



ST. MARY'S
UNIVERSITY

Digital Commons at St. Mary's University

Faculty Articles

School of Law Faculty Scholarship

2005

Justice Tom C. Clark's Legacy in the Field of Legal Ethics

Vincent R. Johnson

St. Mary's University School of Law, vjohnson@stmarytx.edu

Follow this and additional works at: <https://commons.stmarytx.edu/facarticles>



Part of the [Supreme Court of the United States Commons](#)

Recommended Citation

Vincent R. Johnson, Justice Tom C. Clark's Legacy in the Field of Legal Ethics, 29 J. Legal Prof. 33 (2005).

This Article is brought to you for free and open access by the School of Law Faculty Scholarship at Digital Commons at St. Mary's University. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Digital Commons at St. Mary's University. For more information, please contact jilloyd@stmarytx.edu.

Justice Tom C. Clark's Legacy in the Field of Legal Ethics

Vincent R. Johnson

Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. Legal Prof. 33 (2002).

JUSTICE TOM C. CLARK'S LEGACY IN THE FIELD OF LEGAL ETHICS

I. A SCANDALOUS SITUATION.....	33
II. THE CLARK COMMITTEE AND ITS REPORT	42
III. THIRTY-FIVE YEARS OF REFORM IN LEGAL ETHICS	49
A. <i>Modernization of Lawyer Discipline</i>	49
B. <i>Attention to Professionalism in Legal Education</i>	52
C. <i>The Multistate Professional Responsibility Exam</i>	56
D. <i>Continuing Legal Education on Ethics</i>	58
E. <i>Malpractice Actions, Fee Forfeiture, and Litigation Sanctions</i>	61
F. <i>Revision of Ethics Codes</i>	63
G. <i>Abundant Ethics Materials and News Coverage</i>	65
H. <i>Attention to Lawyers with Disabilities</i>	67
IV. FOCUS THE ATTENTION OF THE PROFESSION ON ETHICAL BEHAVIOR	68

*Vincent R. Johnson**

I. A SCANDALOUS SITUATION

Tom C. Clark served at the pinnacles of the American legal profession for nearly a quarter of a century as Attorney General from 1945 to 1949¹

* Associate Dean and Professor of Law, St. Mary's University School of Law, San Antonio, Texas. B.A. and LL.D., St. Vincent College (Pa.); J.D., University of Notre Dame; LL.M., Yale University. Dean Johnson has served as a Fellow at the Supreme Court of the United States, a Fulbright Scholar in China and Romania, and a lecturer in the legal ethics program of the American Bar Association's Asia Law Initiative in Mongolia. He is a member of the American Law Institute.

Preparation of this Article was assisted by St. Mary's University law students Daniel Austin Ortiz, Jacqueline F. Dieterle, Armistead M. Long, Teresa Ahnberg, Patricia Zarate, and Benjamin Carbajal. At the University of Texas School of Law, Michael Widener, head of special collections at the Tarlton Law Library, graciously facilitated access for the author to the papers of Justice Clark.

1. See Larry Temple, *Mr. Justice Clark: A Tribute*, 5 AM. J. CRIM. L. 271, 272 (1977). According to Temple:

[As Attorney General, Tom Clark] was instrumental in using that position to urge and secure the adoption of the Federal Administrative Procedure Act—establishing an orderly, fair, and legally understandable system for the operation of federal governmental agencies. The progeny of that act can now be found in the administrative procedure acts which have been adopted in most of the states of the Union.

Id. at 272. As the nation's top law enforcement officer,

and Supreme Court Justice from 1949 to 1967.² He filed the first *amicus curiae* brief for the United States in a civil rights case,³ and he wrote decisions that are true landmarks in the jurisprudence of criminal law⁴ and church-state relations.⁵ Yet it is arguable that Justice Clark's greatest contribution to the shaping of a field of law was made after he left the Court in 1967, when his son Ramsey was appointed Attorney General by Lyndon B. Johnson.⁶ During that ten-year period of robust professional activity,⁷ Jus-

Clark was active in promoting the government's "loyalty program" during the beginning of the cold-war period, and was the first compiler of the then famous "Attorney General's list" of subversive organizations. He argued several cases before the Supreme Court during his tenure as attorney general, and his nomination by Truman to the vacancy in 1949 came as no surprise. Clark's nomination was opposed in the Senate by liberals who disliked his support of the government's loyalty program, but he was confirmed with little difficulty.

WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 88 (1987).

2. As a Justice, Clark had the courage to vote against the President who appointed him in the landmark Steel Seizure case (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660 (1952) (concurring in the judgment)). "Clark was regarded as a staunch supporter of the government in all matters, and was considered a part of the Court's conservative wing." REHNQUIST, *supra* note 1, at 35. See generally Dennis D. Dorin, *Tom C. Clark, the Justice as Administrator*, 61 JUDICATURE 271, 271-77 (1978) (discussing Justice Clark's confirmation and judicial philosophy, and stating that "[n]o one ever gave more of himself" to the cause of effective judicial administration).

According to Justice William O. Douglas:

Most of the Truman appointees [including Clark] reflected the small-town attitudes of conformity more than the emerging urban consciousness of the need for diversity. Tom Clark was different in the sense that he changed. He had the indispensable capacity to develop so that with the passage of time he grew in stature and expanded his dimensions.

WILLIAM O. DOUGLAS, *THE COURT YEARS: 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 245 (1980). "In my time, Tom Clark probably contributed more insight into antitrust problems than any other Justice." *Id.* at 162.

3. Justice Thurgood Marshall noted, "Tom Clark is . . . to be remembered as the first attorney general of the United States to file a brief *amicus curiae* in a civil rights case. In 1948 he ordered the filing of a brief in support of the Negroes in the restrictive covenant cases." *Justice Clark Dies*, 63 A.B.A. J. 984, 985 (1977).

4. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (requiring exclusion of evidence obtained by an unconstitutional search). Virtually all of the law review articles dealing with Justice Clark during the past score years have related to his criminal law jurisprudence. See Dennis D. Dorin, *Marshaling Mapp: Justice Tom Clark's Role in Mapp v. Ohio's Extension of the Exclusionary Rule to State Searches and Seizures*, 52 CASE W. RES. L. REV. 401 (2001) (celebrating the 40th anniversary of the decision); Paul R. Baier, *Justice Clark, the Voice of the Past, and the Exclusionary Rule*, 64 TEX. L. REV. 415, 419 (1985) (stating that "Tom Clark's voice speaks to us still of wisdom and common sense in the administration of justice"); Mark Srere, Note, *Justice Tom C. Clark's Unconditional Approach to Individual Rights in the Courtroom*, 64 TEX. L. REV. 421 (1985) (discussing opinions by Justice Clark involving the right to a fair trial).

5. See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (holding that compulsory Bible reading and prayer recitation in public schools is unconstitutional).

6. Writing of Justice Clark's retirement from the Supreme Court, Chief Justice Earl Warren stated: No other retirement in the long history of the Court was occasioned by such a felicitous circumstance. To retire because one's son had been appointed Attorney General of the United States, and thus a litigant in half of all the cases that reach the Supreme Court, is a reason that would warm the heart of any Justice . . .

Earl Warren, *Mr. Justice Clark: A Tribute*, 46 TEX. L. REV. 1, 1 (1967).

7. Justice Clark had also led a hectic life while serving on the Court. See John P. Frank, *Justice Tom Clark and Judicial Administration*, 46 TEX. L. REV. 5, 5-6 (1967) (describing a four-and-a-half day period in 1963 when Justice Clark "had 32 scheduled engagements, . . . made several substantial speeches . . . [and] visited with hundreds of persons from all over the country, an astonishingly large number of whom he knew").

tice Clark served as the first Director of the Federal Judicial Center,⁸ headed the implementation of the ABA Standards for Criminal Justice,⁹ chaired the newly created Supreme Court Fellows Program,¹⁰ sat as an appellate judge on every federal circuit,¹¹ and even tried cases as a federal trial judge.¹² Most importantly, as an ex-Justice, Clark lent his considerable talent, prestige, and energy to the work of the American Bar Association Special Committee (now known as the “Clark Committee”) which conducted a thorough review of lawyer discipline.¹³ That Committee issued a report (the “Clark Report” or “Report”)¹⁴ that proved transformative in its effect. The Report was the starting point in a revolution which, over ensuing decades, has wholly reshaped the field of legal ethics.¹⁵ Except perhaps for Justice

8. In March 1968, Justice Clark was named the first Director of the newly created Federal Judicial Center (FJC), a research and training center for issues affecting the federal courts. See Tom C. Clark, *The New Federal Judicial Center*, 54 A.B.A. J. 743 (1968) (discussing the creation of the center); Tom C. Clark, *The Federal Judicial Center*, 53 JUDICATURE 99, 101–03 (Oct. 1969) (discussing studies and training programs conducted by the center). Clark served until he retired at age 70 (in 1969) as required by statute. See Tom C. Clark, *The Federal Judicial Center*, 1974 ARIZ. ST. L.J. 537, 538 (noting that the center had become the “most prestigious ‘judges school’ in the world”).

President Lyndon Johnson, “at the suggestion of the Judicial Conference of the United States,” had urged Congress to establish the Center. Tom C. Clark, *Justice—Truth in Action*, 43 N.Y.U. L. REV. 419, 426 (1968). Chief Justice Warren and Justice Clark had been supporters of the project. See Temple, *supra* note 1, at 273 (stating that “[f]ollowing his retirement from the Court, Justice Clark, along with Chief Justice Earl Warren, established the Federal Judicial Center”); Mimi Clark Grundland, *Associate Justice Tom C. Clark: A Centennial Celebration*, Vol. XX, No. 3 SUP. CT. HIST. SOC. Q. 6 (1999) (stating that Clark had been a major advocate for the Center, which was established by Congress for the purpose of modernizing the federal court system).

Originally based in the Dolly Madison House on Lafayette Square across from the White House, a highly prestigious address, the FJC is now housed in more spacious quarters in the Thurgood Marshall Federal Judiciary Building near Union Station, a short walk from the Supreme Court. The Center continues to research issues of concern to the federal court system and provide training for federal judges.

9. See Tom C. Clark, *The Implementation Story—Where We Must Go*, 55 JUDICATURE 383, 383 (1972) (stating that beginning in 1968, Justice Clark chaired the committee).

10. “In 1974, Chief Justice [Warren] Burger appointed . . . Clark the first chair of the Supreme Court Fellows Commission [originally called the Judicial Fellows Commission].” THE SUPREME COURT FELLOWS PROGRAM 2004-2005 at 9 (brochure). Currently, four Fellows are selected each year: one to work in the office of the Administrative Assistant to the Chief Justice, one for the Federal Judicial Center, one for the Administrative Office of United States Courts, and one for the Federal Sentencing Commission. “Each year, in recognition of the Justice’s interest in the program, one of the Supreme Court fellows is presented with the Tom C. Clark Award.” *Id.* at 9–10.

11. See Temple, *supra* note 1, at 273 (stating that Justice Clark “was understandably proud of the fact that he was the only judge ever to sit on all of the United States Circuit Courts of Appeals”).

12. *Id.* (stating that Justice Clark sat as a trial judge).

13. Justice Clark actually began his work on the ABA Special Committee before leaving the Supreme Court. See *Justice Tom C. Clark to Chair ABA Committee Which Will Evaluate Bar Discipline*, 12 AM. B. NEWS, Apr. 1967, at 1 (stating both that Justice Clark would chair the Committee and that he had announced his retirement from the Supreme Court because of the appointment of his son as Attorney General). “The retirement date has not been announced but is expected to be prior to the convening of the fall court term.” *Id.* Justice Clark left the Supreme Court on June 12, 1967. JERRY GOLDMAN, TOM C. CLARK, at http://www.oyez.org/oyez/resource/legal_entity/86/ (last visited Apr. 7, 2005).

14. See ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (Final Draft 1970) [hereinafter CLARK REPORT].

15. Some might argue that the starting point for the revolution in legal ethics was the ABA’s promulgation of the Model Code of Professional Responsibility in 1969, rather than the issuance of the Clark Report in 1970. The contributions of the Code and its drafters should not be minimized. See Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 25, 43 (2000) (opining that the Code was “really quite useful” in terms of embracing both aspirational

Clark's majority opinion in *Mapp v. Ohio*,¹⁶ which held that evidence obtained by an unconstitutional search is inadmissible in a criminal proceeding, arguably nothing he did led so thoroughly to the reconfiguration of an area of law as his leadership in the field of lawyer accountability.

Thirty-five years after being issued, the Clark Report still reads as a powerful document unequivocally calling for integrity in the legal profession. With straight-forward language and clear prescriptions, the Report, released in 1970, indicted American lawyer disciplinary systems for their many deficiencies. Officially named the Special Committee on Evaluation of Disciplinary Enforcement,¹⁷ the Committee, headed by former Supreme Court Justice Tom C. Clark, called in its Report for prompt and widespread reforms. In no uncertain terms, the Report announced, in words that have often been repeated:

After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a *scandalous situation* that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.¹⁸

The Clark Committee expressed both shock at the numerous weaknesses in state disciplinary regimes as well as confidence that the systems could be fixed. The shock was to some extent feigned, for Justice Clark's personal files show that the Committee had searched for "horribles" that could be used to dramatize deficiencies in lawyer discipline.¹⁹ The Committee's feint notwithstanding, in August 1970, the ABA House of Dele-

principles and mandatory disciplinary standards). Yet, the Code essentially enshrined the status quo. See GEOFFREY C. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 7 (1978) (noting criticism that the 1969 Code was "[m]ade for downstate Illinois in the 1860s"). Cf. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 60 (1986) (stating that "[o]ne group of reform-minded lawyers contended that the Code had been corrupted by revisions made during its drafting process and that opportunities had been missed to make the Code clearer and more responsive to modern practice realities"). In contrast, the Clark Report, on many fronts, sought to break new ground and change the status quo.

16. 367 U.S. 643 (1961).

17. The Committee has become known as the "Clark Committee."

18. CLARK REPORT, *supra* note 14, at 1 (emphasis added).

19. See Resume Minutes of the Special Committee on the Evaluation of Lawyer Disciplinary Enforcement Held in Room 152A in the United States Supreme Court on Saturday November 11, 1967 (Nov. 13, 1967), at 4 [hereinafter Resume Minutes] (copy on file with the author). The minutes state, with respect to one of Justice Clark's speeches about problems in disciplinary enforcement:

The Justice reported that the press in Dallas had highlighted the "horribles" and wondered if he should continue to use this type of material in his speeches. The consensus of the Committee was that these "horribles" were proper and Mr. Hayes [the ABA's Assistant Director of Committee Services] was asked to acquire a set of "horrible" examples for Justice Clark and for the Committee generally.

Id.

gates unanimously approved the Clark Report and its numerous recommendations,²⁰ then proceeded with steps to secure implementation by the individual states.

Today, more than a third of a century later, the issues that the Clark Committee identified are of continuing importance, but the problems have not gone unaddressed. The Clark Report, coupled with the Watergate crisis a few years later, in which so many lawyers were accused or proven guilty of wrongdoing,²¹ ignited a nationwide debate about ethics in the legal profession. That debate then triggered a series of reforms in lawyer discipline²² and in other related areas, including legal education, bar admissions, malpractice liability, continuing legal education, and ethics codes.²³ Those reforms, over subsequent decades, have thoroughly transformed the field of attorney professional responsibility.²⁴

As a result of the Clark Report, “an intense effort began on the part of the individual states and the ABA to improve and standardize the discipline systems.”²⁵ Lawyer ethics and professional accountability are now matters given priority in legal education and in law practice. The public, the media, and lawyers themselves expect errant practitioners to be held accountable. In general, lawyer disciplinary systems throughout the United States now

20. See Michael Franck, *New Life for Lawyer Self-Discipline: The Disciplinary Report of the Clark Committee*, 54 JUDICATURE 383, 383 (1971) (discussing approval of the report).

