Digital Commons at St. Mary's University

Faculty Articles

School of Law Faculty Scholarship

2023

Ethical Lawyering: The Role of Honor, Conscience, and Codes (reviewing Michael S. Ariens, The Lawyer's Conscience: A History of American Lawyer 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 Legal Ethics and Professional Responsibility Commons, and the Legal History Commons

Recommended Citation

Vincent R. Johnson, Ethical Lawyering: The Role of Honor, Conscience, and Codes (reviewing Michael S. Ariens, The Lawyer's Conscience: A History of American Lawyer Ethics), 13 St. Mary's J. on Legal Malpractice & Ethics 172 (2023).

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 sfowler@stmarytx.edu, egoode@stmarytx.edu.

BOOK REVIEW

Vincent R. Johnson

Ethical Lawyering:
The Role of Honor, Conscience, and Codes

The Lawyer's Conscience:
A History of American Legal Ethics
by Michael S. Ariens
University Press of Kansas, Lawrence, Kansas, 400 pages (2023)
Hardcover ISBN 9780700634095, Ebook 9780700633869

Author. Vincent R. Johnson is the Katherine A. Ryan Distinguished Chair for Global and International Law at St. Mary's University School of Law, San Antonio, Texas. He teaches and writes mainly in the areas of Torts, Attorney Professional Responsibility, Legal Malpractice, Judicial Ethics, and Ethics in Government. Professor Johnson has served as a Fellow at the United States Supreme Court and a Fulbright Scholar in China, Romania, and Burma, and has lectured in a dozen other countries. An elected life member of the American Law Institute, Professor Johnson earned a B.A. at Saint Vincent College, a J.D. at the University of Notre Dame, an LL.M. at Yale University, and a second LL.M. at the London School of Economics and Political Science. By appointment of the Supreme Court of Texas, he is serving his second three-year term as a member of the Texas Committee on Disciplinary Rules and Referenda.

BOOK REVIEW CONTENTS

I. A Monumental Work 174
II. Honor, Conscience, and Codes 176
III. The Limits of Ethics Rules 178
IV. Ethical Landmarks 181
V. Gloom or Hope? 182

I. A MONUMENTAL WORK

Michael Ariens' new book,[1] *The Lawyer's Conscience: A History of American Lawyer Ethics*,[2] is a monumental work. Rooted in Ariens' decades of excellent scholarship in the fields of attorney professional responsibility[3] and legal history,[4] this book was primarily written during the Covid-19 pandemic in 2020–21.

In a mere 286 pages of text (supported by 84 subsequent pages of citation-packed end notes), *The Lawyer's Conscience* captures the great sweep and key features of the roughly 250-year period in American legal ethics running from colonial times to the present day. Richly detailed and vividly presented, the story takes the reader on a grand tour of the landmark events and changing ideas that have defined the aspirations, responsibilities, and accountability of members of the American legal profession.

---

1. Ariens' other books include: AMERICAN CONSTITUTIONAL LAW AND HISTORY (2d ed. 2016); LAW SCHOOL: GETTING IN, GETTING OUT, GETTING ON (Carolina Academic Press 2010); RELIGIOUS LIBERTY IN A PLURALISTIC SOCIETY (2d ed. 2002) (WITH ROBERT DESTRO); and LONE STAR LAW: A LEGAL HISTORY OF TEXAS (Texas Tech Univ. Press 2016).

2. MICHAEL S. ARIENS, THE LAWYER'S CONSCIENCE: A HISTORY OF AMERICAN LAWYER ETHICS [hereinafter ARIENS, THE LAWYER'S CONSCIENCE].

