent to deceive the court or any party," "willfully delay[ing] his client's action with a view to his own gain," and "willfully receiv[ing] for his own benefit money . . . which he has not laid out or become answerable for."[56] Of course, the unauthorized practice of law was also a misdemeanor.[57] In addition, prosecutors committed misdemeanors and faced mandatory disbarment if they advised or otherwise aided the defense on a case in which they were currently or formerly involved.[58] Also on the subject of prosecutors, it would be surprising today to have the

52. The court earlier implied that "reprovals" or "censures" were available sanctions, but it did not actually impose them. *In re* Hoover, 46 P.2d 647, 650 (Ariz. 1935) ("reproval"); *In re* Gibbs, 278 P. 371, 375 (Ariz. 1929) ("censure"). Indeed, the State Bar Act of 1933 specifically endeavored to add "reprovals" to the sanction list. *See* State Bar Act of 1933, ch. 66, § 29, 1983 Ariz. Sess. Laws (repealed 1985). Without citing this provision, however, the court did state a "formal reprimand" in passing in a 1934 opinion. *In re* Myrland, 29 P.2d 483, 484 (Ariz. 1934). With that exception, the court did not impose a disciplinary sanction less than disbarment or suspension until 1949, when it issued a "formal reprimand," which the court seemingly treated synonymously with "censure." *See In re* Maltby, 202 P.2d 902, 904 (Ariz. 1949).

53. *Maltby*, 202 P.2d at 904 (relying on a single, passing statement in *Myrland*, 29 P.2d at 483).

54. *In re* Stone, 267 P.2d 892, 893 (Ariz. 1954) ("We are therefore of the opinion that disbarment or suspension is too severe a penalty to impose under all the circumstances but that respondent should be and hereby is severely reprimanded for his carelessness and negligent conduct . . . and he is warned that any repetition of conduct unbecoming a member of his profession might well result in the imposition of a more severe penalty.").

55. ARIZ. R. SUP. CT. 29(b) (1956); *see also* Appendix (listing the dispositions of all disciplinary cases through 1976).

56. ARIZ. REV. STAT. ANN. § 32-265 (1956).

57. State Bar Act of 1933, ch. 66, § 51 (1933).

58. ARIZ. REV. STAT. ANN. § 32-266 (1956).

attorney general or county attorney prosecute a disciplinary case, but back then, the rules required it.[59]

Regardless of the prosecuting attorney, however, early statehood lawyers had little to fear: less than five disciplinary cases were reported before 1930.[60] Disciplinary proceedings began to achieve more frequency and procedural regularity after 1933. That year, the legislature enacted the State Bar Act, which created the State Bar of Arizona, an integrated bar.[61] As such, membership was mandatory to practice law.[62] This reinvigorated, reorganized bar began to approach discipline in a more orderly fashion. Indeed, the court would later describe the bar's role in discipline as foundational:

> As we view it, one of the primary purposes of integrating any state bar through its incorporation was and is to place upon the bar itself the duty and responsibility of disciplining its members. . . . Actually the principle of self government is the very essence of an integrated bar and if the provisions relative to admissions and discipline were emasculated it would leave but an empty shell.[63]

Broadly stated, the resulting disciplinary procedure was as follows:

> The integrated bar, acting through its grievance committees, conducts hearings, summarily dismisses charges found to be without merit, and certifies up to the board of governors the record in those cases in which it deems the evidence justifies further action. The board of governors then conducts further proceedings

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59. 1925 Ariz. Sess. Laws, ch. 32, §§ 4–5; *see also In re* Manatt, 264 P. 473 (Ariz. 1928) (reporting that the Attorney General brought the disciplinary charges); *In re* Spriggs, 284 P. 521 (Ariz. 1930) (same). Earlier in statehood, county attorneys also were supposed to prosecute disciplinary offenses. *See In re* McMurchie, 221 P. 549, 551 (Ariz. 1923) (noting that the lower court correctly decided not to require an offending county attorney to file the complaint against himself). The State Bar Act of 1933 did away with attorney general (and county attorney) participation. *See* State Bar Act of 1933, ch. 66, §§ 29, 37 (1933).

60. *See generally* MURPHY, *supra* note 6, at 104–22 ("In reality, . . . there was little a person injured by the actions of an unethical attorney could do to obtain justice. . . . By the early 1930s criticism of this situation was high both within and without the profession."); *see generally supra* note 12 (noting that, nationally, disciplinary enforcement remained lax until at least the 1970s). This ineffective experience (and the eventual evolution from it) is somewhat similar to that of Missouri, both in substance and timing, for example. *See* Devine, *supra* note 13, at 726–27.

61. *Our State Bar Associations: The State Bar of Arizona*, *supra* note 3, at 809.

62. State Bar Act of 1933, ch. 66, § 49 (1933) (providing that only active members in good standing may practice law); *History*, STATE BAR OF ARIZ., http://www.azbar.org/aboutus/history (last visited Feb. 27, 2012).

63. *In re* Lewkowitz, 220 P.2d 229, 232–34 (Ariz. 1950).

> before such matter is brought before the Supreme Court for final hearing and determination.[64]

Around the same time that the bar's investigative and adjudicative process was evolving, the court's disciplinary jurisprudence evolved. The court officially recognized that disciplinary cases are not to be treated lightly (or unduly harshly); indeed, the court soon articulated the essential principles of modern discipline. For example, the court acknowledged that disciplinary proceedings are quasi-criminal and consequently require a high burden of proof: clear and convincing evidence.[65] The court was wise to proceed humbly, recognizing that disciplinary proceedings constitute "one of the very few cases in which this court sits as ultimate trier of fact, as well as to judge the law."[66] The court acknowledged, for instance, that a single error is only human but that in the case of multiple errors, it had a duty—however unpleasant—to protect the public by disbarring or suspending the attorney.[67] Conversely, the court matured to acknowledge that, when discipline less severe than disbarment or suspension would nevertheless equally protect the public, such lesser discipline should be imposed.[68] All of these principles still endure today.

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64. *Id.* at 231 (noting further that "[i]n the final analysis this court becomes the ultimate triers of the issues of fact as well as of law").

65. *Myrland*, 29 P.2d at 483. *But cf. In re* Greer, 81 P.2d 96, 99 (Ariz. 1938) ("We think that since, as was admitted by counsel for respondent in open court, respondent was at the best grossly negligent in the conduct of the estate, it places the burden upon him to show affirmatively, and to the satisfaction of the court, a legitimate explanation of all suspicious circumstances, and that the presumption is that every transaction and every matter which cannot be so explained by him has no explanation which justifies his conduct.").

66. *Myrland*, 29 P.2d at 483; *see also In re* Sweeney, 73 P.2d 1349, 1349 (Ariz. 1937) (noting that supreme court sits as trier of fact and law in disciplinary proceedings). Also of note, the court guarded respondents' right to due process by denouncing the state bar when it permitted a complainant's counsel to represent the state bar at a disciplinary hearing. *See In re* Everett, 293 P.2d 928, 931 (Ariz. 1956).