21. See Robert H. Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 273 (1976) (noting that Watergate caused “the American Bar Association, state and local bar committees, and law schools to seek new ways of educating prospective lawyers with respect to their ethical duties”); Hon. Tom C. Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 249 (1975) (noting that “each new revelation in the national scandal known as Watergate seemed to give the legal profession another mark of shame, for the majority of those who had participated in the cover-up had been trained as attorneys”). Justice Clark concluded that “[a]s a result the profession is now at its lowest ebb in our history.” *Id.* at 260. See also Donald T. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261, 261 (1975) (stating that “approximately half of the individuals indicted or convicted for Watergate-related crimes are lawyers”); JOSEPH A. CALIFANO, JR., *INSIDE: A PUBLIC AND PRIVATE LIFE* 267–308 (2004) (discussing Watergate); FRED J. MAROON, *THE NIXON YEARS 1969–1974: WHITE HOUSE TO WATERGATE* 95–146 (1999) (discussing the Senate Watergate hearings).

22. See Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 3 (1998) (stating that “[b]y the mid-1970s, states began to review lawyer disciplinary systems and initiated substantive and procedural changes”).

23. See Section III *infra*.

24. See Rhonda Richardson Caviedes, Comment, *Remnant of an Attorney Disciplinary Sanction: Which Jurisdictions Impose Automatic Disbarment? What Offenses Warrant the Imposition of an Automatic Disciplinary Sanction?*, 26 J. LEGAL PROF. 195, 197–98 (2002).

In recent years, the number of jurisdictions with automatic disbarment provisions has declined drastically. This is due in part to the reformation of attorney disciplinary systems throughout the United States, which began to occur in the mid-1970s. The catalyst for this change was the release of the American Bar Association's Special Committee on Evaluation of Disciplinary Enforcement Report, which provided an in-depth survey and analysis of attorney disciplinary practices throughout the country. Known as the Clark Report, it shamed the American legal community into taking action to better regulate all facets of the American legal system.

Id. at 197.

25. ABA/BNA, *LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* 101:2001–02 (1994) (discussing steps to implement the Clark Report recommendations).

work efficiently and effectively.²⁶ A 1992 ABA study, known as the McKay Report,²⁷ found that “‘*revolutionary changes*’ had occurred because most states had implemented many of the changes prescribed by the Clark report.”²⁸ Reasonable persons might today differ on issues relating to the funding, mechanics, speed, or scope of lawyer discipline,²⁹ but virtually no one thinks of the present state regimes as “scandalous[ly]” deficient.³⁰ “The Clark Commission’s scathing indictment of lawyer discipline systems is widely credited with moving state courts and the organized bar to action.”³¹ As the McKay Report said, “[t]he Clark Report . . . reshaped lawyer discipline in the United States.”³²

Justice Clark enjoyed enormous respect among lawyers and judges.³³ Throughout his eighteen years of service on the Supreme Court and during

26. Rachna K. Dhanda, Note, *When Attorneys Become Convicted Felons: The Question of Discipline by the Bar*, 8 GEO. J. LEGAL ETHICS 723, 729–30 (1995) (stating that “[s]ince the Clark Committee issued its report in 1970, lawyer disciplinary practices have been transformed into a ‘sophisticated, effective system of self-regulation’”) (quoting Timothy McPike & Mark I. Harrison, *The True Story on Lawyer Discipline*, 70 A.B.A. J., Sept. 1984, at 92). *But see* GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK, & ROGER C. CRAMTON, *THE LAW AND ETHICS OF LAWYERING* 935 (3d ed. 1999).

The course of events since the Clark Report has not been smooth. Most jurisdictions have introduced reforms along the lines recommended in the report. At the same time, the volume and backlog of disciplinary cases has rapidly increased in many jurisdictions, sometimes overwhelming the disciplinary system, as in California in the 1980s and New Jersey in the 1990s. The bar takes some satisfaction in its efforts to improve disciplinary enforcement, but many lawyers and much of the general public remain dissatisfied with many aspects of current disciplinary enforcement.

Id.

27. ABA, *LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT* (1992) [hereinafter MCKAY REPORT].

28. SUSAN R. MARTYN & LAWRENCE J. FOX, *TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY* 49 (2004) (quoting the McKay Report) (emphasis added).

29. *Id.* Martyn and Fox add that the McKay Commission identified some persistent inadequacies in lawyer discipline:

Funding and staffing levels . . . had not kept pace with the growth in the profession. . . . Secret disciplinary procedures and lack of immunity for complainants continued to shield errant lawyers in too many jurisdictions. Equally important, huge numbers of disciplinary complaints filed by clients that alleged neglect, incompetence, or failure to communicate were being dismissed by disciplinary authorities as minor infractions, which meant that nothing was done to correct the lawyer’s behavior or compensate the client.

Id. at 49–50. Martyn and Fox then discuss improvements that have been made during the past ten years, including increasingly common use of reciprocal discipline and interim suspension. *Id.* at 50 (adding that “[t]he scope of public protection has been further expanded by the addition of component agencies, such as client protection funds, fee arbitration, mediation of malpractice complaints, law practice assistance and substance abuse counseling”).

30. *But see* Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TULANE L. REV. 2583, 2591–92 (1996) (noting that “a closer examination of the McKay Report’s follow-up on the Clark Report’s thirty-six problems could just as easily have led to the conclusion that the ‘scandalous situation’ that existed in 1970 continues”).

31. Levin, *supra* note 22, at 3–4. *See also* Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT’L L. 1117, 1136 (1999) (stating that the “stinging criticisms of the Clark report” and other factors “eventually led to the establishment of formal regulatory systems for lawyer discipline”).

32. *See* MCKAY REPORT, *supra* note 27, intro.

33. *Justice Clark Dies*, *supra* note 3, at 985 (quoting Justice Powell attesting to Justice Clark’s great popularity).

his decade of work after leaving the Court, Clark served, in the words of then-Justice William H. Rehnquist, as a “roving ambassador . . . to the legal profession.”³⁴ Having Justice Clark as the head of the Committee that called for urgent reforms in lawyer discipline lent gravity, persuasiveness, visibility, and appeal to the call for “immediate” action.³⁵ It also calmed the nerves of those who worried that the Special Committee’s public hearings would result in bad publicity for the legal profession or damage relations between state and local bar associations on the one hand and the ABA on the other.³⁶

In terms of law reform, the work product of the Clark Committee has been broadly influential. Indeed, more than three decades of reform in the field of legal ethics has been catalyzed by the Clark Report. At the time that it was released, the Report received widespread attention, in part because its use of the word “scandalous” attracted the scrutiny of the media.³⁷ On the day it was issued, the *New York Times* said that the Report “appeared to be a significant, though cautious, step by the national association to influence state and local bar associations to improve their disciplinary procedures.”³⁸ Today, the Clark Report is more often recognized as a landmark in the development of modern legal ethics.³⁹ The Report has been referenced count-

34. *Id.* (quoting Justice Rehnquist). Justice Blackmun similarly described Justice Clark as “a superb ambassador, in the literal meaning of that term, from the Court to lawyers everywhere . . .” *Id.*

35. CLARK REPORT, *supra* note 14, at 1 (stating that deficiencies in lawyer discipline required “immediate attention”).

36. *Cf.* Letter from Frederick H. Norton, Jr., Executive Secretary, Boston Bar Association, to Earle F. Morris, President, ABA (Feb. 6, 1968) (copy on file with the author) (a copy of which was forwarded to Justice Clark). Mr. Norton wrote:

I think that I can safely say that I express the concern of most bar executives who deal with disciplinary matters daily that the ABA’s Special Committee on Evaluation of Disciplinary Enforcement exercises substantial discretion in their regional meetings, especially in the area of publicity. The question of discipline, I am sure the committee realizes, is essentially of state and local nature. If it should be inferred by the press from the proposed public hearings by your committee that the ABA is investigating disciplinary procedures of state and local associations, the result would be unfortunate from a public relations standpoint both as far as the profession and the public are concerned as well as the relationship between the ABA and state and local associations.

Id. at 1–2.

37. *See* Franck, *supra* note 20, at 383–85.

The news media were quick to pick up the term “scandalous,” of course, which embarrassed some members of the profession, and angered others. But even as it signaled a low point . . . the report . . . marked the beginning of a concerted effort toward reform. The very publicity which embarrassed some lawyers moved others to look, listen and become constructively concerned.

Id. at 383. Franck served as Reporter for the Clark Committee. *Id.* at 385.

38. Fred P. Graham, *Bar Panel Urges Action on Ethics*, N.Y. TIMES, Jan. 25, 1970, at 36 (stating that the Report “gingerly skirted the sensitive question of whether misconduct by lawyers was widespread”).

39. Some evidence of this fact is personal and anecdotal. In spring 2004, I served as an expert on legal ethics for the American Bar Association’s Asia Law Initiative in their Legal Reform Program in Mongolia. In the written materials that I prepared for my presentations in Ulaan Baatar, I sought to explain to Mongolian lawyers the many changes that have taken place in the field of legal ethics in the United States during the past 35 years. My goal was to give them ideas as to how they might institutionalize the principles reflected in *Code of Ethics of Mongolian Advocates* that was approved by the Great Khural of the Mongolian Advocates Association on September 19, 2003. I said that reforms in the

less times in court decisions,⁴⁰ textbooks,⁴¹ treatises,⁴² and other publications.⁴³ In numerous law review articles, the Report has been cited⁴⁴ and discussed,⁴⁵ praised⁴⁶ and critiqued.⁴⁷

United States had been catalyzed by two events, the Clark Report and the Watergate scandal. When I later reviewed the materials prepared by Professor Peter A. Joy of Washington University in St. Louis for his presentation on legal ethics as part of the Asia Law Initiative program in Indonesia on February 24 and 25, 2004, I found that his written materials and Power Point presentation also noted the work of the Clark Committee (although without referring to the Committee by name). The fact that two American law professors, acting independently, found it important to mention the findings of the Clark Report to lawyers in developing legal systems in far parts of the globe is evidence of the important role the Report has played in the development of American thinking about issues of professional responsibility.

40. See, e.g., *Bates v. State Bar*, 433 U.S. 350, 387, 396 (1977) (Burger, C.J., concurring in part and dissenting in part) (citing the Clark Report as evidence that the “administrative machinery of both the profession and the courts has proved wholly inadequate to police the profession effectively;” and for the proposition that disciplinary enforcement is “extremely difficult”); *Cantor v. Sup. Ct.*, 353 F. Supp. 1307, 1310–11 (E.D. Pa. 1973) (discussing the Clark Report and disciplinary reforms in Pennsylvania, and quoting ABA President Robert W. Meserve, who had served on the Committee, as stating that “states are moving to give the disciplinary system the muscle it needs to correct deficiencies brought to national attention in the Clark committee study”); *In re Judicial Misconduct*, 2 Cl. Ct. 255, 261 n.8 & n.11 (Cl. Ct. 1983) (quoting the Clark Report and noting that Chief Justice Warren Burger “repeatedly cited the findings . . . and urged that firm action be taken”); *In re Curtis*, No. 02-C-15210, 2003 WL 22187249, at *4 (Cal. Bar. Ct. Sept. 17, 2003) (stating that the “seminal 1970 report . . . concluded that ‘no single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline’”); *Petition of Albert*, 269 N.W.2d 173, 176 (Mich. 1978) (noting the Clark Report’s recommendation regarding the conditions for reinstatement of a disbarred attorney); *Phila. Newspapers, Inc. v. Disciplinary Bd. of Sup. Ct.*, 363 A.2d 779, 781 n.6 (Pa. 1976) (citing the Report and stating that in reinstatement cases “the main thrust of the proceeding is whether the disciplined attorney is now morally fit and technically competent to engage in the practice of law”). *Id.* at 782 n.6 (citing the Report as discussing the privacy interests of practicing attorneys facing disciplinary charges rather than the interests of attorneys petitioning for reinstatement); *McLaughlin v. Phila. Newspapers, Inc.*, 348 A.2d 376, 380 (1975) (citing the Clark Report in a disbarment proceeding); *Id.* at n.11 (Roberts, J., dissenting) (stating that the Clark Report urged wide-ranging reforms because of public mistrust of the legal profession); *Daily Gazette Co. v. Comm. on Legal Ethics of W. Va. State Bar*, 326 S.E.2d 705, 712 & n.12 (W. Va. 1985) (citing the Report in connection with whether disciplinary proceedings should be public).

41. See NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 43 (3d ed. 2004). According to Professor Crystal:

As a result of the Clark Committee’s report, the ABA appointed a standing Committee on Professional Discipline. The committee prepared Standards for Lawyer Discipline, adopted by the ABA in 1979, which followed many of the recommendations made by the Clark Committee. Since then the ABA adopted a new set of provisions, the Model Rules for Lawyer Disciplinary Enforcement.

Id. See also VERN COUNTRYMAN, TED FINMAN, & THEODORE J. SCHNEYER, THE LAWYER IN MODERN SOCIETY 811–12 (1976) (quoting an article about the Clark Report); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 756 (5th ed. 1998) (mentioning the Clark Report and a subsequent ABA evaluation of lawyer discipline); HAZARD, KONIAK, & CRAMTON, *supra* note 26, at 934–35 (discussing the Clark Report); GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 484–89 (2d ed. 1988) (quoting and discussing the Clark Report); MARTYN & FOX, *supra* note 28, at 49 (discussing the Clark Report); MAYNARD E. PIRSIG & KENNETH F. KIRWIN, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (4th ed. 1984) (quoting the Clark Report).

42. See ABA/BNA, LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 101:2001 (1994) (discussing the Clark Commission); WOLFRAM, *supra* note 15, at 83 (stating that disciplinary systems in many states were re-examined in response to the criticisms of the Clark Report).