3. *See generally* Michael S. Ariens, *Sorting: Legal Specialization and the Privatization of the American Legal Profession*, 29 GEO. J. LEGAL ETHICS 579 (2016); Michael S. Ariens, *Model Rule 8.4(g) and the Profession's Core Values Problem*, 11 ST. MARY'S J. LEGAL MAL. & ETHICS 180 (2021); Michael S. Ariens, *Brougham's Ghost*, 35 N. ILL. U.L. REV. 263 (2015); Michael S. Ariens, *The Ethics of Copyrighting Ethics Rules*, 36 U. TOL. L. REV. 235 (2005); Michael S. Ariens, *Making the Modern American Legal Profession, 1969–Present*, 50 ST. MARY'S L.J. 671 (2019); Michael S. Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689 (2016); Michael S. Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 571 (2014); Michael S. Ariens, *The Rise and Fall of Social Trustee Professionalism*, 2016 J. PROF. LAW. 49 (2016); Michael S. Ariens, *The Fall of an American Lawyer*, 46 J. LEGAL PROF. 195 (2022); Michael S. Ariens, *Ethics in the Legal Industry*, 51 CREIGHTON L. REV. 673 (2018); Michael S. Ariens, *The Agony of Modern Legal Ethics, 1970–1985*, 5 ST. MARY'S J. LEGAL MAL. & ETHICS 134 (2014); Michael S. Ariens, *"Playing Chicken": An Instant History of the Battle over Exceptions to Client Confidences*, 33 J. LEGAL PROF. 239 (2009); Michael S. Ariens, *The Appearance of Appearances*, 70 U. KAN. L. REV. 633 (2022); Michael S. Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003 (1994); Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343 (2008).

4. *See generally* Michael S. Ariens, *On the Road of Good Intentions: Justice Brennan and the Religion Clauses*, 27 CAL. W.L. REV. 311 (1991); Michael S. Ariens, *A Thrice-Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620 (1994); Michael S. Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY'S L.J. 301 (2003).

Organized chronologically, Ariens' book presents ideas and actions in their historical settings. The demands of ethical lawyering,[5] the growth of legal institutions, and the contributions of leading figures are explored in the context of America's transformation from a group of politically fragile colonies into a leading world power. Ariens does an outstanding job identifying the issues, the players, their positions, and the consequences of their arguments and actions.

Ariens helps readers see how times change. For example, knowing how modern lawyer codes of ethics give extensive, if not inordinate[6] attention to conflicts of interest, Ariens notes "conflicts of interest weren't even mentioned in the 1908 Canons."[7]

Ariens poses several important ethical issues, such as "[w]hat . . . it mean[s] to be an American lawyer,"[8] whether entry into the legal profession should be controlled by lawyers,[9] what the essential attributes of a profession are,[10] and whether "the practice of law [is] a profession or merely a business."[11] He delights in sifting through the historical evidence to sort out the possible answers.

For example, when Ariens asks how a lawyer can "serve as an 'officer of the court' as well as a loyal agent of his clients," he examines the different views on the subject held by Supreme Court Justice James Wilson, elite corporate lawyer Elihu Root, and Massachusetts lawyer Theophilus Parsons.[12] Ariens later returns to the subject by considering how Chief Justice Warren Burger's "juxtaposition of the 'officer of the court' and 'hired gun' models [of lawyering] revived the perennial question

5. *See, e.g.*, ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 2, at 2 ("The rise of the administrative state, including governmental regulatory bodies such as the Food and Drug Administration, National Labor Relations Board, and Consumer Product Safety Commission, also increased the power of lawyers.").

6. *Cf.* VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 441–81 (3d ed. 2021) ("Conflict of interest is, in many respects, the most difficult and important subject within the law of legal malpractice.").

7. *See* ARIENS, THE LAWYER'S CONSCIENCE, *supra* note 2, at 275.

8. *Id.* at 1.

9. *Id.* at 7 ("By the 1830s, most states had loosened their bar admission standards, a situation that continued for nearly a century.").

10. *Id.* at 5 (quoting Harvard law dean, Roscoe Pound, stating: "three ideas [are] involved in a profession[:] organization, learning, and a spirit of public service").

11. *Id.* at 266.

12. *Id.* at 4–5.

of the lawyer's competing duties to clients and the public."[13] Similarly, when Ariens examines what justifies a lawyer's representation of an atrocious criminal or a bad cause, he sets out no less than three lines of reasoning rooted in historical fact.[14]

II. HONOR, CONSCIENCE, AND CODES

The title of the book—*The Lawyer's Conscience*—is a good one. These words suggest ethical lawyering presents moral challenges involving the exercise of judgment, while indicating that making correct ethical decisions is necessary but often difficult.