67. *In re* Sullivan, 170 P.2d 614, 617 (Ariz. 1946) ("No one of these [instances of misconduct], considered separately, would be sufficient, perhaps, to warrant disciplinary action in itself. For in determining the standard of professional conduct to be required of an attorney-at-law allowance must be made, in all fairness, for human error. But their cumulative effect, when considered together with respondent's misrepresentations to the court, and his pledging of estate property for private purposes, compels the conclusion that he has conducted himself, in these matters, with bland disregard of his duties and obligations as an officer of the court. Our responsibility to the public and to the profession forbids that it should pass unnoticed."); *see also In re* Johnson, 471 P.2d 269, 271 (Ariz. 1970) (declining to address the facts because, even though respondent punched the opposing party several times, "[i]solated, trivial incidents of this kind not involving a fixed pattern of misbehavior find ample redress" outside of the disciplinary process); *In re* Rogers, 412 P.2d 710, 715 (Ariz. 1966) ("Where one isolated act may not call for action, several considered together would . . . .").

68. *In re* Stone, 267 P.2d 892, 893 (Ariz. 1954).

The court adopted each of these primarily procedural principles while enforcing an ethics code that remained relatively constant until the 1970s, when two critical changes occurred. First, as with the earlier Canons, Arizona adopted wholesale the ABA's *Code of Professional Responsibility* in 1970, excepting only two Disciplinary Rules.[69] Second, as also with the earlier Canons, the Code prohibited most forms of lawyer advertising,[70] and this prohibition ultimately sparked the most famous Arizona disciplinary case of all.

To presumably no one's surprise, *Bates v. State Bar of Arizona*[71] was the case. In 1976, Arizona attorneys John Bates and Van O'Steen had the audacity to advertise their services and fees in *The Arizona Republic* newspaper.[72] The State Bar of Arizona filed disciplinary charges against both lawyers for violating the Code,[73] which at the time banned most types of mass advertising.[74] The Arizona Supreme Court upheld the constitutionality of the advertising prohibition, notwithstanding the First Amendment, and censured Bates and O'Steen.[75] The Supreme Court of the United States, however, took the case and ruled that the truthful, commercial speech at issue was indeed protected by the First Amendment.[76]

Bates was important then, and as legal advertising issues continue to arise daily, it is important now.[77] Advertising, however, was not the only

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69. Order Amending Rule 29, Duties, Obligations, and Discipline of Members, 106 Ariz. XLIX–L (1970) (adopted July 17, 1970, effective Nov. 1, 1970) ("The duties and obligations of members shall be as prescribed by the provisions of Arizona Revised Statutes Title 32, Chapter 2, as amended, and as prescribed by the Code of Professional Responsibility adopted by the American Bar Association, deleting there from Disciplinary Rules DR 2-105(A) (4) and DR 6-101(A) (1)."). The excepted disciplinary rules would have (1) permitted certified specialists to hold themselves out as such and (2) prohibited any lawyer from "[h]andl[ing] a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." MODEL CODE OF PROF'L RESPONSIBILITY DR 2-105(A)(4), 6-101(A)(1) (1969).

70. *See In re* Bates, 555 P.2d 640, 641 (Ariz. 1976), *aff'd in part, rev'd in part sub nom.* Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

71. Bates v. State Bar of Ariz., 433 U.S. 350 (1977). This essay is not about any particular ethical rule or series of rules, but a credible history of Arizona legal ethics could not fail to mention *Bates*.

72. For an interesting insider's account of the case, see Van O'Steen, Bates v. State Bar of Arizona: *The Personal Account of a Party and the Consumer Benefits of Lawyer Advertising*, 37 ARIZ. ST. L.J. 245 (2005).

73. *Id.* at 248 & n.6.

74. *Bates*, 555 P.2d at 641.

75. *Id.* at 646.

76. Bates v. State Bar of Ariz., 433 U.S. 350, 382–84 (1977).

77. Lawyer advertising is still not a settled debate in Arizona (or elsewhere). Unlike the *Model Rules of Professional Conduct*, for example, Arizona's Ethical Rules for years did not permit trade names. *Compare* MODEL RULES OF PROF'L CONDUCT R. 7.5 (1983), *with* ARIZ.

sea-change in Arizona legal ethics on the horizon. Our short and necessarily selective history ends in 1985, when two additional events significantly changed the ethical landscape. First, the court adopted the ABA's *Model Rules of Professional Conduct*.[78] Unlike the past, the court did not adopt the ABA's rules through a verbatim incorporation. Arizona instead began to assert its independence and autonomy vis-à-vis the ABA,[79] which is a trend that has continued to this day and arguably increased.[80] Second, also in 1985, the legislature quietly got out of the business of regulating lawyers (qua lawyers),[81] and the Arizona Supreme Court, in conjunction with the State Bar of Arizona and (now) the presiding disciplinary judge and

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RULES OF PROF'L CONDUCT ER 7.5(a) (2012). Based in part on First Amendment arguments, a petition to change the rule to permit trade names was submitted to the Arizona Supreme Court and ultimately supported by the State Bar of Arizona. *See* Petition to Amend Rule 42, ER 7.5(a), Rules of the Supreme Court, No. R-11-0046 (Ariz. filed Dec. 29, 2011), *available at* http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/view/topic/postid/1616/forumid/7/Default.aspx#1616. In response, the court recently amended the rule to permit trade names.

78. *See, e.g.*, Sec. Gen. Life Ins. Co. v. Super. Ct., 718 P.2d 985, 987 (Ariz. 1986) (noting that the court adopted the rules "by order of the Supreme Court dated September 7, 1984 and effective February 1, 1985"); *see generally* Schneyer, *supra* note 4 (examining the creation of the Model Rules).

79. *See, e.g.*, Mark I. Harrison, *The New Arizona Rules of Professional Conduct: An Overview*, ARIZ. BAR J., Dec.–Jan. 1985, at 11 (noting that Arizona made significant changes to the ethical rules addressing confidentiality, candor to courts, and advertising, among a few other changes). I do not wish to overstate this point, however. In the main, the Arizona and Model Rules of Professional Conduct were substantially similar and often identical. *See, e.g.*, *id.* (noting that "all but seven of Arizona's Ethical Rules are identical to their counterparts in the Model Rules of Professional Conduct"). The point is comparative: Arizona adopted the two previous ethics codes (i.e., the Canons and the Model Code) in full and without much documented reflection. *See infra* Part III.

80. *See infra* Part III. The (slight) deviance can also be seen by comparing the ABA's subsequent "Ethics 2000" amendments with Arizona's reactions. *See Ethics 2000 Commission*, AM. B. ASS'N, http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home.html (last visited May 24, 2013); Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331, 1365 (noting that Arizona was one of several states in the process of adopting new rules on multijurisdictional practice following the national debate on the matter); Lynda C. Shely, *The New Rules of Professional Conduct: An Overview*, ARIZ. ATT'Y, Oct. 2003, at 28; Michael Owen Miller & Lynda C. Shely, *Those Ethical Rules Are Changing*, ARIZ. ATT'Y, Mar. 2002, at 50.

81. S.B. 1077, 36th Leg., 2d Reg. Sess. (Ariz. 1984) (scheduling termination of Title 32, chapter 2, on January 1, 1985, at the bottom of an act regulating physical therapists); *History*, STATE BAR OF ARIZ., http://www.azbar.org/aboutus/history (last visited April 1, 2012); Hart, *supra* note 46, at 16 (noting that "statutory provisions relating to attorneys will expire on January 1, 1985").

Probable Cause Committee, became the sole authorities regulating Arizona legal ethics.[82]

In very short form, that is the history of legal ethics and discipline in Arizona. By 1985, Arizona legal ethics had been modernized and (increasingly) professionalized. The present day exemplifies the next stage in Arizona's ethical development: autonomy and identity.