43. See Franck, *supra* note 20, at 383–89 (summarizing the findings of the Clark Committee); Lawrence F. Gardner, *Report on Disciplinary Enforcement in New Hampshire*, 15 N.H. BAR J. 199, 199–210 (1974) (discussing several recommendations of the Clark Committee and what was needed to implement them); Joryn Jenkin, *Lawyer Regulation*, 43 FED. LAW., May 1996, at 5 (stating that the

Clark Committee determined that “discipline at the bar was virtually non-existent”); Robert B. Kane, *Lawyer Discipline in Florida*, 44 FLA. B.J. 522–23 (1970) (describing the Clark Report as “excellent in all aspects”); Chief Justice Horace Wilkie, *The Role of the Supreme Court in Regulating the Ethics of Lawyers and Judges*, 49 WIS. B. BULL., Feb. 1976, at 23, 26 (stating that “[t]he recommendations of the Clark Committee . . . have been followed in many states”); Richard L. Wright, *Self-Discipline of the Bar: Theory or Fact*, 57 A.B.A. J. 757, 758 (1971) (discussing the Clark Report). “The report of the Clark Committee presented in graphic language the story of where we were in disciplinary enforcement. Generally speaking . . . we have been mired in the mud flats of apathy and inaction.” *Id.*

44. See Aronson, *supra* note 21, at 273 (citing the Clark Report); Walter P. Armstrong, Jr., *The Code of Judicial Conduct*, 26 SW. L.J. 708, 717 (1972) (citing the Clark Report’s discussion of reluctance on the part of lawyers and judges to report instances of professional misconduct as a “major problem”); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1209 n.154 (2003) (citing the Clark Report as evidence that “attorney discipline is, and always has been, a neglected area”); Russell W. Damtoft, Note, *Lawyer Disciplinary Standards: Broad v. Narrow Proscriptions*, 65 IOWA L. REV. 1386, 1399 n.95, 1400 n.111, 1402 n.125 (1980) (citing the Clark Report and noting that it found that complaints against prominent attorneys received too little attention in disciplinary proceedings); Lawrence A. Dubin, *How the Michigan Supreme Court Can Better Protect the Public from Bad Lawyers: The Ball Is in Their Court*, 73 U. DET. MERCY L. REV. 667, 668–69 (1996) (quoting the Clark Report); Christopher S. Lyman, *State Bar Discipline and the Activist Lawyer*, 8 HARV. C.R.-C.L. L. REV. 235, 235 n.2, 239, 251–52 (1973) (citing and quoting the Clark Report); F. Raymond Marks & Darlene Cathcart, *Discipline with the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 193–231 (containing numerous references to the Clark Report); Valerie Swett, *Illinois Attorney Discipline*, 26 DEPAUL L. REV. 325, 325 n.2, 325 n.5, 331 n.31, 356 n.172 (1977) (containing citations to the Clark Report); Note, *Enforcement of Legal Ethics in New Jersey*, 28 RUTGERS L. REV. 707, 707 n.1, 715 n.47, 718 n.61 (1975) (citing the Clark Report); Comment, *Discipline of Attorneys in Maryland*, 35 MD. L. REV. 236, 243 n.40, 244 n.43 (1975) (citing and quoting the Clark Report); Gregory J. Digel, Comment, *Procedures to Disciplining Attorneys in Virginia*, 29 WASH. & LEE L. REV. 439, 439–54 (1972) (containing numerous references to the Clark Report).

45. See, e.g., Daly, *supra* note 31, at 1135 (discussing the work of the “blue-ribbon” Clark Committee); Dhanda, Note, *supra* note 26, at 725–33 (including an extensive discussion of the Clark Report’s recommendation that convicted attorneys be disciplined); David Freedman & Christopher Key, Comment, *The Clark Report and the Revised New Mexico Disciplinary Procedures*, 2 N.M. L. REV. 294, 307 (1972) (indicating that the State had adopted new disciplinary procedures including “almost every recommendation” of the Clark Report); George L. Hampton, *Toward an Expanded Use of the Model Rules of Professional Conduct*, 4 GEO. J. LEGAL ETHICS 655, 656–57 & n.9 (1991) (discussing the findings of the Clark Report); Gerald J. Kross, Recent Decision, *Professional Ethics*, 36 DUQ. L. REV. 651, 658 (1998) (discussing the historical context of the Clark Report); Leslie C. Levin, *The MPRE Reconsidered*, 86 KY. L.J. 395, 400 n.19 (1998) (citing the report as an example of the profession’s manner of addressing problems in the regulation of lawyers); Robert J. Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 419 nn.51 & 53 (citing the Clark report and discussing the views of Justice Clark with regard to disciplinary enforcement); R. F. Outcault, Jr. and George E. Peterson, *Lawyer Discipline and Professional Standards in California: Progress and Problems*, 24 HASTINGS L.J. 675, 676 (1973) (stating that “[t]he well-noted conclusions of the Clark Report on the present status of disciplinary enforcement have prompted a general re-examination by state bars of methods of lawyer discipline”); Michele J. Woods, *The Adoption of the ABA Standards for Imposing Lawyer Sanctions by the Alaska Supreme Court—In re Buckalew*, 6 ALASKA L. REV. 365, 367 & n.18 (1989) (stating that the Clark Report “recognized the need for standards for enforcing the existing ethical rules formulated by the ABA”); Douglas H. Balcombe, Note, *Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility*, 50 DENVER L.J. 207, 212 n.34 (1973) (discussing changes that were “undoubtedly influenced by recommendations” made in the Clark Report); *The Bar and Watergate: Conversation with Chesterfield Smith*, 1 HASTINGS CONST. L.Q. 31, 37 (1974) (discussing the cost of implementing the Clark Committee recommendations).

46. See, e.g., Burton C. Agasta, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 HOFSTRA L. REV. 249, 253 (1975) (referring to the “influential Clark Committee Report”); Paul A. Demoga, Note, *Achieving Effective Bar Discipline*, 6 SUFFOLK U. L. REV. 974, 987 (1972) (opining that the Clark Committee offered “viable solutions”); Levin, *supra* note 22, at 2–3 (stating that the Clark Report is widely credited with instigating the reform of lawyer discipline); Weckstein, *supra* note 21, at 263 (citing the “excellent” report of the Clark Committee).

“The *Clark Report* signaled the emergence of a new age in lawyer discipline”⁴⁸ But beyond that, the work of the Clark Committee precipitated a series of other reforms and developments that have entirely reshaped the field of attorney professional responsibility. Consequently, it is likely that no other public service by a former Supreme Court Justice has had a greater impact on American society or done more to improve public confidence in the administration of justice than Tom Clark’s leadership in the field of legal ethics.

II. THE CLARK COMMITTEE AND ITS REPORT

The Clark Committee was created at the ABA Midyear Meeting in February 1967. Its charge was “[t]o assemble and study information relevant to all aspects of professional discipline, . . . and to make such recommendations as the Committee may deem necessary and appropriate to exact the highest possible standards of professional conduct and responsibility.”⁴⁹

The Committee, which included seven men,⁵⁰ obviously took its work seriously. Prior to the appointment of the Clark Committee, the system of lawyer discipline had received “little attention,”⁵¹ and reliable data were unavailable.⁵² The Committee had to gather the facts,⁵³ analyze them, craft

In an historical essay marking the 100th anniversary of the Arkansas Bar Association, one of its former presidents recently wrote:

[W]e can thank the late Justice Tom C. Clark of the United States Supreme Court for the stimulus, the assistance, and the encouragement which enabled both the Arkansas Supreme Court and the Arkansas Bar to develop an effective and efficient disciplinary system in which all Arkansas attorneys can take pride.

Jack Deacon, *United States Supreme Court Justice Tom C. Clark Helps Establish a Disciplinary System for Arkansas Lawyers*, 51 ARK. L. REV. 660, 661 (1998).

47. Interestingly, the only negative assessment that I have found of the Clark Report was written by one of my faculty colleagues when he was a law student. See Douglas R. Haddock, *The Legal Profession’s Attempt to Discipline Its Members: A Critique of the Clark Report*, 1970 UTAH L. REV. 611 (offering extensive critical analysis and finding numerous shortcomings).

48. Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 926 (1994).

49. CLARK REPORT, *supra* note 14, at xiii.

50. Justice Clark served as chair of the Committee. The members included John G. Bonomi (New York, New York), Joe J. Harrel (Pensacola, Florida), Fred B. Hulse (Sedalia, Missouri), Robert Meserve (Boston, Massachusetts), David W. Richmond (Washington, D.C.), and John A. Sutro (San Francisco, California). Michael Franck (Lansing, Michigan) was the Reporter for the Committee. *Id.* at iii.

51. ABA/BNA, *LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 101:2001* (1994) (stating that “[p]rior to 1967, little attention was paid by either the profession or the individual states to lawyer discipline”); CRYSTAL, *supra* note 41, at 42 (stating the point with reference to the appointment of the Clark Committee in 1967).

52. The Clark Committee reported, “[s]tatistics are unavailable because many disciplinary agencies keep no records at all and a substantial proportion of those that do are inconsistent, the quality and extent of their records depending largely on the conscientiousness of the chairman in any given year.” CLARK REPORT, *supra* note 14, at 2. Early during the work of the Committee, Justice Clark lamented, “[w]e started out and of course we had no information as to the various states. There was no information concerning the disciplinary procedures. . . . We found out there was a hodgepodge. . . . As a consequence, it is difficult to say just what the situation is.” Tom C. Clark, *Address*, 47 NEB. L. REV. 359, 367 (1968) [hereinafter Clark, *Address*]. See also Mr. Justice Clark, *Disciplinary Procedures for the Bar*, 39 PA. B. ASS’N Q. 484, 484 (1968) [hereinafter Clark, *Disciplinary Procedures*] (discussing the difficulties of collecting information about the state of lawyer discipline in the United States).

recommendations, and then persuade the profession to follow the Committee's advice. Justice Clark was personally involved in all phases of the work,⁵⁴ approving the survey instruments⁵⁵ and correspondence,⁵⁶ urging bar leaders to answer queries⁵⁷ and complementing their work,⁵⁸ arranging meetings at the Supreme Court⁵⁹ and other locations, securing funding for the Committee,⁶⁰ persuading lawyers to attend regional meetings,⁶¹ and gen-

53. Cf. Resume Minutes, *supra* note 19, at 1 (copy on file with the author) (stating that various questionnaires had been sent to integrated and non-integrated bar associations).

54. Justice Clark's involvement even extended to reviewing and correcting the minutes of the Committee meetings. See Memorandum from David A.J. Hayes, Jr., to the Special Committee on the Evaluation of Lawyer Disciplinary Enforcement (Nov. 14, 1967) (copy on file with the author) (with handwritten annotation by "TCC," indicating to Hayes which Committee member had been omitted from the list of those present).

55. The Committee held its first organizational meeting in Washington on May 17, 1967. "At this meeting, inter alia, a sub-committee was appointed to draft a questionnaire to be sent principally to state and local bar associations which are responsible for professional discipline." Report of Special Committee on Evaluation of Disciplinary Enforcement, submitted by Tom C. Clark, Chairman, June 9, 1967 (copy on file with the author). The Committee had a clear sense of the types of problems it was likely to document through its research. The questionnaires were intended to pinpoint problems in "funding and staffing grievance committees; lawyer registration; time lags in discipline procedures; inadequate contact with possible sources of information on lawyer misconduct; records; lawyer reluctance to 'inform' on other lawyers; lack of client security funds; reinstatement of disbarred lawyers." *Clark Committee Schedules Regional Meetings as Part of Evaluation of Disciplinary Enforcement*, 12 AM. B. NEWS, Dec. 1967, at 1, 1.

56. See Letter from (presumably) Alice L. O'Donnell, Justice Clark's secretary, to David Hayes, ABA (Dec. 30, 1967) (copy on file with the author) (stating "the Justice would like to see anything and everything that goes out over his name—before it goes out"). The letter also queried whether the Justice would receive financial reports on the status of the Committee. *Id.*

57. Cf. Resume Minutes, *supra* note 19, at 2 (copy on file with the author) (stating that state and local bar associations had nominated liaison members to work with the Clark Committee).

58. See, e.g., Letter from Tom C. Clark, U.S. J., to Robert B. Williamson, Sup. Jud. Ct. of Me., (Jan. 15, 1968) (copy on file with author) ("I was particularly pleased to read [John Ballou's] frank comment that the Bar has, in the past, not always met its obligation to 'keep its house in order.'").

59. Cf. Letter from Tom C. Clark, U.S. J., to Garrett H. Elmore, Special Counsel, State Bar of Cal. (Apr. 18, 1967) (copy on file with the author) (discussing a meeting scheduled for May 1967); Resume Minutes, *supra* note 19 (copy on file with the author) (stating date and location of meeting).

60. Justice Clark personally pleaded the case for adequate funding of his Committee's work. See Letter from (apparently) Tom C. Clark, U.S. J., to Bert H. Early, Exec. Dir., ABA 1-2 (Mar. 14, 1968) (copy on file with author).

[T]he Committee plan is to issue a full and detailed report, perhaps in the form of a legal monograph which can and I believe should be published. . . . I am confident from my discussions that there will be a great demand for a report. . . . Michael Franck, of the staff of the Association of the Bar of the City of New York, who played an active role in the New York Regional meeting, and who, I am advised, has an excellent background as a legal writer and researcher, is available to do the additional Committee work on an hourly basis. I am sending Mr. Hayes a copy of this letter and requesting that he discuss compensation for Mr. Franck with you and Noble Stephens. My estimate at this time is that we will need an additional \$10,000 to carry us through this Association year (July 1, 1967 - June 30, 1968). . . . As for the future, I estimate that we will continue to need \$20,000 a year to complete this important work in a proper and meaningful manner. Without these funds the Committee could make only a very cursory and superficial examination of the many problems we are uncovering. With adequate funds we can come up with a report and recommendations that will be of considerable help to both the bench and the bar and in an area where it is badly needed.

Id.

61. Regional meetings were held in New York, Washington, Miami, San Francisco, Boston, Dallas, and Chicago. See Graham, *supra* note 38, at 36 (discussing the hearings).

It appears that Justice Clark individually urged attendance at the regional meetings by penning personal notes on letters to leaders of the legal profession. The Clark files at the University of Texas

erally promoting the importance of the project.⁶² Justice Clark not only read the materials gathered by the Committee, but personally responded to bar leaders who gathered the information, and he expressed interest in learning additional details relating to their suggestions.⁶³ On occasion, he also directly apologized to persons with concerns about the format of the regional meetings.⁶⁴

In addressing the problems of lawyer discipline, Justice Clark also manifested a willingness to “think outside the box.” For example, he entertained, on at least one occasion, the idea of using a type of ABA strike-force to generate bad publicity that would embarrass local bar associations into acting on pending grievances⁶⁵—an approach that the Clark Committee ultimately found unnecessary. Justice Clark dedicated himself to the task of reforming professional discipline, because he believed that it had merit. In his words, “[t]he work of this Committee, I believe, is one of the most important activities ever undertaken by the ABA for the benefit of the profession and the public.”⁶⁶

Justice Clark actively participated in reviewing the data gathered by the Committee. Shortly after he was appointed to head the evaluation of disci-

contain original letters dated January 26, 1968, to Hon. J. Edward Lumbard (Chief Judge United States Court of Appeals), William T. Gossett (President-Elect, American Bar Association), Bernard G. Segal (Philadelphia, Pennsylvania), Lewis F. Powell, Jr. (Richmond, Virginia), and Whitney North Seymore (New York, New York) signed by Justice Clark bearing varied personal annotations by Justice Clark. A note on the letters in handwriting states “[d]id not mail any in this group.” (Copies on file with the author). It seems likely that similar letters may have been written to other persons incidental to the activities of the Committee.

62. Resume Minutes, *supra* note 19, at 4 (copy on file with the author) (“Justice Clark reported that he had given speeches on the work of the Committee and the problem of disciplinary enforcement generally, in Omaha on October 19, 1967, and in Dallas on October 20, 1967.”).

63. See, e.g., Letter from Tom C. Clark, U.S. J., to Frank W. Marsalek, esq. 1 (Jan. 13, 1968) (copy on file with the author) (“Your report was read with considerable interest . . . I should be interested in discussing it with you when next you are in Washington. I hope you will keep this in mind and give me a call at the Court.”); Letter from Tom C. Clark, U.S. J., to Angelo E. Trogan 1 (Jan. 13, 1968) (copy on file with the author) (“If you would be good enough to send me in more detail what some of your ideas are I shall be glad to present them to the Committee membership for consideration.”).

64. See Letter from Tom C. Clark, U.S. J., to John B. Walsh, General Counsel, B. Ass’n of Erie County (Mar. 20, 1968) (copy on file with the author) (“My understanding was the same as yours, i.e., it would be a closed session where every grievance committee could speak up freely. I agree that the ‘canned speeches’ are of little assistance. . . . I am sure sorry. My best wishes. Forgive me!”)