However, Ariens' book not only focuses on conscience. Rather, the introduction to the work clarifies at least two other possibilities for defining the "higher standard than the morals of the marketplace"[15] to which lawyers could be held—namely public honor or ethics codes. Ariens explains these various forces that have shaped the history of American legal ethics in the following terms:

> Early-nineteenth-century lawyers were few in number and circumscribed in location. To act honorably, and to be perceived as acting honorably by one's peers, was an important mark of success. Dishonorable behavior was socially shameful and might subject the lawyer to disbarment. Even if not disbarred, the lawyer might be ostracized. . . . The honor culture, however, slowly lost its authority as a guide to ethical lawyer behavior. This was visible by the 1830s, although honor remained a touchstone through the early twentieth century[16] . . . The predominant standard of ethical lawyer behavior from the 1830s through much of the twentieth century was that of individual character

13. *Id.* at 208.

14. For example, by the late 1840s, Ariens describes the three related grounds that justified the lawyer's duty to represent the atrocious criminal or bad cause:

> First, the rule of law required that even the most wretched receive due process. Second, lawyers took an individual's case to protect the rights of both the client and society, and they necessarily took on matters in the absence of actual knowledge that the cause was bad. Third, the lawyer's exercise of conscience in taking any case was morally proper. The conscientious lawyer protected the outcast, despite public condemnation: 'The person of strong character transcended fickle public opinion and fleeting public repute.'

Id. at 81–82.

15. *Id.* at 8.

16. *Id.* at 8 (citing DAVID HOFFMAN, A COURSE OF LEGAL STUDY, ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 752–75 (2d ed. 1836)).

> and inner conscience. A lawyer's actions were ethical if undertaken in the presence of a well-formed conscience. Unlike honor, conscience is an internal standard. . . . The emergence of conscience as a standard fit the times, and the idea of honor became anachronistic in much of the United States. . . . The standard of honor did not disappear; it was, however, unmoored from its prominent position and later served as either an occasional rallying cry or a fond memory.[17]

As Ariens observes, "the rise of the individual in the nineteenth century led to 'the substitution of *personal* discipline for *community* discipline.'"[18] Ariens then asks:

> A lawyer was supposed to follow high moral principles when assessing conscience, but how was that achieved as a practical matter? A person's instructed conscience corresponded with moral law, making this judgment personal. This inward turn was assisted by broad contours channeling the instructed conscience. General rules prohibited a lawyer from disclosing confidential communications with a client and from having conflicts of interest in representing a client. The specific exceptions to the ethics rules were uncertain, as they lay in the realm of conscience rather than external rule. . . . For more than a century, writings on legal ethics emphasized character, conscience, and reflection.[19]

---

17. *Id.* at 8.

18. *Id.* at 81 (quoting DANIEL W. HOWE, MAKING THE AMERICAN SELF: JONATHAN EDWARDS TO ABRAHAM LINCOLN 1, 107 (1997) (emphasis in original)).

19. *Id.* at 8–9; *see also id.* at 28–29 ("During much of the antebellum era, . . . a lawyer's unconvicted misbehavior resulted in disbarment only when the court found proof of a pattern of dishonorable conduct."). Notably, character, conscience, and reflection played an outsized role in some corners of legal education as late as the mid-1970s, when the Author of this Book Review was a law student of Thomas L. Shaffer at the University of Notre Dame. Shaffer was a masterful teacher. Looking back on those days, the Author wrote:

We spent hours pondering ethical problems, discussing and debating the difficult choices that lawyers face. What should a lawyer do if a client commits perjury on the witness stand, or wants to disinherit a child, or seeks assistance with marketing a vile product, drafting a predatory lease, or investing in a politically repressive country? Or suppose a truthful statement to the press about the non-enforceability of a police promise might cause a hostage-taker learning of the statement to execute the captives. Or what if a lawyer knows about an unfortunate loophole in the anti-discrimination laws and a client asks for advice? . . . I remember the discussions. But I do not remember many clear answers. Often there seemed to be multiple answers, and sometimes no answers at all. Either way, solutions did not come easily. That may have been the point. The message, as best I understood it, was that for lawyers seeking to do the right thing there are no simple answers to ethical questions. Resolving such