III. TODAY: ARIZONA AS BOTH "ETHICAL" AND AUTONOMOUS

Arizona today is arguably a leader in legal ethics and professional regulation; at a minimum, it is showing increasing autonomy. Since the 1970s, Arizona has been relatively remarkable in client protection and public integration. As three examples of many, Arizona was: (1) an early adopter of the ABA's ethical innovations as discussed above;[83] (2) one of the first states to provide a dedicated client protection fund;[84] and (3) one of the first states to include public members on its disciplinary commission.[85] Arizona not only led the way in client protection and public integration, but Arizona has since started to stamp its own brand on the existing ethical rules. Arizona's ethical rules today contain several critical differences that distinguish the state from both other states and the ABA.[86] As another three

82. Order Amending Rules 46–74, 75, 77, and 78, Rules of the Supreme Court, No. R-09-0044, at 4, 22–24 (Ariz. 2010), *available at* http://www.azcourts.gov/Portals/20/R-09-0044.pdf.

83. *See supra* notes 10, 69, 78 and accompanying text.

84. *See* John G. Balentine, *Arizona's Client Protection Fund: Redress for Victimized Clients*, ARIZ. ATT'Y, Nov. 2008, at 34, 36 (citing The Client Protection Fund of the State Bar of Arizona, Declaration of Trust, Apr. 9, 1960, Rule 1A ("Trust")) (noting that, although the first state to establish a fund was Vermont in 1959, Arizona's fund—authorized in 1960 and adopted in 1961—was one of the earliest in the country).

85. *See Presidential Memories: 70 Years of Leadership*, ARIZ. ATT'Y, Sept. 2003, at 14, 18 (noting that then-State Bar of Arizona President Mark Harrison proposed the concept in 1975); Jeanne Gray & Mark I. Harrison, *Standards for Lawyer Discipline and Disability Proceedings and the Evaluation of Lawyer Discipline Systems*, 11 CAP. U. L. REV. 529, 545 n.66 (1982) (noting the measure's adoption); David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 243 (2011) (noting that Arizona was one of nine states in which a third of the disciplinary commission or grievance board was comprised of non-lawyers); *see also* Scott Slavick, Note, *Illinois and the McKay Commission: A Match Made in Heaven?*, 11 GEO. J. LEGAL ETHICS 129, 133 n.36 (1997) (citing states that initiated changes to offer more information about attorney discipline to the public). In 1985, Arizona also enabled public members to be appointed to disciplinary hearing committees. Hart, *supra* note 46, at 16, 23.

86. *See, e.g.*, Martha Harrell Chumbler, *Conflicts of Interests Relating to Former and Current Government Clients*, 35 URB. LAW. 671, 676 (2003) (citing ARIZ. RULES OF PROF'L CONDUCT ER 1.11) ("Arizona's Ethics Rule 1.11 retains an exception from disqualification of a current government lawyer or official . . . when no one else is lawfully authorized to serve in the

examples of many, Arizona is importantly unique in its treatment of: (1) lawyer screening; (2) prosecutorial ethics; and (3) the inadvertent or unauthorized disclosure of confidential or privileged information.[87] Each example is discussed below.

First, Arizona has adopted its own solution to the problem of whether private firms should be permitted to screen lateral lawyers with conflicts of interest so that those firms can avoid disqualification. To screen lawyers so that their firms may act adversely to the lawyers' former clients is a hugely controversial concept, and in 2001 and 2002, the ABA rejected the concept in this context.[88] The next year, Arizona nevertheless adopted "limited" screening.[89] Limited screening is, in short, a balanced approach that permits screening in *de minimus* situations. More specifically, the rule softens the otherwise harsh result when, for example, a partner or associate has had only passing contact with a case while with a former firm. In Arizona, that partner or associate, if properly screened, will not cause the entire firm to be disqualified from the case.[90] The limited approach is also appropriately limited: in situations in which a partner or associate has actively worked for one side of the case and has then switched sides by joining the opposing

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lawyer's place."); *see generally* Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 813–14 (2005) (commenting on the degree to which various states faithfully adopted the ABA's Model Rules after their most recent revision).

87. Through 2007, the ABA catalogued the various large and small differences between the Arizona and Model Rules of Professional Conduct. *See Comparison of Newly Adopted Arizona Rules of Professional Conduct with ABA Model Rules*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/arizona.authcheckdam.pdf (last updated Apr. 5, 2007). Some states (e.g., Delaware, Nebraska) vary significantly less from the ABA's Model Rules. *See Charts Comparing Professional Conduct Rules*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/policy/charts.html (last visited Mar. 18, 2013). Other states, however, vary even more. *See id.*

88. Robert A. Creamer, *Lateral Screening After Ethics 2000*, 2006 PROF. LAW. 85, 85 (2006) ("One of the few proposals rejected by the House [in August 2001] was an amendment to Model Rule 1.10 to permit 'screening' of private lawyers moving between law firms.").

89. *See* ARIZ. RULES OF PROF'L CONDUCT ER. 1.10(d) (permitting a lawyer to be screened, and the firm to avoid disqualification, if the lawyer did not play a substantial role in a litigated matter); *see generally* Pera, *supra* note 86, at 726–27 (noting that, by 2005, fourteen states had adopted a form of limited screening).

90. *Compare* ARIZ. RULES OF PROF'L CONDUCT ER 1.10(d), *with* MODEL RULES OF PROF'L CONDUCT R. 1.10(a). The states remain divided when it comes to permitting screening. Natalie Broaddus, Comment, *A Strange Way to Protect Clients: Why Recent Changes in the Model Rules of Professional Conduct Should Be Adopted in Texas*, 53 S. TEX. L. REV. 149, 152–53 (2011) ("Currently, twenty-six states allow for some form of screening. Of these, thirteen have adopted Rules consistent with the new version of Rule 1.10. The remaining thirteen have adopted a version of the Rule that allows screening with additional conditions.") (footnotes omitted).

firm,[91] the firm should indeed be disqualified in most instances.[92] Nevertheless, seven years after Arizona struck this appropriate balance, the ABA approved private firms to screen any incoming lawyers—even if they had been lead counsel for the opponent.[93]

Arizona is also blazing unique trails in prosecutorial ethics. In light of a rule change petition I filed with Larry Hammond and Karen Wilkinson, the Arizona Supreme Court has circulated and opened for public comment two groundbreaking rules governing prosecutors in post-conviction practice.[94] The court did so notwithstanding strong prosecutorial opposition to the proposed rules, which would provide ethical guidance to prosecutors when they have likely convicted an innocent person.[95]

The first proposed rule would require a prosecutor to disclose material exculpatory evidence discovered after conviction to both the defendant and the court, and if the evidence shows clearly and convincingly that an

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91. The use of the "side-switching" rhetoric is controversial. *See, e.g.*, Creamer, *supra* note 89, at 86 ("The opponents of lateral screening know well the prohibitions on personal participation by a lateral lawyer in a matter that either the lawyer was previously involved in or about which the lateral had learned protected confidential information while at the former firm. Yet, they continue to argue misleadingly about 'side-switching' lawyers as if the existing rules provided no protection for former clients from such conduct."). I do not mean to make too much of the term; I mean only that, from former clients' perspective, it looks as if their lawyers are switching sides to the opposing firm (even though those lawyers cannot then assist the new firm in prosecuting or defending the case).

92. This brief Essay is not the place to debate the merits of that decision; the goal here is primarily to show that Arizona has taken a relatively different approach to screening. For an in-depth analysis of the various factors involved in lawyer disqualification determinations, including the appearance of impropriety, see RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES (2003); Keith Swisher, *Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS (forthcoming 2013).