65. See Letter from (apparently) Tom C. Clark, U.S. J., to John D. Randall 1–2 (Feb. 1, 1968) (copy on file with the author).

Our staff says that one of the most recurring problems has been the refusal of lawyers to cooperate, first, in the filing of complaints against known violators and, second, after one does get filed, then rushing to a lawyer’s rescue, even though they know him to be guilty. I think if we had an ABA-Oversee committee that could fly into a town after a local grievance committee had failed to act, and hold a hearing, in public, it would bring about sufficient pressure on the local committee so that it would take some action. . . . I believe that after this occurred two or three times that state committees would get busy because they would much prefer to clean up their own house than have it smeared over the front pages of a newspaper by the action of an out-of-state national group.

Id.

66. See Letter from (apparently) Tom C. Clark, U.S. J., to Bert H. Early, Executive Director, ABA 4–5 (Mar. 14, 1968) (copy on file with the author) (handwritten draft; final text of the letter used different language to convey the importance of the project).

plinary enforcement, Justice Clark contracted hepatitis in Bangkok during an around-the-world trip which he had scheduled to begin shortly after he left the Supreme Court.⁶⁷ Upon returning home prematurely, he reviewed the data and information assembled by the Special Committee during periods of required bed rest.⁶⁸ This was typical of Justice Clark. In the words of John P. Frank, Justice Clark, by nature, was “more a plowhorse than a showhorse.”⁶⁹ “Clark did not glide on the wave; he rowed the boat.”⁷⁰ He was “incapable of avoiding attention to details.”⁷¹

While the Report was being prepared and after it was issued, Justice Clark delivered speeches⁷² and wrote articles⁷³ to reinforce its message, urging lawyers to assist in the work of disciplinary reform.⁷⁴ Of course, other persons joined with Justice Clark to secure for the Committee the cooperation of lawyers⁷⁵ and to implement the Report’s recommendations.⁷⁶ Yet, Justice Clark was far more than a figurehead. His personal files relating to the project are voluminous, and they show that he was deeply involved in the project to reform lawyer discipline across America.⁷⁷

67. See Letter from Tom C. Clark, U.S. J., to Earl Morris, President-elect, ABA (May 4, 1967) (copy on file with the author) (describing trip).

68. See Clark, *Address*, *supra* note 52, at 368. (stating “I have been reading the papers in Washington. I don’t have much to do, since the doctors say I have to go to bed every afternoon for three hours, but read papers.”).

69. Frank, *supra* note 7, at 43 (describing Justice Clark’s work in the field of judicial administration).

70. *Id.* at 44.

71. *Id.* at 45.

72. See Howard W. Brill, *The Arkansas Supreme Court Committee on Professional Conduct 1969-1979: A Call for Reform*, 33 ARK. L. REV. 571, 574–96 (1980) (containing numerous citations to the Clark Report and discussing Justice Clark’s work in Arkansas to promote the recommendations of the committee); Clark, *Disciplinary Procedures*, *supra* note 52, at 485 (stating that “[a] disgraceful state of affairs is found in a complete breakdown of central reporting of disciplinary action” and urging that Pennsylvania investigate its system of lawyer discipline).

73. See Clark, *supra* note 21, at 259 (referring to the recommendations of the Clark Committee); Tom C. Clark, *Changing Times*, 1 HOFSTRA L. REV. 1, 6 (1975) [hereinafter Clark, *Changing Times*] (calling for the Bar to correct its “laissez-faire” attitude to lawyer discipline).

74. See Clark, *Address*, *supra* note 52, at 369 (discussing the Committee and its work in a speech to Nebraska lawyers).

I think it is a very important assignment that [ABA President] Orisin Marden has given me. I have a very fine committee. . . . We intend to do something about [lawyer discipline]. We need the help of the lawyers.

. . . .

. . . I want to help on this. Our committee wants to help on it, and I want you to help.

I want you to help *me* so that I might help *you*.

Id.

75. The Clark Committee sometimes had difficulty securing the cooperation of lawyers. See Letter from Orison S. Marden, Last Retiring President of the ABA, to Tom C. Clark, U.S. J., (Feb. 7, 1968) (copy on file with the author) (stating “I am distressed to learn that you are finding the bar uncooperative. . . . I talked today with Earle Morris and we will do our level best to impress upon the presidents of state bar associations and principal local bar associations that they must give you their full cooperation.”). In the Clark papers, the word “must” was underscored twice in blue ink. *Id.*

76. Wright, *supra* note 43, at 758 (stating that “[i]mmediately after its action on the report and recommendations of the Clark Committee, the [ABA] House of Delegates created a Special Committee . . . to bring about [the] prompt implementation of the recommendations”).

77. The files are now housed on the sixth floor of the Tarlton Law Library at the University of Texas School of Law in Austin.

At the same time, Justice Clark was the right public face for the Committee. He was trusted, respected, and extraordinarily well-known and well-liked in the legal profession. Justice Clark was described by pillars of the profession as a “crusader”⁷⁸ and “literal missionary”⁷⁹ for the better administration of justice.⁸⁰ At the time of his retirement from the Court in 1967, Chief Justice Earl Warren wrote that Justice Clark had “worked prodigiously to awaken lawyers and judges to a realization of their responsibilities,”⁸¹ and John P. Frank concluded that “[n]o other single person has ever had so wide a consequence on the administration of justice among the various states.”⁸² Ten years later, at the time of Justice Clark's death in 1977 at age 77,⁸³ Chief Justice Warren Burger said, “[n]o one in the past thirty years has done more than Tom Clark to improve justice in our country, and no one had such universal esteem of the lawyers and judges of this country.”⁸⁴

The Clark Report is a compact but passionate document approximately 200 pages in length. It analyzes and recommends appropriate remedial action to address 36 different problems that the Committee identified in the field of lawyer discipline. With stories from real life written in anonymous terms to protect the Committee's sources,⁸⁵ the Report is packed with vivid vignettes that illustrate the deficiencies of attorney discipline in the late 1960s. In reporting this evidence, the tone of the Report is often one of amazement,⁸⁶ but from front to back, the document is imbued with the Committee's confidence that systems of lawyer discipline could be made to function in ways that would both protect the citizenry and treat lawyers fairly. The Committee emphasized that “the public dissatisfaction with the bar and the courts [was] much more intense than [was] generally believed within the profession.”⁸⁷

The Clark Committee catalogued numerous deficiencies. It found, for example:

78. Warren, *supra* note 6, at 1 (describing Justice Clark as “a crusader for the better administration of justice”).

79. *Justice Clark Dies*, *supra* note 3, at 985 (quoting Chief Justice Warren Burger as stating that “Clark was a literal missionary for the improvement of judicial administration”). See also *id.* (quoting Justice Potter Stewart as stating that Justice Clark worked tirelessly for “fair administration of federal justice”).

80. In less lofty terms, Justice Clark was also described as “the traveling salesman of justice.” Frank, *supra* note 7, at 8.

81. Warren, *supra* note 6, at 1.

82. Frank, *supra* note 7, at 56.

83. Tom C. Clark was born September 23, 1899, and died on June 13, 1977, ten years and one day after retiring from the Supreme Court. GOLDMAN, *supra* note 13.

84. *Justice Clark Dies*, *supra* note 3, at 985.

85. See CLARK REPORT, *supra* note 14, at xvii (discussing methodology).

86. For example, the Committee states:

[A] majority of the states do not take disciplinary action against attorneys convicted of federal income tax violations. Although these states invariably prosecute an attorney guilty of converting the funds of a single client, they somehow have concluded that conversion of funds belonging to all the citizens of the United States does not constitute moral turpitude and, consequently, does not warrant disciplinary action.

Id. at 3.

87. *Id.* at 2.

- that “in some instances disbarred attorneys [were] able to continue to practice in another locale;”⁸⁸
- that “lawyers convicted of serious crimes [were] not disciplined until after appeals from their convictions [were] concluded,” often years following the misconduct;⁸⁹
- that “even after disbarment lawyers [were] reinstated as a matter of course;”⁹⁰
- that lawyers failed to report violations of the ethics code or criminal law to disciplinary authorities;⁹¹
- that lawyers would not cooperate in disciplinary proceedings against other lawyers but instead would use their influence “to stymie the proceedings;”⁹²
- that in small towns and cities, disciplinary authorities would “not proceed against prominent lawyers or law firms;”⁹³
- that state disciplinary agencies were “undermanned and underfinanced, many having no staff whatever for the investigation or prosecution of complaints;”⁹⁴
- that “[l]ack of adequate financing [was] the most universal and significant problem in disciplinary enforcement;”⁹⁵ and
- that overall, “the present enforcement structure [was] failing to rid the profession of a substantial number of malefactors.”⁹⁶

Likewise, the prescriptions called for by the Clark Committee were extensive. The Committee recommended:

- that lawyer discipline in the various states “be centralized by vesting exclusive disciplinary jurisdiction in the state’s highest court under a procedure promulgated and supervised by the court in the exercise of its inherent power to supervise the bar;”⁹⁷

88. *Id.* at 1.

89. *Id.*

90. CLARK REPORT, *supra* note 14, at 1.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 2.

95. CLARK REPORT, *supra* note 14, at 19–20 (finding that “disciplinary agencies throughout the country [were] handicapped severely by the lack of financial resources”).

96. *Id.* at 2–3.

97. *Id.* at xiv. The Committee also found that “[t]he legislative process itself is a far less desirable forum for meaningful reform of the disciplinary structure than judicial deliberation in chambers.” *Id.* at 12. In the view of the Committee, judges were more immune from political pressures and less susceptible to the “element of compromise inherent in the legislative process” *Id.* Interestingly, the Committee “strongly urge[d] courts having disciplinary jurisdiction to exercise their inherent power and to strike down any attempt by the legislature to interfere with their exclusive jurisdiction over the discipline of attorneys.” CLARK REPORT, *supra* note 14, at 13. It is difficult to imagine this type of activist recommendation receiving the type of unanimous approval as that which the Clark Report received from

- that “[a]ll matters involving allegations of misconduct on the part of an attorney [be] submitted initially to a professional staff for investigation;”⁹⁸
- that disciplinary staffs be adequately funded;⁹⁹
- that procedures be simplified,¹⁰⁰ unnecessary formalities eliminated,¹⁰¹ and matters concluded more promptly;¹⁰²
- that membership on disciplinary committees be more representative of the diversity of the profession;¹⁰³
- that a “permanent record of every complaint” be maintained;¹⁰⁴
- that there be improved “exchange of information between disciplinary agencies concerning discipline imposed on attorneys admitted . . . in more than one jurisdiction”¹⁰⁵ and imposition of “reciprocal discipline;”¹⁰⁶
- that an attorney be “suspended forthwith” upon conviction of a serious crime;¹⁰⁷
- that “attorneys who are disbarred or suspended [be required to] notify all clients within a specified time of their inability to continue to represent them and the necessity for promptly retaining new counsel;”¹⁰⁸
- that a person disbarred either not be readmitted or be readmitted only after the maximum period for suspension had elapsed, and then only upon an “affirmative showing by the applicant that he possesses the requisite qualities of character and learning;”¹⁰⁹
- that sanctions be imposed, “in appropriate circumstances, against attorneys and judges who fail to report attorney misconduct of which they are aware;”¹¹⁰
- that attorneys be required to maintain accurate records of client funds, which would be audited annually;¹¹¹
- that judicial training courses be expanded “to include instruction in substantive and procedural problems in disciplinary enforcement;”¹¹² and

the ABA House of Delegates in 1970. This may be evidence of the gravity with which the problems of lawyer discipline were perceived at that time.

98. *Id.* at xiv.

99. *Id.* at 20.

100. *Id.* at 30–31.

101. *Id.* at 71.

102. CLARK REPORT, *supra* note 14, at 30–31.

103. *Id.* at 46 (referring to “single and small-firm practitioners, members of minority groups and attorneys engaged in negligence and criminal law” practices).

104. *Id.* at 78.

105. *Id.* at 2.

106. *Id.* at 121.

107. CLARK REPORT, *supra* note 14, at 4.

108. *Id.* at 148.

109. *Id.* at 151.

110. *Id.* at 167.

111. *See id.* at 173.

- that “procedures for arbitrating fee disputes” be created.¹¹³

III. THIRTY-FIVE YEARS OF REFORM IN LEGAL ETHICS

It has been roughly thirty-five years since the Report of the Clark Committee and the Watergate crisis. During those years, there have been numerous important reforms in the field of legal ethics.¹¹⁴ Some of these developments are directly linked to the Clark Report, such as the reform of lawyer discipline. Other developments, such as changes in legal education, can be tied to Justice Clark individually, who personally called for such reforms.¹¹⁵ But even where it is not possible to link directly the developments noted below to Justice Clark’s work on or off the Committee, it is clear that those changes are part of a larger wave of attorney ethics reform that was initially instigated by the publication of the Clark Report. A discussion of the most notable recent developments in legal ethics follows.

A. Modernization of Lawyer Discipline

The enforcement of ethics rules through disciplinary actions against attorneys has been professionalized in most American states.¹¹⁶ Such systems no longer rely exclusively upon volunteer prosecutors to do the work,¹¹⁷ as was often the case prior to the Clark Report.¹¹⁸ Rather, in most states, there are now professional prosecutors who are employed to investigate client complaints and litigate cases against attorneys when facts warrant prosecution.¹¹⁹

112. CLARK REPORT, *supra* note 14, at 175.

113. *Id.* at 186.

114. See generally Carol M. Langford & David M. Bell, *Finding a Voice: The Legal Ethics Committee*, 30 HOFSTRA L. REV. 855, 859 (2002) (discussing changes in the legal profession). “The past thirty-five years have witnessed two key developments in the regulation of lawyers. First, the professional responsibility rules have evolved from hortatory norms to enforceable disciplinary standards. Second, state systems overseeing the regulation and discipline of lawyers have become professionalized.” *Id.*

115. See Section III-B *infra* (discussing ethics education in law schools).

116. See ABA/BNA, LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 101:2003 (1994) (stating that “most states have an office of discipline counsel staffed by paid employees”); see also Allen Blumenthal, *Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession*, 3 KAN. J.L. & PUB. POL’Y 6, 6 (1994) (stating that “[t]he legal profession has entered a new era . . . [with] a much more active and professional formal attorney disciplinary system”).

117. *Cf.* *Bates v. State Bar*, 433 U.S. 350, 396 (1977) (Powell, J., concurring in part and dissenting in part) (stating that disciplinary proceedings traditionally were “conducted initially by voluntary bar committees subject to judicial review”).

118. See CLARK REPORT, *supra* note 14, at 31 (stating that “[m]uch of the delay inherent in the disciplinary process results from reliance on volunteer practitioners to process, investigate and prosecute complaints of attorney misconduct”).

119. See ABA/BNA, LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 101:2004 (1994) (“The disciplinary agency generally hires a lawyer or lawyers to act as counsel. . . . This lawyer serves as prosecutor for the agency and makes initial determinations about complaints, evidence, jurisdiction, and further action on the matter.”)

