

The Development of Lawyer Disciplinary Procedures in the United States*

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I. Introduction

While serving as Chief Judge of the Court of Appeals of New York, Benjamin Cardozo delved into the history of lawyer discipline in the profession's "home across the seas."¹ English barristers, he noted, were not "officers of the court" but members of the unincorporated associations known as inns of court.² Fellow barristers, known as "benchers," investigated suspected misconduct.³ Only if one's fellow barristers failed to carry out this task did judges step in.⁴

Regulation by barrister peers was "with minute particularity, even in matters so personal as the growth of their beards or the cut of their dress."⁵ In contrast, attorneys were officers of the court subject to its rules that were established to guide all attorneys with respect to their future conduct.⁶

In the United States, the profession was not divided into the two tiers of its English origins. Nevertheless, regulation of the profession has taken from both traditions; the history of regulation in the U.S. has been a mixture of review by fellow lawyers and review by judges. Lawyer regulation has also shared the characteristics of both traditions: particularity and empathy in review by peers, generality and impartiality in review by courts.

This article describes three eras of lawyer discipline in the United States. The first era lasted until the end of the nineteenth century and was characterized by individual judges exercising powers necessary to control their courtrooms, not only

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1. *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 490 (N.Y. 1928) (discussing attorney disciplinary proceedings in England).

2. *Id.*

3. *Id.*

4. If the members of the inns did not perform this duty, "they were subject . . . to visitation by the judges . . . [who] were not diffident or chary in announcing their pleasure or displeasure." *Id.*

5. *Id.*

6. *Id.*

through citing for contempt but by striking a lawyer from the roll of attorneys.⁷ The second era of lawyer discipline began with the establishment of bar associations and advanced the law reform movement's goal of establishing unified bars. This era was characterized by volunteer attorney involvement in peer discipline. The third era is marked by a movement toward institutionalized judicial reassertion of authority over lawyer discipline with the assistance of public input.

II. The First Era: Discipline by Judges

From at least the time of the Statute of Westminster in 1275, attorneys have been subject to the summary jurisdiction of the courts in which they practiced for their professional conduct.⁸ The nature of this power is powerfully illustrated in *Ex parte Wall*.⁹ On March 6, 1882, Judge James W. Locke of the U.S. District Court for the Southern District of Florida was holding court in Tampa.¹⁰ Court adjourned at one p.m. and, as Judge Locke was leaving the courthouse, two officers brought a prisoner to the nearby jail.¹¹ When Judge Locke returned from his meal an hour later, he saw the dead body of the prisoner hanging from a tree in front of the courthouse door.¹² Judge Locke learned that J.B. Wall, an influential local attorney, had incited the lynching.¹³

On the next day, Judge Locke charged that Wall did “engage in and with an unlawful tumultuous and riotous gathering, he advising and encouraging thereto, take from the jail of Hillsborough County, and hang by the neck until he was dead, one John, otherwise unknown. . . .”¹⁴ Judge Locke ordered Wall to show cause by the following day why his name should not be stricken from the district court's roll of attorneys.¹⁵

7. The power of courts to discipline lawyers for misconduct is distinct from its power to punish for contempt. See *Ex parte Bradley*, 7 U.S. 364, 373 (1868) (holding that an attorney cannot be disbarred for being held in contempt of court).

8. The Statute of Westminster provided:

If any serjeant, pleader, or other, do any manner of deceit or collusion in the king's court, or consent unto it, in deceit of the court, or to beguile the court, or the party, and thereof be attained, he shall be imprisoned for a yeare and a day, *and from thenceforth shall not be heard to plead in that court for any man*; and if he be no pleader, he shall be imprisoned in like manner by the space of a year and a day at least; and if the trespass require greater punishment, it shall be at the king's pleasure.

JOSIAH H. BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* 10 (1909) (emphasis added). See EDWARD P. WEEKS, *A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW* 140–50 (1878) (discussing courts' authority to discipline attorneys).

9. 107 U.S. 265 (1882).

10. *Id.* at 269.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 266.

15. *Id.* at 268–69.