93. *See* Matthew Lenhardt, *Ethical Screens in the Modern Age*, 50 SANTA CLARA L. REV. 1345, 1353 (2010) (footnotes omitted) ("On February 16, 2009, the ABA's House of Delegates voted 226-191 to amend Model Rule 1.10 to permit screening when an attorney moves from one private law firm to another."). Screening would typically be permissible with client consent. The ABA, however, decided in 2009 that screening is sufficient even without client consent. *See* MODEL RULES OF PROF'L CONDUCT R. 1.10(a)(2).

94. *In re* Petition to Amend ER 3.8 of the Ariz. Rules of Prof'l Conduct, No. R-11-0033 (Ariz. 2012), *available at* http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1831481894954.pdf (order reopening petition for comment).

95. *See, e.g.*, Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 889–93 (2012) (describing certain prosecutorial offices' erroneous arguments against the amendment in other states and suggesting: "The *in terrorem* effect of prosecutors' hostility conceivably goes beyond discouraging courts from adopting these particular rules; it discourages bar associations from promoting any new ethics rules for prosecutors."); Keith Swisher, *Prosecutorial Conflicts of Interest in Post-Conviction Practice*, 41 HOFSTRA L. REV. 181, 192–206 (2013); Gary Grado, *Proposed Ethical Rules Would Require Prosecutors to Disclose Evidence Even After Convictions*, ARIZ. CAPITOL TIMES, Dec. 17, 2012.

innocent person has been wrongfully convicted, the rule would also require the prosecutor to seek to set aside the conviction.[96] This proposed rule is not organic to Arizona, but it would put Arizona on the forefront of progress. The proposed rule deviates in part from the recent Model Rule,[97] and only nine other states have adopted a similar rule to date.[98]

Although the tragedy of wrongful convictions, and suboptimal reactions to them, are now well-documented,[99] the ethical rules have not provided guidance to prosecutors in these terrible situations; this rule would finally remedy that fact. Moreover, although many prosecutorial offices react diligently and conscientiously when they learn that they likely have convicted an innocent person, some do not;[100] and some even believe that they have only a "one-ten-thousandth-of-one-percent" error rate.[101] For this

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96. *In re* Petition to Amend ER 3.8 of the Ariz. Rules of Prof'l Conduct, No. R-11-0033, attach. at 1 (Ariz. 2012), *available at* http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1831481894954.pdf (text of proposed ER 3.8(g)–(i)).

97. *Compare id.*, *with* MODEL RULES OF PROF'L CONDUCT R. 3.8(g)–(h) (2008).

98. *See, e.g.*, CPR Policy Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct Rule 3.8(g) and (h)*, AM. BAR. ASS'N, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/3_8_g_h.authcheckdam.pdf (last visited Dec. 27, 2012).

99. *See* Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Dec. 27, 2012) (documenting over 1,000 exonerees, the majority of whom are minorities, from 1989 to present). An additional 1100 people have been exonerated in groups (resulting from twelve major law enforcement scandals). Samuel R. Gross & Michael Shaffer, Nat'l Registry of Exonerations, *Exonerations in the United States, 1989–2012*, at 80–90 (June 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

100. *See, e.g.*, Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 410 n.46 (2011) (citing Brandon L. Garrett, *Exonerees Postconviction DNA Testing*, UNIV. VA. SCH. LAW, http://www.law.virginia.edu/pdf/faculty/garrett/judging_innocence/exonerees_postconviction_dna_testing.pdf (last visited Aug. 14, 2012)) (finding that a significant number of prosecutors resisted DNA testing and resisted joining in motions to set aside convictions after DNA testing had exonerated the defendants); Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 557–63 (2002) (recounting prosecutors' positive and negative attitudes toward DNA testing).

101. *See* Testimony of Scott Burns, Exec. Dir., Nat'l Dist. Attorneys Ass'n (NDAA) (July 18, 2012), *available at* http://www.judiciary.senate.gov/pdf/12-7-18BurnsTestimony.pdf; Bill Montgomery, *Adding to Prosecutor Duties Adds Little Justice*, ARIZ. ATT'Y, May 2013; Keith Swisher, *Defendants Guilty of Being Innocent; Prosecutors Guilty of Being Human*, ARIZ. ATT'Y, May 2013. As in other areas of human behavior, a growing literature examines various cognitive biases in prosecutorial decision-making. To believe in a one-ten-thousandth-of-one-percent error rate arguably suggests that several subconscious biases are at work, including overconfidence bias. Moreover, another "bias, the reiteration effect—where confidence in the truth of an assertion naturally increases if the assertion is repeated—makes it increasingly

reason, and for the fact that wrongful convictions warrant systemic action, identifying and remedying wrongful convictions should not be left solely to prosecutors.

A companion rule would therefore impose a duty on all attorneys, not just prosecutors, to turn over exculpatory evidence suggesting that a person has been wrongfully convicted.[102] If adopted, Arizona would become the first state in which all attorneys have an ethical obligation to report evidence of wrongful convictions in our criminal justice system.[103] Some lawyers are unlikely to welcome any mandatory reporting obligation,[104] but it is likely the right thing to require.

As the third and final example (again of many), Arizona has adopted a better ethical solution to the recurring situation in which confidential or privileged information has been inadvertently disclosed. Like the ABA and many other states, Arizona requires lawyers to inform their opponents when they have come into possession of the opponents' (or others') privileged or

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difficult over time for police and prosecutors to consider alternative perpetrators or theories of a crime," and "biases, especially belief perseverance, are responsible for prosecutorial resistance to the possibility of innocence before a DNA test, and even after a DNA test excludes the suspect as the perpetrator." Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1483 (2007) (citing Keith A. Findley & Michael S. Scott, *Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 313); *see also* Aronson & McMurtrie, *supra* ("Because the conviction of an innocent person is inconsistent with the ethical prosecutor's belief that charges should be brought only against suspects who are actually guilty, the ethical prosecutor seeks to avoid cognitive dissonance by clinging to the original belief in guilt, refusing to believe that she took part in a wrongful conviction." (citing Alafair Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593–94, 1612–14 (2006))); Orenstein, *supra* note 100, at 402–03, 425.

102. *In re* Petition to Amend ER 3.8 of the Ariz. Rules of Prof'l Conduct, No. R-11-0033, attach. at 3–4 (Ariz. 2012), *available at* http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1831481894954.pdf (text of proposed ER 3.10).

103. Two other jurisdictions deserve to share the credit. First, the District of Columbia had earlier proposed a substantially similar rule (from which Arizona drew its inspiration), although at the time of this writing D.C. has not yet adopted the proposed rule. *See* D.C. BAR RULES OF PROF'L CONDUCT REVIEW COMM., PROPOSED AMENDMENTS TO SELECTED RULES OF THE D.C. RULES OF PROF'L CONDUCT 45 (Mar. 2012), *available at* http://www.dcbar.org/download.cfml?filename=inside_the_bar/structure/reports/rules_of_professional_conduct_review_committee/proposed_amendments2012. Second, Massachusetts had created an exception to the duty of confidentiality: "A lawyer may reveal . . . [confidential] information . . . to prevent the wrongful execution or incarceration of another." MASS. R. PROF'L CONDUCT 1.6(b).