Ordinary attorneys still volunteer their time to help with the disciplinary process.¹²⁰ These attorneys often sit on committees to make a factual determination as to whether the ethics code has been violated. This is precisely what the Clark Committee envisioned when it wrote:

[T]he volunteer, practicing attorney should [not] be removed from the disciplinary process. To the contrary, the employment of a full-time professional staff to investigate and prosecute complaints would permit the volunteer members of inquiry and hearing committees to devote their full attention to evaluating cases developed by the staff, a role that should remain the responsibility of practicing attorneys who are fully conversant with the problems of day-to-day practice.¹²¹

However, the Clark Committee was emphatic that engagement of a well-trained professional staff was essential. The Clark Committee proposed the “[d]evelopment of courses in enforcement practices, procedural manuals and other procedures for training professional disciplinary agency staffs”¹²² The Committee’s Report stated “[t]he absence of an adequate professional staff, and in many jurisdictions the absence of any staff, presents an insurmountable obstacle to effective disciplinary enforcement.”¹²³

The Committee found that lack of professional staffs resulted in delay, nonuniform standards, lack of expertise, inability to conduct investigations, inadequate record keeping, and procedures violative of due process.¹²⁴ In most jurisdictions these findings have been heeded and professional staffs now play an important role in the disciplinary process.

In many states today, clients are clearly told that they have a right to file a grievance against a lawyer.¹²⁵ Once a complaint is received by disciplinary authorities, typically the lawyer has 30 days to file a response.¹²⁶ Attorneys have an ethical duty to cooperate with a grievance investigation, and failure to do so is itself a basis for discipline.¹²⁷

120. The Model Rules of Lawyer Disciplinary Enforcement recommend that “hearing committees consist of two lawyers and one non-lawyer.” *See id.* at 101:2005.

121. CLARK REPORT, *supra* note 14, at 55.

122. *Id.* at 57.

123. *Id.* at 48.

124. *Id.* at 49–54 (discussing failings).

125. For example, in the State of Texas, the client’s right to file a grievance must be spelled out in the written fee agreement between the lawyer and client. *See* ROBERT P. SCHUWERK & LILLIAN B. HARDWICK, HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 17.03, at 830 (2003). If the lawyer does not put that provision in the contract, the lawyer must provide clients with a brochure about the disciplinary system or post a sign in the law office prominently informing clients that they can complain to authorities if they believe the ethics code has been violated. *Id.* at 830.

126. *See id.* at 820 (discussing Texas).

127. *See* Debra T. Landis, Annotation, *Failure to Co-operate with or Obey Disciplinary Authorities as Ground for Disciplining Attorney—Modern Cases*, 37 A.L.R.4th § 2(a), at 646 (2004). Landis states that “[m]any jurisdictions have adopted disciplinary rules . . . requiring an attorney’s co-operation during the disciplinary process, subject to the privilege against self-incrimination . . . [and] the vast majority of

In many states, the filing of a grievance is completely privileged.¹²⁸ The client has absolute immunity from liability to the lawyer for damages resulting from the filing. A lawyer cannot sue a client to retaliate for the filing of a grievance. The Clark Committee, recognizing a division of authority among the states, with some according complainants only a qualified privilege defeasible by proof of malice, strongly recommended that states provide any individual who files a disciplinary complaint with absolute immunity from suits.¹²⁹ The Committee stated:

A policy of conferring absolute immunity on the complainant encourages those who have some doubt about an attorney's conduct to submit the matter to the proper agency, where it may be examined and determined. A complainant's ability to address such a forum without fear of suit is essential if the profession is to maintain high standards.¹³⁰

The changes wrought by the Clark Report in the field of lawyer discipline have been chronicled elsewhere.¹³¹ Suffice it to say that when one

cases explicitly or implicitly hold that an attorney's failure to cooperate with disciplinary authorities may be a ground for disciplining counsel" *Id.*

128. See, e.g., *Tobkin v. Jarboe*, 710 So. 2d 975, 977 (Fla. 1998). The *Tobkin* court stated that "an individual who files a complaint against an attorney and makes no public announcement of the complaint, thereby allowing the grievance procedure to run its natural course, is afforded absolute immunity from a defamation action by the complained-against attorney." *Id.* See also Wendy Evan Lehmann, *Testimony Before or Communications to Private Professional Society's Judicial Commission, Ethics Committee, or the Like, as Privileged*, 9 A.L.R.4th § 4, at 807 (2004) (discussing communications with state bar associations or their committees).

129. CLARK REPORT, *supra* note 14, at 74.

130. *Id.* at 76.

131. In 1992, the ABA McKay Report found that:

Today . . . [most states] have eliminated duplicative procedures. In over half the states, disciplinary hearings are public. Several national organizations exist, including the ABA Center for Professional Responsibility, the ABA Standing Committee on Professional Discipline, and the National Organization of Bar Counsel. These groups formulate standards, conduct research, present educational programs, compile statistics, and consult with disciplinary officials. The ABA Center and the Bureau of National Affairs publish a comprehensive reference manual on professional responsibility. The Center also operates a national data bank on disciplined lawyers. In the two decades since the Clark Report, most states and the ABA have adopted most of its recommendations.

MCKAY REPORT, *supra* note 27, intro. The McKay Report added:

At the local, state, and national levels, the profession has continually reviewed and improved lawyer disciplinary systems since the Clark Report. At the request of state bar associations and state high courts, the ABA Standing Committee on Professional Discipline has evaluated more than thirty disciplinary agencies and made recommendations for improvement. The Committee also provides technical and research assistance in drafting disciplinary rules. The Committee's ongoing evaluation program not only assists state high courts, it also provides the Committee with feedback and new ideas to improve ABA disciplinary policy. Since the Clark Report, the Committee has formulated and proposed many significant improvements to ABA policy, including expungement of disciplinary records, trust account record-keeping rules, Standards for Imposing Lawyer Sanctions, and numerous technical improvements to the Model Rules for Lawyer Disciplinary Enforcement.

This cooperation among local, state, and national bar associations and state high courts has resulted in constant improvement and refining of disciplinary procedures.

Id. See also Levin, *supra* note 22, at 3-5. According to Professor Levin:

reads the list of recommendations made by the Clark Committee at the vantage point of thirty-five years, it is easy to see how so many of the things that the Clark Report had urged have become standard features of American lawyer disciplinary systems.¹³²

B. Attention to Professionalism in Legal Education

Before 1970, there were very few law school classes devoted solely to the subject of attorney ethics.¹³³ As Justice Clark had noted, new lawyers of that era were often unprepared to meet the professional responsibility issues they would confront in practice.¹³⁴

The Clark Report omitted any assessment of the “adequacy of the law school courses”¹³⁵ but called for an examination of that subject.¹³⁶ The Report also urged that there should be “[g]reater emphasis in law school . . . on the individual attorney’s responsibility to assist the profession’s effort to police itself by reporting instances of professional misconduct to the appropriate disciplinary agency”¹³⁷

Both before and after the Report was issued, Justice Clark personally argued for extensive reforms in legal education.¹³⁸ He wrote:

Since the Clark Report, . . . [s]tate courts have become more actively involved in lawyer discipline. Most courts appoint members of disciplinary boards rather than rely on bar organizations for that function. Lawyer discipline systems are better funded and more public than they used to be. More complaints received by disciplinary agencies are investigated Many of the state discipline systems are better equipped to deal with the most common client complaints about lawyers—such as fee disputes and failures to communicate—that often were not formally addressed by lawyer discipline systems. Although serious questions remain concerning whether the current state lawyer discipline systems are as effective as they could be, there is little question that these systems are better in certain respects than the systems studied by the Clark Commission.

Id.

132. See Caviedes, *supra* note 24, at 197–98. The author states “[s]ince the release of the Clark Report, attorney disciplinary systems throughout the country have been modernized in an effort to restore public faith and maintain professional integrity. Many of the substantive and procedural changes that were made were modeled after standards promulgated by the ABA.” *Id.* at 198.

Cf. Devlin, *supra* note 48, at 926 (stating that “[w]ith some modifications, the Clark Report’s model disciplinary structure has remained the ABA model structure for lawyer discipline”).

133. Cf. Clark, *supra* note 21, at 254 (stating that “when I graduated [from the University of Texas law school] in 1922 . . . [e]thics lessons were taught in the courtroom and not in the classroom”).

134. Justice Clark attributed this fact to changes in the nature of lawyer preparation. He wrote:

In fifty years, we have gone from a profession trained largely through apprenticeship in offices and courts to one almost entirely trained in schools. The result is that new members of the bar lack any experience either in courtroom work or in exercising their sense of professional responsibility, which I look upon as indispensable to the true and faithful practitioner. The over-concentration of law schools on the case method affords students neither and has, therefore, come increasingly under attack.

Id. at 255.

135. CLARK REPORT, *supra* note 14, at xv.

136. See *id.* at xv–xvi (calling for the creation of appropriate ABA committees that would operate in conjunction with the Association of American Law Schools and the National Conference of Bar Examiners).

137. *Id.* at 167.

138. See, e.g., Tom C. Clark, *Some Thoughts on Legal Education*, 12 AM. U. L. REV. 125, 128 (1963) (discussing the need to improve education in procedural law); see also Hon. John V. Tunney, *Is*

[T]o be successful, law schools must consciously undertake the one task that they have universally rejected: instilling normative values in their students.

Seemingly without exception, academicians have emphasized the impossibility of “teaching” integrity. . . .

Yet however difficult it may be for academic institutions to come to grips with the most basic sorts of human values such as honesty and a sense of fairness, it is precisely these basic principles which were so lacking in Watergate and which are so sorely needed in the world. Our law schools, it seems to me, must shoulder the burden of “teaching” honesty because there is simply no one else to do the job. The sad fact of the matter is that integrity is the sort of virtue that once was more or less reliably developed through the joint socializing influences of the church, the family, schools, and peer groups. For a number of reasons, however, the first two contributors to this process have drastically diminished in importance in this country, and no other force has arisen to take their place. The burden, therefore, has come to rest on our law schools, and it is one which they must shoulder alone and shoulder well, for the profession's other tools cannot perform the task.¹³⁹

Justice Clark praised many aspects of legal education.¹⁴⁰ However, with respect to ethics training, Justice Clark's exasperation with academics was palpable. Discussing the attendees at a 1968 ABA-sponsored symposium on Education in the Professional Responsibility of the Lawyer (known as “Boulder II”), he wrote:

[S]ome allowed as how it was unlikely that commitment to professional norms and values can be learned in the course of professional training; others asserted ethics is not the responsibility of the law schools; still others assured their audiences that it is impossible to interest the lawyers in ethical rules. Some pointed out that the lawyer in practice often does not realize that an ethical question is present while the more cynical suggested that there is no possible resolution for most ethical questions anyway. Much time was con-

the Bar Meeting Its Ethical Responsibilities?, 12 SAN DIEGO L. REV. 245, 247 (1975) (stating that, “[a]s Mr. Justice Clark points out, a major responsibility for . . . [instilling in lawyers ethical sensitivity] rests with the law schools”).

139. See Clark, *supra* note 21, at 252–53.

140. For example, Justice Clark wrote:

Certainly, those who come to grips with the state of legal education today should heartily agree that the law schools are turning out the finest products in their history. As I think back to forty years ago when I graduated in law, I shudder at the thought of my being turned loose on the public with a law license. Today, the average graduate's knowledge of substantive law is really amazing and a goodly per cent reach brilliance.

Clark, *supra* note 138, at 127–28.

sumed by the battle over whether the regular curricula should be “pervaded” by reference to professional ethics problems or, on the other hand, whether a specific, separate course must be utilized. At the same time, the necessity for law schools to address themselves to public policy matters and local social concerns floated in and out of the discussions. Sadly, Boulder II illustrates the tendency of academics to raise all possible problems and to resolve none of them Law schools have been stalling on making the hard decisions and mouthing little more than “platitudinous exhortations.”

What good is knowledge of the law when those who possess it are corruptible?¹⁴¹

Justice Clark’s recommendation was clear:

[L]et us examine the present courses on professional responsibility offered by the law schools, debate the merits of what is being offered and buckle down long enough to produce a basic program of instruction; revise the offerings to meet any inadequacy that thus arises; and make professional responsibility a required course on the subject in every law school. . . . As far as I am concerned, the exact subject matter of such a course should be at the sound discretion of each school or professor but, above all, it would have to come to grips with the need to instill integrity in each and every student, and not just give a superficial familiarity with the Code, its annotations and amendments.

In addition, common sense dictates a more pervasive approach to ethical issues in every course offered in the law school. Moreover, weekly informal, evening seminars at which a panel of active practitioners could be questioned . . . should be set up.¹⁴²

Justice Clark, a strong supporter of law school clinics¹⁴³ at a time before they were a common feature in legal education,¹⁴⁴ believed that clinical education had a special role to play in ethics education:

141. Clark, *supra* note 21, at 257–58.

142. *Id.* at 259.

143. See Tom C. Clark, *The Continuing Challenge of Advocacy*, 16 WASHBURN L.J. 243, 243–45 (1977) [hereinafter Clark, *The Continuing Challenge*] (promoting the creation of clinical programs in law schools); Tom C. Clark, *Judicial Reform: A Symposium: Introduction*, 23 FLA. L. REV. 217, 218, 220 (1971) [hereinafter Clark, *Judicial Reform*] (stating that law schools “do not equip students to practice law” and urging the abandonment of the three-year curriculum and the substitution of a two-year basic course followed by a one-year clinical course).

144. Justice Clark was enthusiastic about clinical legal education as far back as 1958, a time long before that view was fashionable. He later wrote:

As I proposed back in 1958 in a speech at the University of Texas, copies of which I mailed to the Deans of all of the law schools, training similar to that of the present limited student legal aid work can be easily spread throughout legal education. I said there:

“It was Dean Pound who proposed, back in 1952, ‘A New Role for the Law School’ in an article under that title appearing in the 38 A.B.A. Journal 637. It appears to have

Student practice clinics can furnish students a meaningful experience in exercising their sense of professional responsibility and can give to a more formal course on legal ethics a content and efficacy not otherwise available. And this is vital, for a legal ethics course is worthless if it doesn't deal with the subject in a way that students can understand and identify with. In this regard, law schools, it seems, have always been afflicted with an inadequate approach to legal ethics.¹⁴⁵

His proposal for clinical education was in no respect modest and, like his policy of hiring one law clerk each year from a non-elite school,¹⁴⁶ was untraditional. He wrote:

[W]e must "beef-up" the clinical programs; make them compulsory; implement the teaching staff with practicing lawyers by court assignment if necessary; and enlist judges on a statewide basis and at all levels to head up clinical programs in their respective courts. In addition to the trial techniques taught in these clinics, there should be constant discussion and examination of the problems of professional responsibility as they arise. . . . Some will say . . . that such a detailed handling of the problems of professional responsibility is

died for want of a second. Belatedly, I would like to second the Dean's proposal The problem of the transition from student to lawyer could be explored and a national program effected that would afford the student experience in the lawyer-client relationship and in actual trial practice as well—a most needed enlargement of present legal education policy."

Clark, *supra* note 138, at 130; *id.* at 128 (discussing the desirability of affording advanced students courtroom experience). See Tom C. Clark, *Public Relations—the Bar and the Courts*, 47 FLA. B.J. Feb. 1973, at 88, 89 (urging that clinics be substituted for the third year of law school); Tom C. Clark, *The Sixties—A Historic Decade in Judicial Improvement*, 36 BROOKLYN L. REV. 331, 334 (1970) (arguing for more clinical courses).

145. See Clark, *supra* note 21, at 256 (stating that "I have dwelled on the subject of effective student clinics in this article on teaching professional responsibility because I believe that they go hand in hand").