Wall appeared and answered that the court had no jurisdiction to issue the show cause order.¹⁶ Judge Locke overruled Wall's exceptions to the court's jurisdiction and heard the dramatic testimony of the federal marshal regarding Wall's participation in the lynching.¹⁷ Wall then made a statement, not under oath.¹⁸ He did not deny participation in the lynching, and he did not offer rebuttal evidence.¹⁹

On March 10, Judge Locke barred Wall from practicing law in the federal district court.²⁰ Wall sought a writ of mandamus from the United States Supreme Court to direct Judge Locke to vacate his order.²¹ The United States Supreme Court

16. *Id.* at 267.

17. Only the sheriff and the mayor had opposed the lynching. *Id.* at 270. By the time of the show cause hearing, they were far away from Tampa. *Id.* at 267–68. This left the federal marshal as the sole witness willing to testify. *Id.* The marshal testified as follows:

I saw Mr. J.B. Wall and others come to Mr. Craft's house about 2 o'clock March 6th, and having already hard [sic] that a sheriff's posse had been summoned to protect the jail, I thought by the orderly manner they came in that it was the sheriff's posse coming for instructions. I was sitting on the end of the piazza, and did not go in the house, but sat there till they came out, thinking they had come for instructions.

When they came out I heard one of the party remark, 'We have got all out of you we want.' Mr. Wall was one of the party.

I then thought something was wrong. They all went out of the gate, and Mr. Craft after them, and I followed after them rather slowly, and when I got to the corner I saw the party coming out of the jail with the criminal, the man who was afterwards hanged. They carried him over the steps to the oak tree in front of the steps to the court-house. The crowd gathered around him, and some one threw the man down. I saw him then put on a dray, and afterwards pulled up on the tree. There was a crowd of about a hundred persons there. I don't think I could name any man in that crowd except the sheriff, who was there protesting, as I had come away from the crowd and was on the upper piazza of the court-house. I heard the man hollowing [sic]. He was put on a dray with a rope around his neck. The dray went off and he fell to the ground about 10 feet from a perpendicular; then the crowd pulled the rope and he went up. The crowd had their backs towards me. I suppose I could have identified some one if I had thought to, but I was excited, and did not notice who they were. I saw Mr. Wall coming from the jail with the prisoner until they crossed the fence; then I did not see him any more until after it was over. I did not see him leave the crowd, though he might have done it without my seeing it. When going from the jail to the tree Mr. Wall, I think, had hold of the prisoner; he was beside him.

I did not see him afterwards until the hanging was over, then the crowd had increased, perhaps, to 200 persons, and I went down to them to the plank-walk.

This was Monday of this week, the sixth of this month, I think, in Tampa, Hillsborough county.

I also saw Mr. Sparkham, the mayor of the city, protesting at the time of the hanging.

Id. at 267–68. Counsel for J.B. Wall explained that "the fury of the mob had been excited by the attempt of the victim of its violence to outrage the person of a young female." *Id.* at 291.

18. *Id.* at 270.

19. *Id.*

20. Judge Locke found the evidence "positively conclusive beyond a reasonable doubt that said J.B. Wall had been guilty of active participation in a most immoral and criminal act, and a leader in a most atrocious murder..." *Id.* at 270.

21. *Id.* at 266.

refused to issue the writ because the district court had provided the basic elements of due process for lawyer disciplinary procedures: “[t]he charge was specific, due notice of it was given, a reasonable time was set for the hearing, and the petitioner was not required to incriminate himself by answering under oath.”²²

Wall’s objections to Judge Locke’s show cause order were twofold. First, he objected to the summary proceeding which was based upon alleged acts that did not occur in the presence of the court and about which there was no written, sworn complaint.²³ Second, he objected that, because the alleged acts amounted to a crime not cognizable under federal law, the federal court should have continued the disciplinary matter unless and until there was a conviction under state law.²⁴

In response to Wall’s objection that the disciplinary proceeding had been initiated in the absence of a formal complaint, the Supreme Court quoted Chief Justice Sharswood of the Pennsylvania Supreme Court who had expressed “no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of an attorney from the roll . . . provided he has had reasonable notice, and been afforded an opportunity to be heard in his defense.”²⁵

The Supreme Court pointed to the ancient power of the courts to exercise summary power over attorneys and to strike their names from the rolls for gross misconduct.²⁶ Such misconduct included conviction of a felony or of a misdemeanor involving fraud or dishonesty, gross malpractice or dishonesty in the profession, or conduct gravely affecting professional character.²⁷