104. *Cf., e.g.*, Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259 (2003) (noting the various controversies and state deviations resulting from Model Rule 8.3, which requires lawyers to report substantial ethical violations to disciplinary authorities). To the credit of Arizona lawyers, however, no lawyers have objected to this proposed rule on the court's public rules forum.

confidential documents (including emails).[105] Unlike the ABA and many other states, however, Arizona also requires lawyers not to use or disseminate those documents until the opponents have had an opportunity to take protective measures.[106] This hold requirement renders less necessary and determinative the frantic rush to use or protect the documents, and it more comprehensively protects confidentiality and privilege. Notably, Arizona adopted this better approach three years before the Federal Rules of Civil Procedure followed suit.[107]

Arizona has developed many other examples of its own ethical identity, and these developments have been slowly increasing since 1985.[108] The

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105. ARIZ. RULES OF PROF'L CONDUCT ER 4.4(b) & cmt. 2.

106. *Compare* ARIZ. RULES OF PROF'L CONDUCT ER 4.4(b) ("A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures."), *with* MODEL RULES OF PROF'L CONDUCT R 4.4(b) (2008) ("A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."). The Arizona comments further elaborate on the additional duty in Arizona. ARIZ. RULES OF PROF'L CONDUCT ER 4.4(b) cmt. 2 ("Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a document was sent inadvertently, then this Rule requires the lawyer to stop reading the document, to make no use of the document, and to promptly notify the sender in order to permit that person to take protective measures."); *see also* Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. 01-04 (2001) ("This Opinion discusses a lawyer's ethical obligations not to use information obtained by a client in a civil case from documents copied from the records of a potentially adverse party that contain privileged or otherwise confidential information without the consent of opposing counsel or court order. The lawyer also must advise the client to refrain from obtaining other privileged documents and notify opposing counsel of the receipt of the information.").

107. Although the ABA has been reluctant to take firm positions with respect to such information, the civil rules drafters have not. *See, e.g.*, FED. R. CIV. P. 26(b)(5)(B) ("If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.").

108. For example, Ethical Rules 1.15 and 7.3 have been amended numerous times since Arizona adopted the Model Rules in 1985. Furthermore, as suggested earlier, Arizona is often a leader—or technically a leader among the other followers—in adopting the ABA's ethical updates. *See, e.g.*, Pera, *supra* note 86, at 688 ("Of the remaining six jurisdictions that have remained with the approach of former Model Rule 1.13(c), several [including Arizona] were quite advanced in their consideration of the work of Ethics 2000 and may well have completed their work before the ABA acted favorably on the proposals of the Cheek Commission."); *see generally* Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem That Won't Go Away*, 34 ARIZ. ST. L.J. 585, 610–11 (2002) (noting that "Arizona has

developments are varied and impactful, addressing disparities in access to justice,[109] accommodating technological advances in the practice of law,[110] adopting additional consumer protection,[111] and anticipating constitutional requirements.[112] The Arizona Supreme Court has also commendably committed to improve disciplinary procedure.[113] Not every development is

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been a leader in assisting *pro se* litigants" and "on the forefront of . . . pro bono service by lawyers," but noting that Arizona "needs . . . leadership on the non-lawyer unauthorized practice [of law] issue").

109. *See*, *e.g.*, *In re* Petition to Amend ERs 1.5, 4.2, 4.3, and 6.5, Rule 42, Rules of the Supreme Court, and Rules 5.1 and 11, Ariz. Rules of Civil Procedure, No. R-12-0027 (Ariz. 2012), *available at* http://www.azcourts.gov/Portals/20/2012Rules/120412%20motions/R120027.pdf (adopting several ethical and civil rules changes that broaden the ability of lawyers to provide short-term and limited-scope representation in response to the "increased . . . need for low or no-cost legal services available to the indigent and working poor").

110. For example, the Arizona ethical rules directly address lawyers' acceptance of credit card payments and the implications for trust accounting and fiduciary obligations; the ABA Model Rules do not. *See* ARIZ. RULES OF PROF'L CONDUCT ER 1.15 & cmts. 1–3 (2009).

111. For example, unlike the ABA Model Rules, the Arizona ethical rules require that all new fee agreements be reduced to writing for the client. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.5, *with* ARIZ. RULES OF PROF'L CONDUCT ER 1.5.

112. For example, unlike the ABA Model Rules, the Arizona ethical rules require: "In a criminal case, a lawyer shall promptly inform a client of all proffered plea agreements." ARIZ. RULES OF PROF'L CONDUCT ER 1.4(c). The Supreme Court recently confirmed that this conduct is required for effective assistance of counsel. *See* Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) ("This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

113. For example, using Colorado's well-regarded system as a model, the court ushered in sweeping procedural changes. The key changes include:

- Utilization of a paid full-time hearing officer, the Presiding Disciplinary Judge, to preside over all formal cases;
- Establishment of an independent probable cause committee, appointed by the Supreme Court, with representation by attorneys and members of the public;
- A streamlined process for formal cases that encourages resolution of cases before the Presiding Disciplinary Judge and provides the judge with the authority to impose all sanctions, including disbarment;
- Elimination of the Disciplinary Commission review and recommendation process; replacing it with a direct appeal to the Supreme Court; . . .
- Establishment of an Advisory Committee on Attorney Regulation to monitor the implementation of the new process and to periodically review the entire attorney admission and discipline system.

Changes to Attorney Discipline, ARIZ. JUDICIAL BRANCH, http://www.azcourts.gov/mediaroom/PressReleasesNews/ChangestoAttorneyDiscipline.aspx (last visited Jan. 13, 2013).

laudable,[114] but every development is an example of an Arizona that no longer ignores legal ethics or merely mimics the ABA's every move.

TOMORROW: CONCLUSION

Arizona's attention to legal ethics has evolved from frightening to fascinating. Progress moved slowly and at times awkwardly for decades upon decades, but what has slowly emerged is a fully functioning system of professional regulation. In its modernity, Arizona arguably has shown signs of leadership in legal ethics, and it certainly has shown significant signs of autonomy and identity. But having a unique identity does not mean that it will always remain a particularly good identity—unless the Arizona bench and bar continue to exercise careful vigilance in professional regulation. An autonomous and unique vision of legal ethics could turn protectionist or backward just as easily as it could remain client-centered and just. Pushing forward, we must ensure that this past and present will be a good judge of the future of Arizona legal ethics.

114. For example, Arizona recently dropped its requirement that court-appointed lawyers place both the fee and scope of representation in writing for clients. *See* ARIZ. RULES OF PROF'L CONDUCT ER 1.5(b) (requiring that lawyers communicate the scope of the representation and their fees in writing, but excepting "court-appointed" lawyers from this requirement). Although Arizona perhaps understandably deemed it unnecessary to require court-appointed lawyers to put their "fee" agreements in writing, even clients who cannot afford to pay attorneys deserve to review the scope of representation in writing. This is arguably yet another example of indigent defendants receiving less protection than defendants who can afford to retain private attorneys.