But then things changed dramatically:

> The next model resulted from the adoption of codes of legal ethics. This effort began modestly in voluntary state bar associations in the late nineteenth century. . . . [T]he massive growth of the legal profession from 1870 through 1910 made elite lawyers uncomfortable with the idea of conscience serving as the sole guide to ethical behavior. Those lawyers generated external standards as a general guide informing the lawyer's conscience. . . . In 1908[,] the [American Bar Association ("ABA")] adopted its own canons of professional ethics. . . . The second iteration began in 1969 with the ABA's adoption of its Code of Professional Responsibility. . . . In the aftermath of the Watergate scandal, the ABA commissioned another project on legal ethics[:] [t]he Model Rules of Professional Conduct (1983).[20]

III. THE LIMITS OF ETHICS RULES

Supplementing honor and conscience with codified ethics rules was a good development in the legal profession. As the Author of this Book Review has explained elsewhere:

> Absent a common shared moral tradition, it is unrealistic to think that a million lawyers, independently resolving the ethical questions that arise in the practice of law, would arrive at the same answers. If clients are to be afforded reasonably equal treatment by the lawyers who serve them, the existence of ethics codes is indispensable. Resolving ethical questions by reference to a code may offer little opportunity for moral growth on the part of lawyers, but it holds fair promise for ensuring equality of client treatment.[21]

However, the transformation of attorney professional ethics into a field of legal regulation has not gone without question. For instance, Thomas L.

---

dilemmas required weighty deliberation and clear, mature judgment. Ethical problem-solving, we learned, depended on the lawyer's character and skill in making moral choices. The decision-making process was arduous and uncertain, but it provided an opportunity for moral growth.

Vincent R. Johnson*, The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 25, 25–26 (2000) [hereinafter *The Virtues and Limits of Codes in Legal Ethics*]. *See also* Vincent R. Johnson, *Lawyers, Mistakes, and Moral Growth*, 12 ST. MARY'S J. LEGAL MAL. & ETHICS 181 (2019) (reviewing Michael H. Bassett's book titled "The Man in the Ditch: A Redemption Story for Today").

20. *See* ARIENS, THE LAWYER'S CONSCIENCE*, supra* note 2, at 9–10.

21. *See The Virtues and Limits of Codes in Legal Ethics, supra* note 19, at 36.

Shaffer[22]—professor of law and former dean of The University of Notre Dame Law School—asserted:

> Americans . . . evade moral discussion of what they are about. . . . [T]his is true of law students in "professional responsibility" courses, as it is of law faculties and lawyers in practice. The methods of evasion are diverse but consistently banal. They include resolutions that dig no deeper than rules of practice imposed by courts—rules which virtually everyone identifies as ethically inadequate, or labels as a superficial moral minimum, or both.[23]

Shaffer urged:

> [M]ost American attorneys should ignore most of what my colleagues . . . [in the professional responsibility field] say about legal ethics, and should regard official "ethics" rules for attorneys the way they regard the motor vehicle code—as an administrative regulation having very little to do with being righteous and an attorney simultaneously.[24]

Shaffer lamented: "[t]he claim that a lawyer must obey his conscience (and that his conscience is one conscience, at home or in town) fades a little more every time the profession recodifies its rules of professional behavior."[25] Additionally, Shaffer stated "somewhere between [David] Hoffman's day

---

22. This Author has previously described Shaffer by the following:

> As a law professor and scholar, Thomas L. Shaffer . . . was one of the giants in the field of legal ethics as it emerged in the last quarter of the twentieth century. Along with other great law teachers[,] . . . Shaffer molded the ideas about attorney professional responsibility that were shaped anew in the wake of Justice Tom C. Clark's American Bar Association report on the 'scandalous' deficiencies in lawyer discipline (1970) and the Watergate Crisis that tarred President Richard M. Nixon and other prominent lawyers with the stigma of criminal and ethical misdeeds (1972–1974).