146. Justice Clark explained his practice in hiring law clerks in an article published shortly after he left the Supreme Court:

[W]hen I was on the Court I had two law clerks. . . . I used to take one of my law clerks, for eighteen years, from the smaller law schools, the ones that had maybe one hundred to two hundred to three hundred students, because I thought that rather than taking both of them from the prestige schools, I might give the smaller law schools an opportunity to say, "We have a clerk on the Supreme Court." It was a very good tonic for them.

I found, incidentally, that the young men I obtained from the smaller schools did as good if not a better job in some instances than did the ones from the brand name schools, the prestige ones. Indeed, I had one that came from a night school—a night school—who was one of the best clerks I ever had. . . . It just goes to show you that these small law schools are still the backbone of our legal profession. Don't fool yourself on that!

Clark, *Address, supra* note 52, at 362. Like Justice Clark's views on clinical education, his ideas about hiring Supreme Court law clerks were ahead of their time. See Tony Mauro, *Ivy League Schools Losing Ground? Supreme Court Law Clerks' Alma Maters Increasingly Diverse*, CONN. L. TRIB., Nov. 10, 2003, at 6 (noting "A survey of this term's 35 law clerks reveals that more and more of the clerks are from non-Ivy League schools. . . . Fully 19 of the clerks . . . graduated from non-Ivy League law schools.").

not the law school's job, or it is too expensive, or it will absorb too much time from the rest of the curriculum. My answer is this: if this be true, we must still make the most of it. Let the third year be a combined clinical and professional responsibility year.¹⁴⁷

Much of what Justice Clark envisioned for legal education has come to pass. At most law schools in the United States, students are now required to take a course devoted exclusively to the subject of attorney professional responsibility.¹⁴⁸ These courses normally require law students to spend twenty or more classroom hours studying the types of ethical issues that attorneys confront in the practice of law.¹⁴⁹ Law school Professional Responsibility courses typically must be completed and passed in order for a student to graduate.¹⁵⁰ In addition, clinical legal education is now available to a significant number of law students. In both the United States and other countries, clinical law courses give substantial attention to the ethical issues that lawyers confront in law practice.¹⁵¹

C. *The Multistate Professional Responsibility Exam*

A large majority of the American states¹⁵² now require law school graduates to pass a special examination on the law of attorney professional responsibility prior to being admitted to the practice of law. The Multistate Professional Responsibility Examination (MPRE) is a standardized test with fifty questions, which change each time the exam is given.¹⁵³ Students are given two hours and five minutes to complete the examination,¹⁵⁴ and a student who fails to pass the exam cannot obtain a license in most states and therefore cannot practice law. Up until the introduction of the MPRE in 1980, "some states tested professional responsibility only minimally or not at all on their bar examinations and it was possible to gain admission to the

147. Clark, *supra* note 21, at 260.

148. See Levin, *supra* note 45, at 407 n.49 (stating that "[a]t present . . . at least two-thirds of all accredited law schools require students to take a professionalism or ethics course, although the number of credits vary").

Naturally, with so many legal ethics classes now being taught, many law school professors now specialize in teaching the law of attorney professional responsibility. See ASS'N OF AM. L. SCHS., THE AALS DIRECTORY OF LAW TEACHERS 1310-17 (2002-03) (listing more than 900 law professors teaching in the fields of Legal Ethics and Professional Responsibility).

149. Ordinarily, students must learn the rules of conduct that apply to lawyers and to judges. Professional Responsibility classes examine the duties that a lawyer owes to clients, to courts, to other lawyers, and to the legal system. The classes address the different roles that private practitioners, prosecutors, corporate counsel, and judges play in the American adversarial system of justice.

150. Levin, *supra* note 45, at 395.

151. Cf. Sue Bentsch, *Confidentiality, Corporate Counsel, and Competition Law: Representing Multi-National Corporations in the European Union*, 35 ST. MARY'S L.J. 1003, 1004 (2004) (discussing issues confronted by a clinical professor teaching legal ethics as a Fulbright Scholar in Latvia).

152. Levin, *supra* note 45, at 395 (indicating that the MPRE is required in 47 states); NAT'L CONFERENCE OF BAR EXAMINERS, THE MPRE: 2004 INFORMATION BOOKLET 3 (2003) (stating that "[t]he MPRE is required for admission to practice law in most U.S. jurisdictions").

153. See NAT'L CONFERENCE OF BAR EXAMINERS, *supra* note 152, at 31-32 (describing the exam).

154. *Id.* (stating the length of the exam).

bar without demonstrating awareness of any rules of professional responsibility.”¹⁵⁵

The Clark Committee had hinted at the desirability of making ethics a bar examination subject.¹⁵⁶ However, there is reason to question whether Justice Clark would have thought that a multiple-choice test on ethics was a good idea. In an article on the future of the legal profession, he suggested that, ideally, “the bar examination as presently conducted¹⁵⁷ would be abolished and a more realistic test of the student’s ability to practice law would be devised.”¹⁵⁸ Justice Clark’s writings¹⁵⁹ also suggest that he was more interested in ethics as character-building¹⁶⁰ than in ethics as knowledge of rules of conduct.¹⁶¹ Still, the MPRE, which many regard as “a step in the

155. Levin, *supra* note 45, at 399.

156. See CLARK REPORT, *supra* note 14, at xv–xvii. The Report stated:

The adequacy of law school courses designed to promote pride in the profession and to elevate ethical standards and the effectiveness of present procedures to screen applicants for admission to the bar are subjects of substantial dimensions and require a special expertise. In view of the critical importance of these subjects to the maintenance of high standards in the profession, the Committee urges that consideration be given to the creation by the American Bar Association of appropriate committees, in conjunction with such interested organizations as the Association of American Law Schools and the National Conference of Bar Examiners, to survey these issues in depth.

Id.

157. In 1974, the year Justice Clark wrote this statement, the Multistate Bar Examination on core legal subjects was just coming into use. The MBE was first administered on February 23, 1972. Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 380 (1996) (stating date); *id.* at 379–80 (indicating that, since the beginning, the MBE has tested on Torts, Contracts, Property, Criminal Law, and Evidence, and that Constitutional Law was added at a later date). Today, “the MBE is administered in 48 states and the District of Columbia.” SUZANNE DARROW-KLEINHAUS, *THE BAR EXAM IN A NUTSHELL* 133 (2003). The Multistate Professional Responsibility Examination did not come into use until 1980. Levin, *supra* note 45, at 399 (stating the test was first introduced in 1980 “in response to concerns about lawyers’ ethical conduct and the public’s perception of lawyers”). In 1974, many states still relied, perhaps primarily, on essay questions to test bar applicants.

158. See Clark, *Changing Times*, *supra* note 73, at 4. On a later occasion, Justice Clark urged that the third year of legal education should be an internship year and that students should be permitted to take the bar exam after completing 24 months of classroom training, with formal certification to practice law delayed until after completion of the internship. See Clark, *The Continuing Challenge*, *supra* note 143, at 246 (discussing development of practical lawyering skills).

159. Clark, *supra* note 21, at 259 (stating that we “need to instill integrity in each and every student, and not just give a superficial familiarity with the Code, its annotations and amendments”).

160. See Clark, *Disciplinary Procedures*, *supra* note 52, at 486 (noting that to remedy the poor image of the profession, “[w]e must tighten our disciplinary procedures, make them more effective and instill in every student who aspires to be a lawyer and every lawyer as well the moral and ethical standards that he must practice in the law”).

161. Justice Clark placed priority on character and virtues. “Honesty and integrity,” he wrote, “must be the hallmark—the guiding star—of every member of the bar.” *Id.* However, Justice Clark also championed disciplinary procedures through which professional ethics standards would be enforced as hard-edged rules as rules of law. See Clark, *supra* note 21, at 259 (proposing “let us have strict enforcement of the Code of Professional Responsibility, with no if’s, and’s, or wherefore’s”). These somewhat competing views placed him at an important crossroads in the development of the field of legal ethics.

At the beginning of [the twentieth] century, the professional ethics of lawyers, judges, politicians, and civil servants were largely personal matters. In making difficult decisions, and in distinguishing right from wrong, these individuals relied primarily upon religious beliefs and social mores. The process required moral reasoning about the common good. Formal enforcement of ethical standards was neither a goal nor an issue; rather, the character of the actor was the public’s principal guarantee of good performance of professional duties. More

right direction,”¹⁶² was the logical outgrowth of the reforms in legal education that Justice Clark had urged. The MPRE helps to ensure that what is taught in law school Professional Responsibility courses is focused and academically demanding. The exam aims to guarantee that every lawyer at least has been introduced to the basic rules of professional conduct. Nothing was more natural than that calls for increased attention to ethics education in law schools, such as Justice Clark’s, would be followed by a plan to test whether the changes in legal education were producing measurable results.

D. Continuing Legal Education on Ethics

The Clark Report urged continuing education programs to do a better job in impressing on attorneys their duty to report misconduct by other members of the profession.¹⁶³ This was a matter about which Justice Clark felt strongly. With respect to lawyers failing to assist the disciplinary system, Justice Clark wrote, “[i]t is amazing that lawyers who are supposed to uphold and defend the law shrink away from performing their duties in this area.”¹⁶⁴

The Clark archives show that Justice Clark practiced what he preached. While chairing the ABA Special Committee, Justice Clark received a complaint from a layperson about an attorney who allegedly acted unethically in

importantly, the principles embodied in the nascent ethical codes for lawyers and doctors were typically not imposed upon unwilling practitioners with the force of law.

Today, however, the situation is considerably different. At the threshold of the new millennium, professional ethics in American public life is regulated heavily. The rules governing the conduct of lawyers, judges, and public servants are routinely codified in uniform terms and strictly enforced. Several developments in American society have animated this shift from ethical standards based on individual character to standards based instead on legally binding, uniform rules. Although undoubtedly this change reflects the premium that Americans place on the rule of law and individual rights, three other forces have contributed greatly to this transformation: the rise of consumerism, the power of the press, and the American preference for statutory solutions.

Vincent R. Johnson, *America's Preoccupation with Ethics in Government*, 30 ST. MARY'S L.J. 717, 746–49 (1999).

The difference between character-based and rules-based approaches to legal ethics has resulted in something of a dichotomy in the teaching of professional responsibility in law schools. Some law professors focus on “the identification, transmission, and enforcement of uniform standards governing the conduct of lawyers,” whereas others study the choices lawyers make in real or fictional stories, such as lawyers depicted in biographies or literature. See Vincent Robert Johnson, *Law-Givers, Story-Tellers, and Dubin's Legal Heroes: The Emerging Dichotomy in Legal Ethics*, 3 GEO. J. LEGAL ETHICS 341, 342–45 (1989) (discussing the two camps); see also Johnson, *supra* note 15, at 25–29 (discussing different approaches to teaching professional responsibility).

162. Levin, *supra* note 45, at 399–412 (1998) (stating that “the MPRE was a step in the right direction of insuring that lawyers admitted to practice acquire some knowledge of basic professional responsibility rules,” but that it should be reconsidered to determine whether it does enough to prepare lawyers for the professional responsibility challenges they will face in practice).

163. See CLARK REPORT, *supra* note 14, at 167 (recommending “[g]reater emphasis in . . . continuing legal education courses on the individual attorney’s responsibility to assist the profession’s efforts to police itself by reporting instances of professional misconduct”).

164. Letter from (apparently) Tom C. Clark, U.S. J., to Orison S. Marden 2 (Feb. 2, 1968) (copy on file with the author).

connection with the settlement of a case and disbursement of funds. That letter was immediately forwarded to the appropriate local grievance committee “[o]n behalf of Justice Clark”¹⁶⁵

Justice Clark personally envisioned that continuing legal education would not just reinforce the duty to report misconduct, but that it would play an important role in refocusing the legal profession on its tradition of public service. He wrote:

[W]e must . . . provide exhortation and instruction by the leaders of the bar to inspire acceptance of high ethical standards. For example, let us organize seminars on professional responsibility within the unified bars, with attendance compulsory. In jurisdictions not having a unified bar, the seminars could be sponsored by the [s]upreme [c]ourt of the state, the ultimate authority on such matters.¹⁶⁶

Recent law school graduates and continuing legal education programs, Justice Clark believed, would spread an “ethical renaissance . . . across the land.”¹⁶⁷

During the past quarter-century, most American states have adopted continuing education requirements for lawyers.¹⁶⁸ For example, in the State of Texas, every lawyer must take fifteen hours of additional instruction each year in order to remain licensed.¹⁶⁹ In many states, some portion of the continuing legal education requirements must be devoted to legal ethics. In Texas, three of the fifteen hours of instruction must focus on this subject.¹⁷⁰ This type of requirement has an important practical effect. Virtually every continuing legal education program now contains one or more presentations devoted in whole or in part to ethical issues.¹⁷¹ Continuing legal education

165. Letter from David Hayes, Jr., Staff Assistant, ABA, to James I. Smith, III, Executive Director, Allegheny County Bar Ass’n (Dec. 18, 1967) (copy on file with the author) (pertaining to a client’s complaint that a lawyer had forced the client to accept a settlement and had failed to provide a proper accounting of the funds that were received). The letter states:

On behalf of Justice Clark, I am sending along to you Cullen E. McCoy’s letter dated December 10th, which complains of unethical and unprofessional conduct on the part of a Pittsburgh attorney. I would be pleased if you could place Mr. McCoy’s letter in the hands of your Grievance Committee Chairman for such action as he deems appropriate.

Id. Interestingly, the letter was sent a mere eight days after the date of the letter informing Justice Clark of the alleged misconduct. There was no delay.

166. Clark, *supra* note 21, at 259.

167. *See id.* at 252; *see also* Clark, *Judicial Reform*, *supra* note 143, at 222 (urging that “provision should be made for the continuing education of both the judge and his staff”).

168. *See* Harry J. Haynsworth, *Post-Graduate Legal Education in the United States*, 43 S. TEX. L. REV. 403, 403 (2002) (stating that “[t]hirty-nine states currently have what is known as a mandatory continuing legal education (‘MCLE’) requirement”).

169. TEX. STATE BAR RULES art. 12, § 6(a) (1998) (stating fifteen-hour requirement).

170. *Id.* at § 6(b) (stating three-hour requirement).

171. In continuing legal education programs, knowledge of basic rules of legal ethics is reinforced. Lawyers learn about new developments in the ethics field. Advice is provided to help attorneys identify, avoid, and deal with ethical problems.

organizers commonly regard the availability of ethics credit as a factor that helps to increase attendance at programs for jurisdictions with an ethics requirement.

Continuing education for lawyers in ethics is just one of the many ways that lawyers already admitted to practice are afforded access to information about their professional responsibilities. Today, lawyer magazines often contain an "ethics" column.¹⁷² In many states, attorneys can obtain free advice by telephone about ethical questions. For example, in Texas, an ethics expert is employed by the bar association to answer questions by telephone from any lawyer in the state.¹⁷³ The American Bar Association offers a similar free service.¹⁷⁴

As was true long before the Clark Report, in all states it is also possible for lawyers to obtain a free written ethics opinion addressing an area of particular concern.¹⁷⁵ A recent variation on the old theme is that, in some states, a lawyer may submit for pre-approval a proposed advertisement for legal services.¹⁷⁶ In Texas, prior approval of an ad is usually binding in a subsequent disciplinary proceeding.¹⁷⁷ This process, like continuing legal

Brochures for continuing legal education programs commonly state both the number of CLE hours that can be earned at the program and the portion of the total hours that count toward the ethics requirement. For example, a flyer might state, "Earn six hours of CLE credit (including 1.5 hours of ethics credit)."