APPENDIX

TABLE ONE: DISCIPLINARY DISPOSITIONS
The First Fifty Years: 1927–1976

Dismissal	Reprimand	Suspension	Disbarment
9	12[115]	10	40[116]

TABLE TWO: DISCIPLINARY CASES
The First Fifty Years: 1927–1976

Case	Conduct	Code	Disposition
(1) *In re Bailey*, 254 P. 481 (Ariz. 1927).	Bailey forged his admission date in another state to avoid taking the Arizona bar exam and misappropriated client funds.	Chapter 32, Session Laws of 1925, subdivision 7, § 2 (prohibiting conduct violative of the ABA's *Canons of Professional Ethics*).	Disbarred[117]
(2) *In re Manatt*, 264 P. 473 (Ariz. 1928).	Manatt embezzled money from a client.	Chapter 32, Session Laws of 1925 (listing attorneys' duties and the procedure for disbarment).	Disbarred
(3) *In re Gibbs*, 278 P. 371 (Ariz. 1929).	Gibbs sent letters to prospective clients soliciting work.	Canon 27 (prohibiting solicitation of business).	Dismissed
(4) *In re*	After Spriggs	Canon: none	Disbarred

115. Two attorneys were reprimanded in *In re Richey*, 261 P.2d 673 (Ariz. 1953).

116. Two attorneys were disbarred in *In re Graham*, 118 P.2d 1093 (Ariz. 1941).

117. This first recorded ethics decision followed a prior demurrer action involving the same respondent. *In re* Bailey, 248 P. 29, 31 (Ariz. 1926) (concluding that an attorney may be deprived of the privilege to practice law under the authority of either a statute or the inherent power of the court); *see also* McMurchie v. Super. Ct. Yavapai Cnty., 221 P. 549, 553 (Ariz. 1923) (ordering that a "peremptory writ of mandamus issue for the purpose only of requiring the [lower court and its judge] pending a final determination of said disbarment proceedings, to recognize the petitioner as an attorney of that court, both in his private and official capacity.").

***Spriggs*, 284 P. 521 (Ariz. 1930).**	became a judge, he instructed a deputy court clerk to antedate the filing mark on an affidavit to renew a judgment in one of Spriggs's previous cases.	cited.	
(5) *In re Lohrke*, 2 P.2d 1039 (Ariz. 1931).	Lohrke practiced law before taking the oath; converted client funds to his own use; issued bad checks; and committed perjury.	Section 201, Revised Code of 1928 (prohibiting any violation of oath or duties).	Disbarred
(6) *In re Langworthy*, 8 P.2d 245 (Ariz. 1932).	Langworthy misappropriated funds; issued an insufficient funds check to a client; lied about the check; and failed to render legal services upon payment.	Canon: none cited.	Disbarred
(7) *In re Myrland*, 29 P.2d 483 (Ariz. 1934).	Myrland wrongfully withheld money belonging to his client.	Canon: none cited.	Reprimanded
(8) *In re Myrland*, 45 P.2d 953 (Ariz. 1935).	Myrland drafted a document that appeared to be a court order and caused a man otherwise unwilling to release disputed property to release the property.	Canon: none cited.	Suspended
(9) *In re Hoover*, 46 P.2d 647 (Ariz. 1935).	Hoover failed to correct client's false testimony on the stand (although his failure ultimately did not merit	Canon: none cited.	Suspended

	discipline); and filed and failed to dismiss an action in which the residency requirement was not met.		
(10) *In re Barth*, 50 P.2d 564 (Ariz. 1935).	Barth embezzled money that belonged to a minor and had been disbarred (and later reinstated) for similar conduct in another state.	Canon: none cited.	Disbarred
(11) *In re Forest*, 66 P.2d 245 (Ariz. 1937).	Forest failed to render legal services upon payment; represented the services had been performed; and returned only a portion of the unearned fee.	Canon: none cited. The Court nonetheless concluded that the conduct constituted professional misconduct in the highest degree.	Disbarred
(12) *In re Sweeney*, 73 P.2d 1349 (Ariz. 1937).	Sweeney allegedly procured witnesses to testify falsely in a criminal case.	Canon: none cited.	Dismissed[118]
(13) *In re Greer*, 81 P.2d 96 (Ariz. 1938).	Greer engaged in maladministration of an estate and embezzlement.	Canon 15 (requiring duty of devotion to and good faith in defense of client).	Disbarred
(14) *In re Lee*, 107 P.2d 222 (Ariz. 1940).	Lee falsely stated to a client that fees were fixed by the bar and withheld money owed to a client.	Canon: none cited.	Suspended
(15) *In re MacDonald*, 105 P.2d 1114 (Ariz. 1940).	MacDonald solicited business through mail and personal communications and	Canon 27 (prohibiting solicitation); Canon 15	Suspended

118. Sweeney was later disbarred. *In re* Sweeney, 267 P.2d 1074 (Ariz. 1954).

	withheld money owed to clients.	(requiring duty of devotion to and good faith in defense of client).	
(16) *In re Shelley*, 107 P.2d 508 (Ariz. 1940).	Shelley advised a client that he was free to remarry (yet Shelley had failed to secure the divorce); failed to file another client's complaint for divorce; and failed to refund unearned fees.	Canon: none cited.	Disbarred
(17) *In re Van Bever*, 101 P.2d 790 (Ariz. 1940).	Van Bever became delinquent in paying state bar dues but was never notified of the delinquency; and he failed to disclose his disbarment in California when paying the arrearages on his dues to resume practice in Arizona.	Canon: none cited. The court noted that, although a disbarment judgment in another state is entitled to full faith and credit, it does not require automatic disbarment.	Dismissed[119]
(18) *In re Fellows*, 112 P.2d 864 (Ariz. 1941).	After accepting payment, Fellows failed to appear in court and defend a client; failed to file or prosecute a divorce action; and failed to attend an estate's probation.	Canon 44 (permitting attorneys to withdraw from employment for good cause and requiring return of unearned fees).	Disbarred
(19) *In re Russell*, 114 P.2d 241 (Ariz. 1941).	Russell improperly contracted to sell client property; failed to report his actions promptly	Canon: none cited. The court found that some of the charges in isolation did not	Disbarred

119. Van Bever was subsequently disbarred because he failed to prove that he had been rehabilitated following his disbarment in California. *See In re* Van Bever, 120 P.2d 403 (Ariz. 1941).

	and fully to the client; failed to render an accounting of payment; and misappropriated funds.	warrant disbarment, but charges collectively warranted disbarment.	
(20) *In re Graham*, 118 P.2d 1093 (Ariz. 1941).	Beumler and Graham refused to let a non-English speaking widow bring her own translator and instead translated a document they had drafted (granting them half of the proceeds of a claim that was already settled and power of attorney to act for her in matters pertaining to the claim) to the widow's teenage daughter.	Canon: none cited.	Disbarred
(21) *In re Hall*, 118 P.2d 67 (Ariz. 1941).	Hall failed to render legal services upon payment and did not return unearned fees.	Canon: none cited.	Disbarred
(22) *In re Van Bever*, 120 P.2d 403 (Ariz. 1941).	Van Bever had been disbarred in California, and state bar, in effect, sought reciprocal discipline; and he failed to show that he had been rehabilitated since the disbarment.	Canon: none cited.	Disbarred
(23) *In re Richeson*, 166 P.2d 583 (Ariz. 1946).	Richeson made unsubstantiated, malicious, and libelous charges	Canon 1 (duty to court to maintain respectful attitude); Canon	Disbarred

	against federal judges and members of the state bar.	29 (duty to uphold the honor of the profession).	
(24) *In re Sullivan*, 170 P.2d 614 (Ariz. 1946).	Sullivan misrepresented the value of an estate to the court; hypothecated estate property for his own benefit; and otherwise incompetently administered the estate.	Section 32-304, Arizona Code Annotated, 1939 (the court has jurisdiction over active and retired members).	Suspended
(25) *In re Maltby*, 202 P.2d 902 (Ariz. 1949).	Maltby represented a woman in her divorce and custody case and then represented her husband in the same cause of action for modified custody; failed to keep proper accounts; and advertised on matchbooks.	Canon: none specifically cited: "Respondent's actions and attitude in this matter are wholly unbecoming to a member of the legal profession. While his actions are not deserving of suspension or disbarment, yet he has been guilty of infractions of the Canons of Ethics." *Id.* at 903–04.	Publicly reprimanded[120]
(26) *In re Rutherford*, 202 P.2d 904 (Ariz. 1949).	Rutherford solicited business; induced a client to sign a false statement; used a client to solicit new business; retained unearned fees; collected exorbitant fees; and performed unnecessary services for the sole purpose	Canon 12 (fixing fees); Canon 27 (advertising); Canon 28 (stirring up litigation); Canon 34 (division of fees); and Canon 38 (compensation, commissions, and	Disbarred