See Vincent R. Johnson, *Thomas L. Shaffer, Legal Ethics, and St. Mary's University*, 10 ST. MARY'S J. LEGAL MAL. & ETHICS xxviii, xxix–xxx (2020). Moreover, Shaffer was the Author's professor in several law school courses, including Professional Responsibility. In an article pondering how the apple could drop so far from the tree, the Author wrote: "Shaffer was interested in moral growth; I am interested in consumer protection. Shaffer saw moral struggle at the center of lawyering. I see it at the periphery." *Id.* at xlv.

23. *See The Virtues and Limits of Codes in Legal Ethics, supra* note 19, at 28–29.

24. *Id.* at 25–26.

25. Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181, 223 (1981).

(he died in 1854) and our own, professionalism stopped meaning that lawyers are responsible for justice."[26]

Ariens' book helps us understand arguments like those posed by Shaffer, because it clarifies the intellectual history of the legal profession. With respect to the role of conscience in lawyering, the Author of this Book Review opines:

> Ethics codes may indeed tempt lawyers to let others do their ethical thinking for them and to eschew responsibility for the actions they take. But even if that is true, it would be neither wise nor feasible for the profession to dispense with such formulations. Lawyers' ethics codes provide an important basis for the equitable delivery of legal services and a valuable tool for stating professional aspirations, re-examining ethical choices, and promoting open discussion of ethical issues. In the absence of such codified standards, the ethical quality of law practice would quickly degenerate into inconsistency and unpredictability, with each of a million lawyers ruling a different fiefdom. Chaos on ethical matters would be the order of the day.[27]

Despite its title, the focus of the book is not limited to the role of a lawyer's conscience; rather, it extends to honor and codifications, and indeed much more. The first three chapters examine the "changing understanding of the ethical duties of American lawyers from the late colonial era through the nineteenth century."[28] The following three chapters explore the ABA's effort to codify the rules of legal ethics applicable to all lawyers. The final chapter focuses on what Ariens and undoubtedly some others perceive as a professionalism crisis.

---

26. Thomas L. Shaffer, *Inaugural Howard Liechtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 402–03 (1991). Echoing a statement made by Shaffer, this Author wrote:

> The legal profession in America, when I came into it in 1961, was . . . a moral teacher. When I later left my law firm, to become a fulltime teacher, I could say—I did say—that the lawyers I had practiced law with there were persons of character who taught their junior colleagues how to practice the virtues in their practice of law. One of the most ordinary of these lessons—and the one I have found it most difficult to persuade my students of—is that the lawyer in modern business practice in the United States is a source of moral guidance for his clients.

Thomas L. Shaffer, Legal Ethics, and St. Mary's University, *supra* note 22, at xxxvi–xxxvii (quoting Thomas Shaffer, *The Profession as a Moral Teacher*, 18 ST. MARY'S L.J. 195, 214 (1986)).

27. *See The Virtues and Limits of Codes in Legal Ethics, supra* note 19, at 46.

28. *See* ARIENS, THE LAWYER'S CONSCIENCE*, supra* note 2, at 10.

IV. ETHICAL LANDMARKS

Ariens' book is packed with a diverse and interesting array of events and ideas that have contributed to our understanding of the legal ethics field. Among the seminal events in which lawyers played important roles were the Boston Massacre Trials,[29] the Philadelphia Treason Trials,[30] and the Trial of Queen Caroline (in the House of Lords).[31]

Ariens pays attention to many ideas and beliefs that made important contributions to defining the intellectual content of American lawyer ethics. These include recurrent antilawyer sentiment,[32] and the proper roles for "zealous partisanship,"[33] "adversarial spirit,"[34] "independent judgment,"[35] and professional "detachment."[36] Ariens' book also thoughtfully considers "[t]he idea that lawyers are fiduciaries owing a duty of utmost faithfulness to their clients, not mere private actors."[37] Attention is also paid to the notion that lawyers are subject to professional discipline for conduct unrelated to the practice of law,[38] and to the challenges of infusing lawyer ethics codes with moral content.[39] The cast of characters who cross the pages of Ariens' book is large, including notably John Adams,[40] Alexander Hamilton,[41] Aaron Burr,[42] Daniel Webster,[43] David Hoffman,[44] George

29. *Id.* at 16–19.