22. *Id.* at 271. The Court cited its decision in *Randall v. Brigham*, 74 U.S. 523 (1868), a suit brought by a lawyer against a justice of the Massachusetts Superior Court which had stricken him from its rolls for taking \$400 that his impecunious client had been promised if he enlisted as a substitute for another recruit. *Id.* at 525–26. In that case, the United States Supreme Court said:

‘Due process of law,’ in the case of attorneys-at-law, is held to require, whatever may be the form of process or mode of procedure, and for whatever cause (invariably limited to causes involving moral or professional delinquency), that there shall be a sufficient charge or allegation in writing, duly filed of record in court, specifying the particular offence or matter complained of (usually supported by the oath of the party preferring the accusation); and, unless waived of record, written notice served on the attorney to show cause why he should not be removed from his office . . . ; and which notice should specify the time when, the place where, and the tribunal before which he is to appear and answer. The attorney is entitled to a day in court, on which to make defence, and the trial is to be conducted like all other trials in summary proceedings at the common law, and the attorney convicted only if the proofs shall establish or conform to the allegations.

74 U.S. 523, 530 (citations omitted).

23. *Wall*, 107 U.S. at 267.

24. *Id.*

25. *Id.* at 272 (citing *Ex parte Steinman & Hensel*, 95 Pa. 220 (1880)).

26. *Wall*, 107 U.S. at 273. The courts could also exercise summary jurisdiction to compel attorneys to “act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts.” *Id.*

27. *Id.*

In forceful terms, the Court concluded that the allegations of Wall's involvement in a lynching constituted legitimate grounds for striking him from the rolls, irrespective of the fact that he had not been convicted of a crime.²⁸ Justice Bradley quoted Lord Mansfield who, in striking from the rolls an attorney convicted of theft, said:

The question is . . . whether, after the conduct of this man, it is proper that he should continue [as] a member of a profession which should stand free from all suspicion. . . . It is not by way of punishment; but the court[s] in such cases exercise their discretion, whether a man whom they have formerly admitted is a proper person to be continued on the roll or not.²⁹

In dispensing with Wall's claim that Judge Locke's court lacked the authority to order his removal from the rolls of practicing attorneys, the Court focused not only upon the enormity of the crime but also upon Wall's disrespect for the courts and the administration of justice.³⁰

The Court had greater difficulty with Wall's claim that he should not be disciplined in a summary proceeding on a criminal charge prior to a criminal conviction; it decided upon a case by case approach.³¹ However, the Court established an analytical framework in which a disciplinary proceeding would not bar a subsequent

28. The Court found the crime with which Wall was charged was

not a mere crime against the law . . . [but] . . . the prostration of all law and government; a defiance of the laws; a resort to the methods of vengeance for those who recognize no law, no society, no government. Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dange[r]ous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve. Whatever excuse may ever exist for the execution of lynchlaw in savage or sparsely-settled districts, in order to oppose the ruffian elements which the ordinary administration of law is powerless to control, it certainly has no excuse in a community where the laws are duly and regularly administered.

Id. at 274.

29. *Id.* at 273 (citation omitted).

30. The Court's outrage was apparent:

The United States court was in session; this enormity was perpetrated at its door; the victim was hanged on a tree, with audacious effrontery, in the virtual presence of the court! No respect for the dignity of the government as represented by its judicial department was even affected; the judge of the court, in passing in and out of the place of justice, was insulted by the sight of the dangling corpse. What sentiments ought such a spectacle to arouse in the breast of any upright judge, when informed that one of the officers of his own court was a leader in the perpetration of such an outrage? We have no hesitation as to the character of the act being sufficient to authorize the action of the court.

Id. at 274.

31. *Id.* at 287

indictment because the disciplinary proceeding was not criminal.³² It characterized disciplinary proceedings as “not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministrations of persons unfit to practice in them.”³³

In response to Wall’s Fifth Amendment due process objection to the summary nature of the disciplinary proceedings, the Court conceded “that an attorney’s calling or profession is his property, within the true sense and meaning of the [C]onstitution.”³⁴ Nevertheless, the Court concluded that “[i]t is a mistaken idea that due process of law requires a plenary suit and a trial by jury in all cases where property or personal rights are involved.”³⁵ The Court decided not to issue a writ of mandamus because the lawyer had been given notice and hearing “in the manner in which proceedings against attorneys, when the question is whether they shall be struck off the roll, are always conducted.”³⁶

In dissent, Justice Field protested:

I cannot think that the court had authority to formulate a charge against him of criminal conduct not connected with his professional duties, upon the verbal statements of others, made to its judge outside of the court and without the sanction of an oath. And I cannot admit that upon a charge thus formulated the petitioner could be summarily tried. In no well-ordered

32. *Id.* at 288.