120. Maltby was disbarred in 1957. *In re* Maltby, 311 P.2d 968 (Ariz. 1957).

	of collecting a fee.	rebates).	
(27) *In re Wein*, 240 P.2d 183 (Ariz. 1952).	Wein assisted in bribing a public officer; shared fees; and accepted rebates.	Canons 32 (duty to be honest); Canon 34 (division of fees); and Canon 38 (compensation, commissions, and rebates).	Disbarred[121]
(28) *In re Wilson*, 258 P.2d 433 (Ariz. 1953).	Wilson, then the Pima County Attorney, accepted money from a prostitute to protect her from prosecution.	Canon: none cited.	Disbarred
(29) *In re Richey*, 261 P.2d 673 (Ariz. 1953).	Richey and Herring represented one client against another; misrepresented to the court that they had been relieved as attorneys to the other client by a written order signed by the trial judge (when no such order had been signed); and failed to advise the other client that he was no longer represented.	Canon 6 (conflict of interest); Canon 22 (candor and fairness); and Canon 29 (upholding the honor of the profession).	Reprimanded
(30) *In re Stone*, 267	Stone mismanaged an estate; paid	Canon: none cited.	Severely reprimanded[122]

121. An earlier Arizona case mentioned Wein's transgressions, *In re Lewkowitz*, 220 P.2d 229, 234 (Ariz. 1950), but that case involved (essentially) only a motion to dismiss, which was denied. Former Gila County Attorney Frank Tippett was also disbarred because he had been convicted of tax evasion (arising in part from the bribery). *See In re* Wein, 240 P.2d 183, 183 (Ariz. 1952). Tippett's disbarment was neither counted nor included in the above table because the disbarment did not result in a published opinion.

P.2d 892 (Ariz. 1954).	himself without court approval; paid numerous creditors without presentation of claims; contracted and sold property belonging to the estate; and failed to file an accounting.		
(31) *In re Sweeney*, 267 P.2d 1074 (Ariz. 1954).	Sweeney willfully convinced a witness to commit perjury.	Canon: none cited.	Disbarred
(32) *In re Wren*, 285 P.2d 761 (Ariz. 1955).	Wren solicited business from an inmate; failed to appear in court to represent the inmate on three separate occasions; and blamed chronic alcoholism for his absences.	Canon 27 (soliciting business); Canon 8 (advising clients of merits of case); Canon 21 (duty to be punctual in duties to client and to court); and Canon 15 (duty to be present and to represent client with good faith in court).	Reprimanded
(33) *In re Everett*, 293 P.2d 928 (Ariz. 1956).	Everett allegedly misrepresented to the complainant the amount Everett had received from an equipment sale.	Canon: none cited. The court found that the proof fell below the requisite clear and convincing evidence standard, and in any event, "[f]or what we consider to be no more than a poorly drawn letter the respondent has	Dismissed

122. Stone was disbarred in 1956. *In re* Stone, 295 P.2d 839 (Ariz. 1956).

		already suffered embarrassment, humiliation and worry far beyond his deserts." *Id.* at 931.	
(34) *In re Stone*, 295 P.2d 839 (Ariz. 1956).	A military sergeant submitted a false travel questionnaire to the military allegedly with the knowledge and advice of Stone.	Canon: none cited.	Disbarred
(35) *In re Metheany*, 298 P.2d 804 (Ariz. 1956).	Metheany allegedly advised client to transfer property to him to hide it from creditors and later refused to return the client's property.	Canon 11 (dealing with trust property); Canon 29 (upholding the honor of the profession); and Canon 32 (the lawyer's duty in its last analysis).	Reprimanded
(36) *In re Van Spanckeren*, 299 P.2d 643 (Ariz. 1956).	Van Spanckeren withheld funds owed to client and engaged in "rank procrastination" in another matter.	Canon 11 (prohibiting comingling); and Canon 21 (duty to be punctual, concise, and direct).	Suspended
(37) *In re Moeur*, 310 P.2d 508 (Ariz. 1957).	Moeur falsely represented that he had completed work and promised to obtain settlement offers.	Canon 21 (duty to be punctual, concise, and direct).	Disbarred
(38) *In re Maltby*, 311 P.2d 968 (Ariz. 1957).	Maltby comingled and withheld client funds; refused to allow the court to supervise the reasonableness of an attempted contingency fee	Canon 11 (prohibiting comingling); Canon 13 (failure to have reasonableness of fee determined under court	Disbarred

	revision; and failed to answer requests from a client.	supervision); and Canon 21 (failure to be concise and direct in disposition).	
(39) *In re Watson*, 330 P.2d 1091 (Ariz. 1958).	Watson comingled client funds and caused a default judgment to be entered against a client when Watson failed to pay to prosecute an appeal.	Canon 11 (prohibiting comingling).	Disbarred
(40) *In re Zussman*, 344 P.2d 1021 (Ariz. 1959).	Zussman lied to another investor in a hotel venture about the purchase price and downpayment.	Canon 11 (prohibiting comingling); Canon 32 (duty to be honest); and Canon 38 (compensation, commissions, and rebates).	Publicly reprimanded
(41) *In re Garcia*, 359 P.2d 499 (Ariz. 1961).	Garcia failed to expedite legal services and to return unearned fees.	Canon: none cited.	Disbarred
(42) *In re Tribble*, 382 P.2d 237 (Ariz. 1963).	Tribble solicited a person involved in an accident and offered to represent the person if not already represented by an attorney.	Canon 27 (prohibiting advertising and solicitation); and Canon 28 (stirring up litigation).	Reprimanded
(43) *In re Yount*, 380 P.2d 780 (Ariz. 1963).	Yount refused to return documents to a client and converted client funds.	Canon 11 (prohibiting comingling); A.R.S. §§ 32-265 (attorney misconduct) and 32-267 (grounds for disbarment).	Disbarred
(44) *In re Lanahan*, 389	Lanahan failed to comply (on behalf	Canon 32 (lawyer's duty in	Disbarred

P.2d 263 (Ariz. 1964).	of his client) with a court order to answer interrogatories and failed to comply with an obligation to defend his client.	its last analysis).	
(45) *In re Peterson*, 391 P.2d 599 (Ariz. 1964).	Peterson misappropriated client funds from an estate for his own use.	Canon: none cited; Supreme Court Rules 35 and 37 (proceedings before the court).	Disbarred[123]
(46) *In re Steward*, 391 P.2d 911 (Ariz. 1964).	Steward misappropriated funds; misrepresented that a settlement had been negotiated; gave a client his own money to cover the "settlement" but then withdrew it and physically ejected the client from his office when the client told Steward he had checked court records; failed to return documents; and failed to account for funds.	Canon: none cited; Supreme Court Rules 35 and 37 (proceedings before the court).	Disbarred
(47) *In re Bixler*, 391 P.2d 917 (Ariz. 1964).	Bixler failed to render legal services; failed to return unearned fees; and converted	Canon 11 (prohibiting comingling); A.R.S. §§ 32-265 (attorney	Disbarred