30. *Id.* at 19–20

31. *Id.* at 65.

32. *Id.* at 21–24.

33. *Id.* at 49. *See id.* at 25–28 (discussing Aaron Burr, Alexander Hamilton and zealous representation); *see also id.* at 74 ("Destroying a person's reputation was a standard aspect of [Rufus] Choate's advocacy.").

34. *Id.* at 49.

35. *Id.* at 211.

36. *Id.* at 209.

37. *Id.* at 32. *See also id.* at 37 (acknowledging that due to the "lawyer's 'power and opportunity' to do great evil or great good . . . he was held to a higher standard of trust than an ordinary citizen").

38. *Id.* at 39–40.

39. *Id.* at 204 ("Serving as guardian of the law was a moral undertaking, and that meant drafting a code that grappled with moral issues in the practice of law.").

40. *Id.* at 2.

41. *Id.* at 25.

42. *Id.*

43. *Id.* at 43–48.

44. *Id.* at 50–58.

Sharswood,[45] David Dudley Field,[46] Thomas Goode Jones,[47] Justice Lewis F. Powell, Jr.,[48] John Sutton,[49] Charles Wolfram,[50] Thomas Morgan,[51] and Geoffrey C. Hazard.[52]

V. GLOOM OR HOPE?

Despite the encyclopedic reach of Ariens' book, there is more that could be discussed. One important issue is the role of women scholars in shaping the law of attorney professional responsibility. Undoubtedly, the field of legal ethics has been predominantly male dominated over the past 250 years. However, that has now changed for the better. In connection with the development of the law of attorney professional responsibility, Ariens mentions, at least briefly, important women such as Myra Bradwell,[53] Judith Maute,[54] Carolyn B. Lamb,[55] Georgene Vairo,[56] Susan Martyn,[57] Nancy J. Moore,[58] Susan Saab Fortney,[59] and Margaret Love.[60] However, it is surprising to find no reference to Deborah Rhode, the Stanford law professor who even forty years ago was a major figure in the developing field of legal ethics.[61] Similar concerns could be expressed about absent minority voices.

---

45. *Id.* at 86–88.

46. *Id.* at 72–73, 91–107.

47. *Id.* at 112 ("In 1881[,] thirty-seven-year-old Thomas Goode Jones suggested that the Alabama State Bar Association create a code of legal ethics. . . [H]e was unusual in crafting such a code.").

48. *Id.* at 180.

49. *Id.* at 200–03.

50. *Id.* at 258, 262–63, 265, 267–68.

51. *Id.* at 265–66.

52. *Id.* at 200.

53. *Id.* at 112.

54. *Id.* at 203.

55. *Id.* at 279.

56. *Id.* at 257.

57. *Id.* at 272.

58. *Id.*

59. *Id.* at 361 n. 40.

60. *Id.* at 273, 285 ("The tortuous (and torturous) adoption of the Model Rules of Professional Conduct (1983) exemplified the fractured legal profession. Lawyers were united only in the fact that they all received the same license to practice law.").

61. *See Professor Deborah L. Rhode*, 34 GEO. J. LEGAL ETHICS 1, 1 (2021) ("Rhode . . . [was] an enormously accomplished and pioneering scholar in the field of legal ethics . . . [who was] especially

Focusing on the past fifty years or so, and the days ahead, Ariens writes somewhat darkly about a "fractured"[62] and "unraveling"[63] American legal profession in the throes of disintegration.[64] He laments "lawyers pay little attention to, and evince little understanding of, the rules of professional conduct."[65] Moreover, he asserts (incorrectly, in my opinion)[66] "[p]rofessional liability claims [i.e., legal malpractice actions] are an insufficient threat to influence lawyer behavior, and they are unimportant in the private practice of law. . . ."[67]

The Author believes the future of American lawyer ethics will be bright, not bleak. There will, to be sure, be growing pains, as the legal profession continues to address the challenges of both increasing diversity and the complexities of the digital age. However, in many respects, the ethical infrastructure of the American legal profession has never been better.[68] The law of lawyering is taught to every law student in every law school,[69] tested

---

committed to the advancement of women's rights, a cause she advanced with passionate conviction and a dedication to justice.").