172. See, e.g., Kathryn A. Thompson, *Ethics: The Real Deal-Breakers*, 90 A.B.A. J., Aug. 2004, at 26 (discussing lawyers' operation of ancillary businesses).

173. In the State Bar of Texas website (www.texasbar.com), information can be found under the topic of "Client Assistance and Grievance," under the "Chief Disciplinary Counsel" link. At http://www.texasbar.com/Template.cfm?Section=Chief_Disciplinary_Counsel&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=25&ContentID=3305 (last visited Apr. 7, 2005).

174. Information can be located at www.abanet.org, under the category of "Legal Ethics, by selecting "ETHICSearch." At <http://www.abanet.org/cpr/ethicsearch/home.html> (last visited Apr. 7, 2005).

175. Opinions are often published so that other lawyers can also benefit from the guidance. For example, the *Texas Bar Journal*, which is distributed monthly to the more than 70,000 members of the State Bar of Texas, includes an Ethics Opinion(s) section in months when one or more opinions have been issued. See, e.g., *Ethics Opinions*, 65 TEX. BAR J. 555 (2002) (containing the text of multiple opinions). A lawyer who relies on an advisory ethics opinion and acts in conformance with the views expressed normally will not be charged with improper conduct. See WOLFRAM, *supra* note 15, at 67 (stating that "a lawyer who has acted in accordance with a recent ethics committee recommendation is ordinarily given the benefit of the doubt in disciplinary proceedings").

176. See TEX. DISCIPLINARY RULES OF PROF. CONDUCT R. 7.07 (Vernon 2005). Rule 7.07 provides in part:

(c) A lawyer who desires to secure an advance advisory opinion concerning compliance of a contemplated written solicitation communication or advertisement may submit to the Lawyer Advertisement and Solicitation Review Committee, not less than thirty (30) days prior to the date of first dissemination, the material specified in paragraph (a) or (b) of this Rule, including the required fee

TEX. DISCIPLINARY RULES OF PROF. CONDUCT R. 7.07(c) (Vernon 2005).

177. See TEX. DISCIPLINARY RULES OF PROF. CONDUCT R. 7.07 (Vernon 2005). Subsection (c) states in part:

An advisory opinion of the Lawyer Advertisement and Solicitation Review Committee of noncompliance is not binding in a disciplinary proceeding or disciplinary action but a finding of compliance is binding in favor of the submitting lawyer if the representations, statements, materials, facts and written assurances received in connection therewith are true and are not misleading. The finding constitutes admissible evidence if offered by a party.

TEX. DISCIPLINARY RULES OF PROF. CONDUCT R. 7.07(c) (Vernon 2005).

education programs, provides useful information to attorneys about whether their conduct complies with their ethical obligations.

E. Malpractice Actions, Fee Forfeiture, and Litigation Sanctions

The rules of attorney ethics are enforced today not only through disciplinary proceedings but also in civil lawsuits against attorneys who violate the rules. In lawsuits called malpractice actions, plaintiffs (typically former clients) seek to recover money damages from attorneys who caused them harm.¹⁷⁸ The risk of malpractice liability is a major concern in modern American law practice.¹⁷⁹

A violation of ethical obligations also sometimes means that a lawyer will be barred from collecting or retaining attorney's fees, either in whole or in part.¹⁸⁰ For this to occur, the violation usually must involve a serious breach of the duty of loyalty to the client.¹⁸¹ Fee forfeiture (sometimes called disgorgement) is an increasingly important claim in civil litigation.¹⁸²

In addition, in all American states, a large body of law has emerged recently which penalizes attorneys and their clients for frivolous litigation.¹⁸³ These rules give meaning to the general ethical precept that "[a] lawyer

178. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 4.1 (3d ed. 2001) (discussing malpractice actions generally). If a lawyer's unethical conduct injures a client, there is a fair chance that the lawyer can be sued successfully. Malpractice actions are not common, but they are also not rare. See Gary N. Schumann & Scott B. Herlihy, *The Impending Wave of Legal Malpractice Litigation: Predictions, Analysis, and Proposals for Change*, 30 ST. MARY'S L.J. 143, 146-47 (1998) (stating "in the past decade, there has been a definite and significant increase in legal malpractice claims throughout the United States, although such trends vary widely from jurisdiction to jurisdiction").

Some lawyers will never be sued by a client for malpractice, but others will be sued once or more during their careers. If the client has been seriously harmed, an amount of money, sometimes substantial in amount, may be awarded to compensate the client.

179. See Steve McConnico & Robyn Bigelow, *Summary of Recent Developments in Texas Legal Malpractice Law*, 33 ST. MARY'S L.J. 607, 607 (2002) (stating that the nature of malpractice claims has "changed dramatically and the potential for attorney liability has increased as a result"); Susan Saab Fortney & Jett Hanna, *Fortifying a Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based on Conflicts of Interest*, 33 ST. MARY'S L.J. 669, 672 (2002) (stating that "risk management experts have recommended the adoption of policies and procedures to avoid conflicts of interest").

180. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000). Section 37 provides:

A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.

Id. If the fee has not yet been paid, the court can refuse to allow the attorney to collect the fee. Or, if the client has already paid for legal services, a court may order the attorney to return to the client all or part of the money. See also *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (holding that a client need not prove actual damages to obtain forfeiture of an attorney's fee due to the attorney's breach of a duty to the client).

181. See, e.g., *Burrow*, 997 S.W.2d at 240 (stating that "an attorney's compensation is for loyalty as well as services, and his failure to provide either impairs his right to compensation").

182. See McConnico & Bigelow, *supra* note 179, at 625-35 (discussing fee forfeiture claims).

183. See Erin Schiller & Jeffrey A. Wertkin, *Frivolous Filings and Vexatious Litigation*, 14 GEO. J. LEGAL ETHICS 909, 909 (2001) (charting recent developments in state legislatures and in Congress regarding frivolous litigation).

should use the law's procedures only for legitimate purposes and not to harass or intimidate others."¹⁸⁴ Under frivolous-litigation rules, an attorney or client can be held responsible for costs incurred by an opponent in defending against a meritless claim.¹⁸⁵

At the time of the Clark Report, malpractice actions against lawyers, forfeiture of attorney's fees, and frivolous-litigation sanctions were quite unusual. Today, they are much more common. Lawyer discipline and legal malpractice actions are the chief mechanisms for enforcing ethics rules, but fee forfeiture and frivolous-litigation penalties play important, albeit smaller, roles. It seems likely that the increased visibility of ethics issues generated by the Clark Report was a contributing factor in clients seeking avenues other than discipline to enforce the ethical obligations of attorneys. The Clark Report's candid acknowledgment of the existence of lawyer misconduct probably also made lawyers more willing to see the deficiencies of other attorneys and, thus, more ready to represent clients who had been harmed by other counsel.¹⁸⁶ The Report probably encouraged judges to be more sympathetic to the plight of malpractice clients and to shape procedural and substantive doctrine so that it would be more responsive to the victims of unethical conduct.¹⁸⁷ It is reasonable to conclude that the Clark Committee's efforts to improve lawyer disciplinary systems encouraged parallel developments in the other regimes that are used to address unethical conduct.

It is also likely that the increased attention to ethics education in law schools, which Justice Clark promoted,¹⁸⁸ emboldened law professors to serve as expert witnesses on legal ethics in malpractice actions and encouraged newly minted lawyers to seek to apply the ethics rules in fee-generating forms of civil litigation. Justice Clark would have appreciated that linkage, for he understood how attention in legal education was related to developments in law practice. He had remarked in another context that the failure of law schools to treat criminal law as an important subject had caused too few lawyers to carve out a career in that field.¹⁸⁹

184. MODEL RULES OF PROF. CONDUCT pmb1. (2003).

185. See Tessa M. Thrasher, *Rule 11 Sanctions for Frivolous Pleadings: When Can the Client Be Sanctioned*, 17 J. LEGAL PROF. 345, 345 (1992) (stating that "[u]nder the new Rule 11, represented parties as well as their attorneys can face sanctions if they file frivolous pleadings").

186. ROBERT H. ARONSON & DONALD T. WECKSTEIN, *PROFESSIONAL RESPONSIBILITY IN A NUTSHELL* 82 (2d ed. 1991) (stating that "[a]ttorneys are becoming less reluctant to represent clients or to testify as experts in malpractice actions").

187. *Id.* The authors state that "judicial attitudes are becoming more liberal toward acknowledging professional misconduct and incompetence: Expanding time limits for bringing claims, allowing new theories of recovery, and eliminating the requirement of privity for third party actions in some cases, all exemplify this liberalization." *Id.*

188. See section III-B *infra*.

189. See Clark, *supra* note 138, at 132. Justice Clark wrote:

As my Brother Brennan has so well said:

"Certainly the law schools do not turn out droves of bright young men anxious to carve out a career in criminal law—at least for the defense. . . . [I]f the law schools, and particularly the major ones, give only cursory attention to the criminal law in the curriculum, it is hard to see how students can be blamed for coming away from the law school

F. Revision of Ethics Codes

In the United States, each state has its own rules of attorney conduct, and virtually every jurisdiction has significantly revised its ethics code twice or more during the past thirty-five years.¹⁹⁰ Indeed, it would be fair to say that the reform of ethics rules has become an apparently permanent feature of the American legal profession.¹⁹¹ At any moment, it seems that either the American Bar Association is drafting a new model, States are deciding whether to implement the new model, or amendments are being proposed to make changes to either the ABA model or state variations. The process never ends. In Texas, for example, there is a permanent committee of the state bar that continuously reviews proposals for reform.¹⁹²

Debates over the content of attorney ethics rules were not always so common. As recently as the end of the 1960s, there was not much interest in these issues. This is illustrated by another ABA development in the field of legal ethics which paralleled the work of the Clark Committee, the drafting and passage in 1969 of a new model Code of Professional Responsibility. The Code, which replaced the sixty-one-year old Canons of Professional Ethics,¹⁹³ was quickly adopted nationwide,¹⁹⁴ probably because issues relating to attorney conduct were much less visible within the legal profession. The result was a happy uniformity of ethics rules across the country.¹⁹⁵ That blissful state of uniformity no longer exists.¹⁹⁶ Although

with the feeling that perhaps the institution also shares the unfortunate tendency of the community to disapprove of lawyers who undertake the defense of people charged with crime.”

Id.

190. In most states, major reforms follow the adoption of a new or substantially revised ABA model code. As explained in the text, *infra*, the last three major ABA revisions occurred in 1969, 1983, and 2002.

191. Ethics reform is a ceaseless task, in part because new issues arise as the nature of law practice changes. Views also evolve as to the correct prioritization of conflicting values. For example, since the late 1960s, the ABA and the states have been seriously conflicted over whether to rank the confidentiality of client information more highly than other competing interests, such as prevention of harm to the public or truthfulness to tribunals. As a result, these and other issues of substantive law have been hotly debated, and the rules in some areas have changed frequently, and sometimes dramatically. See Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125, 128–30 (2003) (discussing the history of the duty of confidentiality).

192. The committee is the Texas Disciplinary Rules of Professional Conduct. Its purpose is “[t]o evaluate the Texas Disciplinary Rules of Professional Conduct and make suggestions to the Board of Directors of the State Bar concerning revisions that may be appropriate.” At <http://www.texasbar.com/Template.cfm?Section=Committees&CONTENTID=10259&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Apr. 7, 2005).

193. See Wright, *supra* note 43, at 757 (stating point).

194. See WOLFRAM, *supra* note 15, at 56 (stating that “the 1969 Code was an impressive and quick success”).

195. See *id.* at 57 (stating that “[t]he Code was adopted in the great majority of states by the supreme court under the court’s inherent and exclusive power to regulate the legal profession”).

196. See Vincent Robert Johnson, *Solicitation of Law Firm Clients by Departing Partners and Associates: Tort, Fiduciary, and Disciplinary Liability*, 50 U. PITT. L. REV. 1, 17 (1988). The article states:

At the risk of oversimplification, it is probably fair to state that the profession has moved from a point, in the early 1970s, when rules of ethics were largely uniform from one jurisdic-

quickly adopted by the States, the 1969 Code soon proved to be controversial once the Clark Report and the Watergate crisis focused a spotlight on the legal profession. There were proposed “amendments to the Code every year between 1974 and 1980”¹⁹⁷ The Code was eventually replaced by the ABA Model Rules of Professional Conduct in 1983,¹⁹⁸ and the Model Rules were extensively revised in 2002.¹⁹⁹

Proposed changes in ethics rules, at least since the mid- and late-1970s, have been flashpoints of controversy, because issues of legal ethics are much more prominent throughout the profession due to developments such as the issuance of the Clark Report, which brought issues of attorney conduct to the forefront. As a result of extensive discussion, debate, and revision during state-level adoption, state ethics codes frequently vary from the ABA model and from one another in addressing difficult issues on which reasonable minds can differ.

Justice Clark recognized the important connection between substantive ethics rules and mechanisms for enforcement. While the Clark Committee was in the process of evaluating lawyer discipline, it was also in communication with the Wright Committee (officially known as the ABA Special Committee on the Evaluation of Ethical Standards), which was drafting the new Code of Professional Responsibility.²⁰⁰ A designated member of the Clark Committee regularly attended meetings related to the new lawyers’ code and offered comments relating to the process.²⁰¹ Information about the work of the Wright Committee was then reported back to the Clark Com-

tion to the next, to a point where today there is less harmony and greater diversity as to the norms of professional conduct.

Id.

197. WOLFRAM, *supra* note 15, at 57.

198. *Id.* at 62.

199. See Lonnie T. Brown, Jr., Foreword, *Symposium—Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual*, 2003 U. ILL. L. REV. 1173, 1173 (discussing the “Ethics 2000” reforms that were approved by the ABA in 2002).

200. See, e.g., Letter from David Hayes, Jr., Assistant Director of Committee Services, ABA, to Fred B. Hulse and John G. Bonomi (both members of the Clark Committee) (Sept. 22, 1967) (copy on file with the author) (indicating that Professor John Sutton said that the “Evaluation Committee is most interested in talking to representatives of our Committee to explain and review their work up to date”); Letter from David Hayes, Jr., Assistant Director, Committee Services, ABA, to Professor John Sutton, University of Texas (Oct. 2, 1967) (copy on file with the author) (discussing meeting); Letter from (apparently) Alice L. O’Donnell, Justice Clark’s secretary, to David Hayes, Jr., ABA (Jan. 4, 1968) (copy on file with the author). The letter states “I asked Mr. Justice Clark about the Ethics Committee which Mr. Edw. Wright heads, and he agrees that we should at least have a representative of the Discipline Committee there.” *Id.*

201. See Letter from David Hayes, Jr., Assistant Director, Committee Services, ABA, to Alice O’Donnell (Justice Clark’s secretary) (Jan. 2, 1968) (copy on file with the author) (stating “Ed Wright’s Committee on the Evaluation of Ethical Standards, as you know, is interested in having a representative of our Committee attend their meetings”). The letter further stated: “John Bonomi attended their meeting here in Chicago in November and reports from Ed Wright indicate that they were very pleased to have him and his observations and comments were very well received.” *Id.*; see also Memorandum from John G. Bonomi (a member of the Clark Committee), to the Special Committee on Disciplinary Enforcement (Jan. 15, 1968) (copy on file with the author) (discussing three meetings of the Wright Committee that he attended and several more that he intended to attend, and summarizing concerns he expressed to the Committee).

mittee.²⁰² Justice Clark was interested in promoting communication between the two bodies.²⁰³

Shortly following the issuance of the Clark Report, there were also efforts to adopt standards governing judicial conduct. Justice Clark supported those initiatives. He wrote:

While I verily believe that one who is elevated to judicial office is usually grounded in the fundamental precepts of good judicial conduct and needs no reminder of what is right and what is wrong; nevertheless, I urge the adoption by the courts—both federal and state—of a clear and concise statement of the permissible bounds of judicial conduct. The principles embodied in such a code would aid in the recovery of public respect and confidence in the court that is so necessary in a stable society.²⁰⁴

Undoubtedly, the efforts to draft and then later reform American attorney codes and judicial codes have brought increased attention to issues of professional responsibility, such as the effectiveness of disciplinary mechanisms. Similarly, the attention focused on unethical attorney conduct and poor enforcement of existing rules by the Clark Committee spurred the efforts of those who seek to write and revise the content of attorney conduct law. These two developments—revision of substantive ethics laws and reformation of ethics enforcement mechanisms—are mutually reinforcing and have contributed substantially to the transformation of the field of legal ethics.