123. Peterson's later petition for reinstatement was denied because the court found that while he held steady jobs since disbarment and repaid the money he had wrongfully taken, evidence cast doubt on his claim that he was unaware of, and thus failed to repay, fees spent to recover the misappropriated funds or fees owed to the Bar Security Fund on another matter. *In re* Peterson, 495 P.2d 851, 853 (Ariz. 1972). "In the case of a petition for reinstatement of a disbarred attorney, the principal inquiry is what has taken place since the disbarment." *Id.* at 852.

	client funds.	misconduct) and 32-267 (grounds for disbarment).	
(48) *In re Rogers*, 412 P.2d 710 (Ariz. 1966).	While managing an estate, Rogers purchased a vehicle for himself; paid an excessive amount to his son to watch the client's dog; and purchased a washer and dryer for the dog's bedding and a car to transport the dog.	Canon 6 (conflict of interest); and Canon 11 (prohibiting comingling).	Suspended
(49) *In re Steel*, 415 P.2d 109 (Ariz. 1966).	Steel comingled funds and failed to account for funds.	Canon 11 (prohibiting comingling).	Disbarred
(50) *In re Kastensmith*, 419 P.2d 75 (Ariz. 1966).	Kastensmith failed to return part of a retainer because he thought his secretary had handled the matter.	Canon 44 (and Supreme Court Rule 12) (withdrawal from employment as attorney); Canon 29 (upholding the honor of the profession).	Dismissed[124]
(51) *In re Brown*, 416 P.2d 975 (Ariz. 1966).	Brown failed to petition the court to withdraw from employment after refusing to bring a frivolous defense.	Canon 44 (withdrawal from employment as attorney). Because the client chose to default, however, the court concluded that Brown did not have to withdraw.	Dismissed[125]
(52) *In re Baker*, 429 P.2d 665 (Ariz. 1967).	Baker comingled funds and refused to return funds entrusted to him.	Canon 11 (prohibiting commingling); Canon 12 (fixing	Disbarred

124. Kastensmith was later suspended. *In re* Kastensmith, 453 P.2d 961 (Ariz. 1969).

125. Brown was later disbarred. *In re* Brown, 453 P.2d 958 (Ariz. 1969).

		fees); and A.R.S. § 32-267(6), (8) (grounds for disbarment).	
(53) *In re Block*, 446 P.2d 237 (Ariz. 1968).	Block comingled funds; misrepresented to a client that he returned the funds by mail; and failed to repay funds after selling property that belonged to an estate.	Canon 11 (prohibiting commingling).	Disbarred
(54) *In re Brown*, 453 P.2d 958 (Ariz. 1969).	Brown misappropriated client funds; failed to notify a client of a hearing date or to follow up on promises to correct the situation; and failed to answer interrogatories resulting in a default judgment against his client.	Canon: none cited; Supreme Court Rules 35 and 37 (proceedings before the court).	Disbarred
(55) *In re Kastensmith*, 453 P.2d 961 (Ariz. 1969).	Kastensmith failed to file complaints for clients involved in car accidents (causing one client to be barred from relief by the statute of limitations).	Canon 15 (failure to pursue client's remedies).	Suspended
(56) *In re Russin*, 462 P.2d 812 (Ariz. 1969).	Russin overlooked the reply date for a counterclaim and claimed there was no defense when he received the notice of default.	Canon 15 (failure to pursue client's remedies).	Reprimanded
(57) *In re Wilson*, 470	Wilson allegedly misappropriated and	Canon 11 (prohibiting	Dismissed

P.2d 441 (Ariz. 1970).	comingled clients' funds; clients and business partners complained of Wilson's handling of their cases but later retracted their statements.	comingling); and Canon 22 (candor and fairness).	
(58) *In re Johnson*, 471 P.2d 269 (Ariz. 1970).	Johnson punched an opposing party.	Canon 18 (a lawyer should always treat adverse witnesses and suitors with fairness and consideration); A.R.S. § 32-263 (duty of attorneys to abstain from all "offensive personality").	Dismissed
(59) *In re Wykoff*, 470 P.2d 678 (Ariz. 1970).	Wykoff failed to respond to a counterclaim from his client's wife; failed to notify his client of the hearing, resulting in a default judgment; and failed to return his unearned fees.	Canon 44 (governing withdrawal and the requirement to return unearned fees).	Reprimanded
(60) *In re Grant*, 472 P.2d 31 (Ariz. 1970).	Grant twice sued a client for fees, even though the client had already paid the fees to Grant's former associate, who had taken the client's file with him when he left Grant's employment.	Canon 14 (suing a client for a fee).	Reprimanded
(61) *In re Holt*, 478 P.2d 510 (Ariz. 1971).	Holt mismanaged client funds; let time limits run against client interests; issued a fictitious	Canon 11 (prohibiting comingling).	Disbarred

	divorce decree; and failed to respond to the disciplinary authority.		
(62) *In re Tanner*, 490 P.2d 6 (Ariz. 1971).	Tanner failed to return unearned fees; failed to inform a client about trial (and the client was arrested for failure to appear); failed to inform a client he was suspended and could not represent client; and worked out of a used car dealership and cocktail lounge.	Canon: none cited (although the court mentioned that respondent was alleged to have violated "various" Canons).	Disbarred
(63) *In re Campbell*, 495 P.2d 131 (Ariz. 1972).	Campbell misappropriated funds and waited two years and nine months to return the funds.	Canon: none cited.	Disbarred
(64) *In re Moore*, 518 P.2d 562 (Ariz. 1974).	Moore comingled and converted funds.	Canon 9, DR 9-102(A) and (B) (preserving identity of funds and property of a client).	Disbarred
(65) *In re Carpenter*, 519 P.2d 1136 (Ariz. 1974).	Carpenter cashed a settlement check and failed to deliver his client's portion to her.	Canon 9, DR 9-102(B)(4) (preserving identity of funds and property of a client).	Disbarred
(66) *In re Krotenberg*, 527 P.2d 510 (Ariz. 1974).	Krotenberg drafted a will granting money to his own family (e.g., money to Krotenberg's son's college fund) and inconsistent with the client's request.	Canon 5, DR 5-101 (attorney shall not accept employment if personal interests may reasonably affect professional	Suspended

		judgment), and Canon 1, DR 1-102(A)(1), (4), (5) and (6) (defining disciplinable conduct).	
(67) *In re Lurie*, 546 P.2d 1126 (Ariz. 1976).	Lurie offered legal services in lieu of a monetary contribution to a corporation and then improperly withdrew money from the corporation.	Canon 1, DR 1-102(A)(4), Canon 9, DR 9-102(A), (B) (preserving identity of funds and property of a client).	Suspended
(68) *In re Evans*, 556 P.2d 792 (Ariz. 1976).	Evans created the appearance that he was representing all parties in an agreement and then sued certain parties to the agreement on behalf of his (other) clients.	Canon 5, DR 5-105(A), (B) (prohibiting representation if attorney's independent professional judgment will be adversely affected by attorney's duties to another client), and (C) (permitting certain potentially conflicting representations after full disclosure and client consent); Canon 9 (avoiding the appearance of impropriety).	Dismissed