62. *See* ARIENS, THE LAWYER'S CONSCIENCE*, supra* note 2, at 273.

63. *Id.* at 208.

64. *See id.* at 252 ("The cause of professionalism was lost during the Great Recession of 2008. The ongoing adoption of creeds and civility standards cannot mask the disintegration of the model of the lawyer as social trustee, and promoter of justice and public good. To do good was immensely difficult when relatively few were doing well. The market model triumphed."); *see also id.* at 281 ("The idea of the lawyer as social trustee, as an 'officer of the legal system and a public citizen having special responsibility for the quality of justice,' had died. If it wasn't dead before, the Great Recession killed it.").

65. *Id.* at 258.

66. The Author agrees with Professor Geoffrey C. Hazard who explained the Restatement recognizes "the remedy of malpractice liability and the remedy of disqualification are practically of greater importance in most law practice than is the risk of disciplinary proceedings." GEOFFREY C. HAZARD, JR., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, at xxi (2000).

67. ARIENS, THE LAWYER'S CONSCIENCE*, supra* note 2, at 256 (quoting HERBERT M. KRITZER & NEIL VIDMAR, WHEN LAWYERS SCREW UP 100–01, 108–09 (2018)).

68. Indeed, the Author has observed this transformation in the field, by stating:

In little more than four decades, the field of American legal ethics has been transformed from an unimportant backwater into a mighty river of legal principles that drives the practice of law in countless respects. Today, this complex matrix of substantive provisions and enforcement mechanisms ensures, to a great extent, that clients are protected from unnecessary harm, that lawyers are safeguarded from improper accusations, and that the provision of legal services is consistent with the public interest.

Vincent R. Johnson, *Legal Malpractice in A Changing Profession: The Role of Contract Principles*, 61 CLEV. ST. L. REV. 489, 490 (2013).

69. *See generally* ABA Standards and Rules of Procedure for Approval of Law Schools 2022–2023, available at https://www.americanbar.org/groups/legal_education/resources/standards/

on the bar exam,[70] and reinforced by continuing legal education requirements that generally mandate additional hours of ethics training each year.[71] In addition, every jurisdiction has an ethics code that is reasonably complete and well-drafted. Whenever a client walks into a law office, there is an implicit promise that the lawyer's services come with all of the ethical "standard equipment," including confidentiality, avoidance of conflicts of interest, competence, safekeeping of property, communication of material information, and much more. If those obligations are breached, the client can seek redress in an action seeking to discipline the attorney, recover damages, or procure fee forfeiture.[72] The lawyers who litigate such claims are increasingly well-trained and effectively supported by organizations such as the National Organization of Bar Counsel ("NOBC")[73] and the

---

[https://perma.cc/RVK8-MDTR], at 18 (providing: "[a] law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: (1) one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members."

70. The Multistate Professional Responsibility Examination (MPRE) "is required for admission to the bars of all but two US jurisdictions (Wisconsin and Puerto Rico) . . . [but] Connecticut and New Jersey accept successful completion of a law school course on professional responsibility in lieu of a passing score on the MPRE"). Multistate Professional Responsibility Examination, NAT'L CONF. OF BAR EXAMINERS, https://www.ncbex.org/exams/mpre/ [https://perma.cc/LR2P-J5PE] (last visited Feb. 11, 2023).

71. *See, e.g.*, *Minimum Continuing Legal Education: MCLE Rules,* STATE BAR OF TEXAS (Dec. 19, 2022), available at: https://www.texasbar.com/Content/NavigationMenu/ForLawyers/MCLE1/MCLEHomepage/default.htm [https://perma.cc/PEX3-CNWY]. Section 6 of the Texas Minimum Continuing Legal Education Rules provides:

> (A) Every member must complete 15 hours of continuing legal education during each compliance year as provided by this article. No more than three credit hours may be given for completion of self-study activities during any compliance year.
> (B) At least three of the 15 hours must be devoted to legal ethics/professional responsibility subjects. One of the three legal ethics/professional responsibility hours may be completed through self-study.