G. Abundant Ethics Materials and News Coverage

The increased importance of legal ethics, both as a law school subject and in law practice, has given rise to a wealth of scholarship.²⁰⁵ As was not

202. See Resume Minutes, *supra* note 19, at 4 (copy on file with the author). The minutes state: Mr. Bonomi [a member of the Clark Committee] reported that he had met with [the ABA Special Committee on the Evaluation of Ethical Standards] on October 7, 1967. He reviewed generally the concept of the work of that Committee and reported on the practical problems that Committee is having and will have in drafting disciplinary rules to enforce the revised canons. He also pointed out the problems the Committee will have when it asks some 10,000 lawyers to comment on the draft of the revised canons, as it currently plans to do.

Id.

203. See *id.* (copy on file with the author) (stating that “Justice Clark suggested that our Committee members attend meetings of the Evaluation of Ethics Committee”).

204. Tom C. Clark, *Judicial Self-Regulation—Its Potential*, 35 LAW & CONTEMP. PROBS. 37, 42 (1970). Justice Clark added:

I am hopeful that before too long the ABA will approve and promulgate its final draft of Standards of Judicial Conduct and the courts—federal and state—will follow with speed in the adoption of clear and concise canons of judicial department based thereon, together with practical and effective procedures for their enforcement.

Id. at 42.

205. See Vincent R. Johnson, *Celluloid Legal Ethics: Discipline Redux*, 3 GEO. J. LEGAL ETHICS 745, 745 (1990) (discussing the proliferation of texts, monographs and treatises).

true prior to the Clark Report, there are now many books on legal and judicial ethics.²⁰⁶

The Clark Report had called for public dissemination of information about the disciplinary process. The Committee focused on the problem of “[f]ailure to publish the achievements of disciplinary agencies.”²⁰⁷ It found that “[m]ost disciplinary agencies deliberately discourage any publication of information concerning their activities, believing that the public image of the profession is damaged by a disclosure that attorney misconduct exists.”²⁰⁸ The Committee realistically concluded:

Efforts to foster public acceptance of a myth that there is no misconduct in the profession are not only useless but may expose the profession to ridicule as well. The route to encouraging public confidence in the disciplinary process lies in acknowledging the existence of attorney misconduct and showing the public the steps taken against it.²⁰⁹

The Clark Report stated:

Arrangements should be made to have relevant information concerning attorney discipline published in media likely to reach members of the profession and the public, including law journals, bar journals or newsletters and local newspapers of general circulation.²¹⁰

Today, ethics issues often receive extensive coverage in legal newspapers, which was not true at the time of the Clark Report. Such newspapers report on who has been sued for malpractice,²¹¹ who has been disciplined,²¹²

206. For example, as the result of work throughout the 1990s, the American Law Institute has issued a new comprehensive guide to lawyer duties called the *Restatement (Third) of the Law Governing Lawyers*, which is an important landmark in this field of law. See *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* (2000). There is also a wide selection of written and video materials available for use in ethics education programs. See Johnson, *supra* note 205, at 745–46 (discussing video resources). Various law schools now sponsor conferences focused on legal malpractice and attorney professional responsibility, which publish symposium issues in law journals. See Adam Boland, Foreword, *The Second Annual Symposium on Legal Malpractice & Professional Responsibility*, 34 *ST. MARY'S L.J.* 733 (2003) (discussing annual symposium on legal ethics).

207. CLARK REPORT, *supra* note 14, at 143.

208. *Id.*

209. *Id.*

210. *Id.* at 145. The Report said with approval:

The secretary of a state bar association noted that the deterrent effect inherent in every disciplinary proceeding is directly proportionate to the number of practicing attorneys who are made aware of its existence

Similarly, the very effectiveness of discipline in a particular case [such as disbarment or suspension] may depend on widespread awareness that it has been imposed.

Id. at 144.

211. See, e.g., *Verdicts and Settlements*, NAT'L L.J., July 12, 2004, at 20 (reporting that a malpractice suit against a law firm yielded a \$4.4 million award); *Verdicts and Settlements*, NAT'L L.J., Mar. 29, 2004, at 15 (reporting a suit where a lawyer allowed the case to lapse after taking a retainer fee).

and other charges of misconduct.²¹³ Similarly, the public media readily recount the shortcomings of lawyers and the actions that are or should be taken to address those failings.²¹⁴ These steps, along with the evolving wealth of literature on legal and judicial ethics, provide useful information to members of the profession and the public and are consistent with the spirit of the Clark Report.²¹⁵

H. Attention to Lawyers with Disabilities

Today, all states have a lawyer assistance program to provide counseling, mentoring, and other forms of support to attorneys with drug and alcohol problems.²¹⁶ State rules also commonly provide for attorneys to be suspended from the practice of law during periods of disability.²¹⁷

The Clark Report had called for the temporary suspension from practice of those afflicted with disability. The Committee wrote:

Many states have no provisions for coping with the problem of the attorney who is disabled by reason of mental illness or addiction to intoxicants or drugs but whose infirmity has not resulted in misconduct. The absence of such a procedure exposes the public to serious danger, for it prohibits any action against the lawyer known to be disabled before his disability has led to harm to his clients. What rationale can the profession provide for its failure to authorize the suspension of a lawyer who is involuntarily committed to a mental hospital²¹⁸

The Clark Committee had recommended state adoption of “[a] court rule authorizing indefinite suspension or transfer to inactive status of any attorney incapacitated by mental illness, senility or addiction to drugs or intoxicants until such time as the incapacity no longer exists.”²¹⁹ The

212. See, e.g., *Discipline*, TEX. LAW., Feb. 2, 2004, at 100, available at WL 2/2/2004 TEXLAW CS1117 (Discipline; 5th United States Circuit Court of Appeals—John Dalton Chappelle [Grievance Committee 6A, Nos. D0010218078 & D0010218080]).

213. See, e.g., Mary Alice Robbins, *Jenkins Sues Two Attorneys*, TEX. LAW., July 12, 2004, at 1, available at WL 7/12/2004 TEXLAW 1 (discussing a law firm's action to enjoin lawyers from committing alleged violations of the law, including breach of the ethics rules on confidentiality).

214. *Pitt Says Lawyers Will Be Held Accountable to Directors*, N.Y. TIMES, Aug. 13, 2002, at C2 (calling for lawyers to be held accountable for failure to report S.E.C. violations); Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES (Valley Edition), July 15, 2000, at A1 (discussing a capital punishment case in which the defense attorney was caught asleep during trial).

215. Note, however, that the Clark Report recommended that in most cases the pendency of an unresolved disciplinary charge should “be kept confidential until hearings have been held and the charges sustained by the trial authority.” CLARK REPORT, *supra* note 14, at 138.

216. See Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265 (1997) (discussing lawyer assistance programs or similar committees in all 50 states).

217. SCHUWERK & HARDWICK, *supra* note 125, app. C at 1496 (quoting Texas rules).

218. CLARK REPORT, *supra* note 14, at 6.

219. *Id.* at 110.

Committee also hinted that creation of support mechanisms to assist those with substance abuse problems might be appropriate. The Committee had found that “the profession’s delay in meeting the problem of the incapacitated attorney has been its reluctance to deprive brother attorneys, who often have no independent income or pension, of their means of earning a livelihood.”²²⁰

The Clark Committee rejected the priority of that consideration. However, the Report stated:

That is not to say that the profession should concern itself only with removing the disabled attorney and should ignore the economic plight that may follow. To the contrary, a profession whose sense of responsibility prompts it to create security funds to reimburse those victimized by its members might well create a similar fund to protect those of its members who fall victim to illness.²²¹

Justice Clark had personally expressed great concern for those who used drugs. In an article published after stepping down from the Supreme Court, which today seems wholly extraordinary, Justice Clark spoke about the “badge of criminality” that a conviction for marijuana use placed on “thousands and thousands of our children” and called for the repeal of marijuana laws.²²²

IV. FOCUS THE ATTENTION OF THE PROFESSION ON ETHICAL BEHAVIOR

The Clark Report was a brilliant document. Clear-eyed, courageous, and prescient, it charted a course of reform and stirred a debate on attorney ethics that continues to resound throughout the legal profession. The issuance of the Report was a pivotal moment in the development of the American bar and in the field of legal ethics. Had Justice Clark not brought to the Committee his reputation,²²³ good judgment, agreeable temperament,²²⁴ and visibility, the Report might well have languished, as many reports do, and great opportunities might have been lost. Justice Clark’s leadership of the

220. *Id.* at 111.

221. *Id.* at 112.

222. See Tom C. Clark, *Drugs and the Law*, 18 *Loyola L. Rev.* 243, 246–47 (1972). Justice Clark wrote, “[n]ot only have the experts found that marijuana does not incite crime but they have declared that ‘both Eastern and Western literature contain little evidence at this time that light to moderate use of cannabis (marijuana) has deleterious physical effects. . . .’” *Id.* at 246 (quoting U.S. DEP’T. OF HEALTH, EDUC., & WELFARE, *THE SECOND ANNUAL REPORT TO CONGRESS* 229 (1972)).

223. See *Justice Clark Dies*, *supra* note 3, at 985 (quoting Chief Justice Warren Burger as stating of Clark that “no one had such universal esteem of the lawyers and judges in this country”).

224. See Temple, *supra* note 1, at 274 (stating that Justice Clark was “the sweetest and most thoughtful man I have ever known”).

reform effort was broadly welcomed,²²⁵ for he was a man who was not only passionate about the legal profession²²⁶ but described by friends and colleagues as “genuinely warmhearted,”²²⁷ “constantly solicitous of the welfare” of others,²²⁸ “unfailingly cheerful, optimistic, and generous,”²²⁹ “selfless,”²³⁰ and “open-minded.”²³¹ Justice Lewis F. Powell, a former president of the American Bar Association, said, “[i]t is likely that Mr. Justice Clark was known personally and admired by more lawyers, law professors, and judges than any [J]ustice in the history of the Supreme Court of the United States.”²³²

The goodwill that Justice Clark had accumulated during years of public service was an asset to the project,²³³ as was his ability to define a clear course of action.

Balanced with Clark’s extraordinary gentleness and considerateness [was] his equally extraordinary directness and incisiveness [T]his is the hand of iron in the very velvet glove. . . . If there were alternate points of view and he had to offend someone by taking a side, he took sides. He was an ambassador of good will only when it did not interfere with being an ambassador of improved judicial administration.²³⁴

225. Cf. Statement by Orison S. Marden, Last Retiring President of the ABA, at the First Public Hearing of the Special Committee on Disciplinary Enforcement of the ABA, Held at the Association of the Bar of the City of New York, Mar. 8, 1968 (draft Feb. 7, 1968), at 4 (copy on file with the author). The statement says:

Promptly on learning of the retirement plans of Mr. Justice Tom C. Clark I waited upon his doorstep, hat in hand, in the hope of persuading him to assume the directorship of this important work. It was grossly unfair to ask this of Justice Clark as he had given so much of his time and energy over the past decade to the work of the organized bar but I overcame the pangs of conscience and made the request. Needless to say, his acceptance filled me with joy and gratitude and I know that lawyers all over the country share these sentiments.

Id.

226. See Clark, *Address*, *supra* note 52, at 369 (quoting Justice Clark as stating that “‘Old Tom’ . . . is getting old—sixty-eight last week—but he is still young in heart and he still loves the lawyers”).

227. Donald Turner, *Mr. Justice Clark: A Personal Note*, 46 Tex. L. Rev. 3, 3 (1967) (stating, as a former clerk, that “Mr. Justice Clark is indeed one of the most genuinely warmhearted persons I have ever known”).

228. *Id.* at 3 (stating that Justice Clark was “constantly solicitous of the welfare of those who worked with him even to the point of insisting that we take more holidays than we really thought that we should”).

229. *Justice Clark Dies*, *supra* note 3, at 985 (quoting Justice Byron White).

230. *Id.* (quoting Justice John Paul Stevens referring to Justice Clark’s “selfless dedication to the administration of justice,” which earned the “respect, admiration, and affection of the entire federal judiciary”).

231. Turner, *supra* note 227, at 3 (describing Justice Clark as “[o]pen-minded, far more dispassionate than most men can be, [and] willing to re-examine positions earlier taken”).

232. *Justice Clark Dies*, *supra* note 3, at 985.

233. See Letter from John G. Bonomi, Special Committee member, to Tom C. Clark (Mar. 28, 1968) (copy on file with the author) (stating that the good attendance by “so many distinguished members of the judiciary and bar” at the New York regional meeting was “directly attributable to the great reservoir of respect and good will that you have accumulated over the years”).

234. Frank, *supra* note 7, at 37–38.

Who better to persuade the legal profession to take on the hornets' nest of reforming lawyer discipline than Justice Clark—a man gentle but courageous?²³⁵

The “deplorable”²³⁶ state of affairs that Justice Clark condemned in the 1970s no longer exists. Attorneys who violate the rules of ethics are regularly held accountable in disciplinary actions. Through increased funding and professional prosecution, American disciplinary systems have moved very substantially toward that goal.

There have also been great improvements in the teaching of legal ethics, in protecting clients through civil remedies, and in promoting the fair and efficient functioning of the justice system, where ethics rules play an increasingly larger role. It is fair to credit the Clark Committee, the Clark Report, and Justice Clark himself for setting the profession on this productive course of development.

It seems likely that Justice Clark would be pleased with many of the developments in the field of legal ethics since the issuance of the Clark Report. He argued that “we must focus the attention of the profession on ethical behavior and convince them of the necessity to adopt such standards in their daily lives.”²³⁷ There is no question that the attention of the profession is now focused on issues of attorney professional responsibility.

235. ABA President Marden was well aware of the significance of getting Justice Clark to head the reform effort. See Letter from Orison S. Marden, President, ABA, to Hon. Thomas C. Clark, Associate Justice, Supreme Court of the United States, Mar. 28, 1967 (copy on file with the author). Marden wrote to Justice Clark: “We are overjoyed by your acceptance of the Chairmanship of our Special Committee on Evaluation of Disciplinary Enforcement. I know that your leadership will get us off to a good start in the vitally important undertaking.” *Id.* at 1.

236. See Clark, *supra* note 21, at 252. Justice Clark expressed his views in unequivocal terms that “[t]here is no doubt in my mind that the present state of our disciplinary machinery is deplorable and that we must perfect the professional system of disciplining and weeding out judges and lawyers who are inept, lazy, corrupt or dishonest.” *Id.*

237. See Clark, *supra* note 21, at 258–59.