33. *Id.* The Court then added a caution:

Undoubtedly, the power [to remove an attorney from office] is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney. But when such a case is shown to exist, the courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws. The power to do this is a rightful one; and, when exercised in proper cases, is no violation of any constitutional provision.

Id.

This echoed the words of Chief Justice John Marshall in *Ex parte Burr*:

The power [to strike attorneys from the rolls] is one which ought to be exercised with great caution, but which is, we think, incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession.

22 U.S. 529, 531 (1824).

According to Chief Justice Taney in *Ex parte Secombe*,

[I]t is the duty of the court to exercise and regulate [the court’s power to discipline attorneys] by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.

60 U.S. 9, 13 (1856).

34. *Wall*, 107 U.S. at 289.

35. *Id.*

36. *Id.* at 290.

system of jurisprudence, by which justice is administered, can a person be tried for a criminal offense by a court, the judge of which is himself the accuser.³⁷

Justice Field's dissent raised basic questions about lawyer disciplinary procedures. Should lawyers be disciplined for conduct not within the attorney-client relationship? Should disciplinary tribunals act upon anonymous, unsworn complaints? What is the standard of proof? A more specific concern noted by Justice Field is whether disciplinary proceedings based upon an allegation of criminal conduct should be held in abeyance until a conviction.³⁸

Justice Field focused upon the issue of the same judge who initiated the charge of misconduct conducting the disciplinary proceeding and expressed concern with the arbitrariness of this approach.³⁹ In essence, Justice Field questioned whether it was fair to have the accuser be the judge.

III. The Second Era: Bar Association Discipline

The evolution of disciplinary procedures in the United States can be conceptualized by tracking who has been designated as the appropriate decision-maker. In the first era, not only were lawyers subject to the summary power of the judges in whose courts they practiced but the proceedings were ad hoc, i.e., dependent upon those judges to initiate them. Thus, it is not surprising that, "[d]iscipline by the courts was invoked only in rare and extreme cases."⁴⁰

The bar was not held in the highest esteem during the first century of the American republic,⁴¹ despite Alexis de Tocqueville's characterization of the bench and the bar as the American aristocracy of the 1830s.⁴² In fact, hostility to the bar reigned from the 1830s to the end of the Civil War, and almost all of the nation's bar associations disappeared.⁴³

In the nineteenth century, Jacksonian democracy's anti-elitist ethos, combined with the elimination of formal training requirements, made admission to the bar

37. *Id.* at 291 (Field, J., dissenting).

38. Justice Field argued that an attorney should not be disbarred for crimes or misdemeanors implicating his moral character before a conviction had been entered. *Id.* at 309. He viewed conviction of a felony or a misdemeanor involving moral turpitude as conclusive proof of the attorney's lack of fitness. *Id.* at 307.

39. Field viewed vesting such arbitrary discretion in the courts as "utterly inconsistent with any manly independence of the bar." *Id.* at 302. He noted that attorneys are responsible for their professional misconduct and that they hold "something more than a mere license, revocable at the pleasure of the court." *Id.* at 303 (citations omitted).

40. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 185 (1953).

41. *Id.* at 177–85.

42. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 122–27 (Richard D. Heffner, ed., Mentor 1956) (1835).