72. *See* VINCENT R. JOHNSON & SUSAN SAAB FORTNEY, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION, at 42–46 (3d ed. 2021) (differentiating malpractice from discipline); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) (discussing fee forfeiture).

73. The NOBC website homepage, describes the history and purpose of the organization, by stating:

The National Organization of Bar Counsel [("NOBC")] was formed in 1965 to enhance the professionalism and effectiveness of lawyer disciplinary counsel throughout the United States. NOBC membership has grown to include discipline and lawyer ethics counsel from over 75 state, local, and federal lawyer regulatory agencies in the United States, Canada, and the United Kingdom. NOBC is

Association of Professional Responsibility Lawyers ("APRL").[74] Attorneys practicing in the legal ethics field enjoy the benefits of scholarly guidance provided by legal ethics and legal malpractice treatises,[75] textbooks, monographs, and ethics opinions. Moreover, additional guidance is available from professional entities like the ABA Center for Professional Responsibility[76] and the Texas Center for Legal Ethics.[77] It seems likely no country has ever enjoyed such a well-developed legal framework for protecting the interests of both clients and the public.

There are surely challenges ahead for those who seek to maintain or improve the rules requiring attorney professional responsibility.[78] But

represented in the ABA House of Delegates, and NOBC liaisons have been active in the major commissions and workgroups of the ABA and its Center for Professional Responsibility, producing national reports, standards, and models in the field of legal ethics, and attorney regulation.

NATIONAL ORGANIZATION OF BAR COUNSEL, https://www.nobc.org/ [https://perma.cc/7A8R-RYN5] (last visited Feb. 10, 2023).

74. *See Welcome to APRL*, ASSOC. OF PROFESSIONAL RESPONSIBILITY LAWYERS, https://aprl.net/ [https://perma.cc/KZ3W-G5SH] (last visited Feb. 10, 2023) ("Originally formed over three decades ago primarily as an association of lawyers who represent other lawyers in disciplinary proceedings, APRL membership now encompasses lawyers who provide services in all aspects of legal ethics and professional responsibility. In addition to respondents' counsel work, APRL lawyers also represent and advise lawyers and law firms on ethics and professional responsibility, risk management, legal malpractice, and the law of lawyering.").

75. *See generally* GREGORY C. SISK ET AL., LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (2018).

76. "The Center for Professional Responsibility provides national leadership in developing and interpreting standards and scholarly resources in legal and judicial ethics, professional regulation, professionalism and client protection." *See Center for Professional Responsibility*, AM. BAR ASSOC., https://www.americanbar.org/groups/professional_responsibility/ [https://perma.cc/3TKY-KCWM] (last visited Feb. 11, 2023).

77. *See Resources*, TEXAS CENTER FOR LEGAL ETHICS, https://www.legalethicstexas.com/resources/ [https://perma.cc/6G8L-C9GK] (last visited Feb. 11, 2023) ("Whether you're looking for an opinion from the Supreme Court Professionalism Committee, ethics and disciplinary rules, advice from our experts on legal ethics, or want to find answers to Frequently Asked Questions, our Resources page is the place to start.").

78. Articulating this point, the Author stated:

[T]he fabric of legal ethics is threatened by a looming transformation of the legal profession. That potential restructuring may revolutionize the delivery of legal services by replacing what is essentially a unified American legal profession that has monopoly powers and corresponding responsibilities with a diverse range of legal services providers, some of whom may not be lawyers at all, others of whom may not be fully licensed, and none of whom will enjoy an exclusive franchise. Such changes, if they come to pass, will undercut the foundations upon which the law of modern legal ethics is founded. It will then be necessary to reconstitute an effective legal ethics regime for a world of disaggregated legal services.

Ariens' history of legal ethics suggests progress can and will be made. Michael Ariens' *The Lawyer's Conscience* is a major contribution to literature about the American legal profession. Meticulously researched and well-written, it will stand the test of time and inform the understanding of law teachers, litigators, scholars, and reformers in the legal ethics field for generations.

See Legal Malpractice in A Changing Profession, *supra* note 68, at 490.