43. Those bar associations that existed prior to 1850 had only a "temporary existence" and left no records, although they claimed continuous existence from the earlier era. Pound, *supra* note 40, at 243–46.

relatively easy.⁴⁴ By the 1870s, however, concerns about the lack of professional control began to be addressed in an organized manner with the formation of local bar associations.⁴⁵ Established in 1869, the Association of the Bar of the City of New York (New York City Bar) was the first local bar of the new era.⁴⁶

The American Bar Association (ABA), established in 1878, provided leadership in 1908 by promulgating the *Canons of Legal Ethics (1908 Canons)*.⁴⁷ The *1908 Canons* were based on the Alabama State Bar Association's Code.⁴⁸ By 1910, the *1908 Canons* had been adopted in twenty-two additional states.⁴⁹ Even where not formally adopted, the canons served as the profession's ethical norms.⁵⁰

While there are some indications that the nation's early bar associations had been concerned with professional misconduct,⁵¹ they were mostly organized for the purpose of good fellowship.⁵² Those established in the late nineteenth century, however, had a greater focus on proper conduct by members of the bar.⁵³ By 1915, the bar associations of the larger cities were investigating grievances.⁵⁴ A contemporary noted that "[s]ome of the bar associations . . . are attempting to reprimand and discipline their members after an investigation without taking the matter into court and are endeavoring, when the matters are taken into court, to carefully

44. As Roscoe Pound explained, "[t]he attack on the profession called for taking away the standing of the admitted attorney by admitting everyone freely irrespective of education and professional training." *Id.* at 225. By the 1870s, examinations, in addition to proof of good moral character, were only required in Alabama, Arizona, Arkansas, California (statutory requirements), the Dakota Territory, Illinois (statutory requirements), Iowa, Nevada, New York, and Pennsylvania. Weeks, *supra* note 8, at 117–31.

45. Michael C. Dorf, *Disbarment in the United States: Who Shall Do the Noisome Work?* 12 COLUM.J.L. & SOC. PROBS. 1, 7–8 (1975).

46. POUND, *supra* note 40, at 249.

47. M. LOUISE RUTHERFORD, *THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION* 89 (1937).

48. *Id.* The drafters of the *1908 Canons* were aware of and drew upon the works of David Hoffman, whose 1836 *Fifty Resolutions in Regard to Professional Deportment* were reprinted in the *ABA Reporter*. David Hoffman, *Fifty Resolutions in Regard to Professional Deportment*, 31 A.B.A.REP. 717 (1907). The drafters were also influenced by the work of George Sharswood whose 1854 *Essay on Professional Ethics* was the basis of almost all the state bar codes. ORIE L. PHILLIPS & PHILBRICK MCCOY, *CONDUCT OF JUDGES AND LAWYERS: A STUDY OF PROFESSIONAL ETHICS, DISCIPLINE AND DISBARMENT*, 4–5 (1952).

49. RUTHERFORD, *supra* note 47, at 89.

50. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 2.6, at 55–56 (1986) ("the Canons came to be widely regarded as 'wholesome standards of professional action' or as 'guidelines' which lawyers could only ignore at their peril") (citations omitted).

51. It seems that from 1835 to 1842 the Detroit Bar Association held occasional meetings concerning the misconduct of lawyers and judges. POUND, *supra* note 40, at 209–10. An attempt to establish a state bar association in Massachusetts in 1849 was accompanied by a weak approach to discipline which imposed substantial burdens on complainants. *Id.* at 214–15.

52. RUTHERFORD, *supra* note 47, at 11.

53. *Id.* at 12–14.

54. See ORRIN N. CARTER, *ETHICS OF THE LEGAL PROFESSION* 88 (1915) (discussing disbarment procedures in the late nineteenth and early twentieth centuries).

distinguish as to the character of professional offenses and grade the severity of the judgment accordingly.”⁵⁵

The new era of bar association lawyer discipline was exemplified by the New York City Bar’s Committee on Grievances which was created to deal specifically with misconduct.⁵⁶ Lawyers volunteered their time to investigate complaints for the Committee, hear the charges, and prosecute cases before referees and to the courts.⁵⁷

An anecdote of the time illustrates the pros and cons of this approach to lawyer discipline. Ezra Ripley Thayer, Dean of Harvard Law School, is reported to have voted for the disbarment of a lawyer but stayed the sanction pending repayment of the misappropriated funds.⁵⁸ He then loaned the lawyer the money for repayment and periodically visited him thereafter “to place him on his feet both ‘professionally and morally.’”⁵⁹ While the purpose of lawyer discipline is not punishment, the public is not protected when the particular injured client is made whole but the lawyer receives no disciplinary sanction. Yet, periodic monitoring by the profession can be useful when the misconduct is less serious.

The voluntary nature of the resurgent bar associations did not satisfy the goals of the leaders of the law reform movement.⁶⁰ In 1914, the founder of the American Judicature Society (AJS), Herbert Harley, visited Ontario and returned with a plan to organize the bars of the United States on a compulsory basis.⁶¹ In 1918, the AJS published a model act for the “integration” of the state bars.⁶² The term “integrated bar” has been replaced by the term “unified bar.”⁶³ North Dakota became the first unified bar.⁶⁴

By the middle of the twentieth century, twenty-five states had unified bars.⁶⁵ Unified bars were viewed as having the advantage over non-unified states where bar admission, standard-setting, and discipline were “performed by separate bodies set up by [the] legislature or supreme court, but in the [unified] states the bar police[d] its own ranks [which was] more efficient and effective. . . .”⁶⁶

55. *Id.* at 89.

56. *Id.* at 257.

57. One commentator expressed his opinion that he was “reasonably confident that of the thirty or forty counsel who are drafted each year by the Association, each one spends at least a full month of his professional time [in disciplinary work].” JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* 21 (1924).

58. *Id.* at 21–22.

59. *Id.*

60. Several reports and resolutions were passed by the ABA from 1905 to 1908 that illustrate this dissatisfaction. See RUTHERFORD, *supra* note 47, at 87–88 (discussing the ABA’s attempts to maintain and enforce ethical standards during this time).

61. GLENN R. WINTERS, *BAR ASSOCIATION ORGANIZATION AND ACTIVITIES: A HANDBOOK FOR BAR ASSOCIATION OFFICERS* 5 (1954).

62. *Id.*

63. WOLFRAM, *supra* note 50, § 2.3, at 36 n.7.

64. WINTERS, *supra* note 61, at 5.

65. *Id.*

66. *Id.* at 6.

Bars were not uniform in their approaches to lawyer discipline.⁶⁷ In 1935, twenty-one grievance committees reported to the governing boards of their state bars, twenty reported to the courts, and seven reported to state attorneys general.⁶⁸ In six states, the respondent was entitled to a jury trial.⁶⁹ Twenty-one states' prosecutors were appointed by their bar associations, twenty-one other states' prosecutors were attorneys general or regular prosecutors, and three states' prosecutors were appointed by the courts.⁷⁰

In the early 1950s, the Survey of the Legal Profession, conducted under the auspices of the American Bar Association, published a study of disciplinary procedures.⁷¹ The authors, two distinguished jurists, asked:

What [was] this business of discipline and disbarment? [Was] it of any value to the public? What [was] its relation to the courts and the legal profession?⁷²

They concluded that "[u]nless this power [was] fully recognized and fully exercised by the courts, with the support and assistance of the organized Bar, we [might] as well cease to think of ourselves as a learned profession."⁷³

Part of the study was an attempt to compare the effectiveness of disciplinary procedures in states with and without unified bars.⁷⁴ They compared California, which was integrated in 1927, with Illinois, which was not integrated but had a lawyer population of comparable size to California's.⁷⁵ The Illinois Supreme Court had vested disciplinary investigations in the voluntary Illinois State and Chicago Bar Associations.⁷⁶ They found that from 1928 through 1948, California had 1993 formal disciplinary proceedings while Illinois had 1291.⁷⁷

The most telling finding, however, was the study's "General Footnote on Availability of Disciplinary Statistics" which revealed that twenty-three of the forty-eight states could or would not furnish any disciplinary data.⁷⁸ It appeared that lawyer discipline was not the highest priority of those responding to the survey. From the prominence given by the authors to the lack of information, a warning should have been taken.

67. SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 5-6 (1970) [hereinafter CLARK REPORT].

68. PHILLIPS & MCCOY, *supra* note 48, at 90-91.

69. *Id.* at 91.

70. *Id.*

71. *Id.* at xi. Phillips was Chief Judge of the U.S. Court of Appeals for the Tenth Circuit, and McCoy was Judge of the Superior Court of Los Angeles. *Id.* at title page.

72. *Id.* at 85.

73. *Id.* at 87.

74. *Id.* at 95.

75. *Id.*

76. *Id.* at 107.

77. *Id.* at 95.

78. *Id.* at 126-29.

IV. The Third Era: The *Clark and McKay Reports* and the Profession's Response

A. The Clark Committee and Its Report

In 1970, a bombshell fell upon the profession. The ABA's Special Committee on Evaluation of Disciplinary Enforcement, chaired by former U.S. Supreme Court Justice Tom Clark (the Clark Committee) reported that:

After three years of studying lawyer discipline throughout this country, . . . [they had discovered] the existence of a scandalous situation that require[d] the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement range[d] from apathy to outright hostility. Disciplinary action [was] practically nonexistent in many jurisdictions; practices and procedures [were] antiquated; [and] many disciplinary agencies ha[d] little power to take effective steps against malefactors.⁷⁹

The committee emphasized that “public dissatisfaction with the bar and the courts [was] much more intense than [was] generally believed within the profession”⁸⁰ and warned that “unless public dissatisfaction with existing disciplinary procedures [was] heeded and concrete action [was] taken to remedy the defects, the public soon [would] insist on taking matters into its own hands.”⁸¹ The Clark Committee warned that this might take the form of “public participation in the disciplinary process.”⁸² In the face of external threats to self-regulation of the profession, the Clark Committee strongly recommended assertion or reassertion of the judiciary's inherent power to supervise the disciplinary process in the face of any intervention by the legislature.⁸³

The Clark Committee's most lasting legacy, however, is its consideration of the profession's failed attempt at self-policing through the use of volunteer lawyers' investigating and prosecuting complaints.⁸⁴ The committee identified several problems resulting from the decentralized disciplinary structures of bar associations, including reluctance of members of a local legal community to discipline each other, lack of uniformity in decisions, and lack of initiative.⁸⁵ Dissatisfaction with the disciplinary procedures of the bar associations led the Clark Committee to call for the professionalization of lawyer disciplinary enforcement.⁸⁶

Specifically, the Clark Committee identified thirty-six problems in disciplinary enforcement and provided recommendations for addressing each. The first

79. CLARK REPORT, *supra* note 67, at 1.

80. *Id.* at 2.

81. *Id.*

82. *Id.* at 8.

83. *Id.* at 10–18.

84. *Id.* at 5.

85. *Id.* at 5–8.

86. *Id.* at 9.

seven dealt with disciplinary agency financing, structure, and staffing. The committee recommended: (1) that adequate funding be provided by bar associations and public bodies to employ professional staffs to process complaints;⁸⁷ (2) that discipline be centralized under ultimate control by the state's highest court;⁸⁸ (3) that disciplinary procedures be streamlined;⁸⁹ (4) that the membership of disciplinary agencies be rotated;⁹⁰ (5) that solo and small firm practitioners, minorities, and criminal negligence lawyers be represented on hearing panels and boards;⁹¹ (6) that full-time professional staffs be hired;⁹² and (7) that training programs be developed for disciplinary agency staffs.⁹³

87. *Id.* at 20. It was suggested that non-unified states, where county bar associations typically had disciplinary responsibilities, would have greater difficulty in obtaining the necessary funding from their members to hire staff. *Id.* at 21. It was also suggested that, in the face of a legislature reluctant to provide funds, the funding of the agency be placed in the court's budgetary request. *Id.* at 22. Funding through assessing the costs of disciplinary proceedings against respondents was discouraged on the ground that this could unfairly penalize the less affluent. *Id.* at 23.

88. *Id.* at 24. The underpinnings of this recommendation were twofold: perceptions that the local community would be less reluctant to discipline one of its own and lack of intrastate uniformity of disciplinary decisions. *Id.* at 25. Control by the highest court was recommended to lessen these possibilities. *Id.* at 26–27.

89. *Id.* at 30–31. The committee found that some cases took five years to resolve. *Id.* at 30. It identified the causes of delay as reliance on the "spare time" of volunteers, procedures with six to seven stages, and repetitive investigations and reviews. *Id.* at 31–33. It suggested the establishment of standing hearing committees and the creation of statewide disciplinary boards in lieu of bar governing boards to review the hearing committees' decisions. *Id.* at 35–36. Other suggestions included smaller hearing panels, stringent hearing schedules, development of expertise in disciplinary law by respondents' counsel and panel members, and final determinations by the courts within 30 days of final argument. *Id.* at 36–38.

90. *Id.* at 39. A maximum of two terms of three years each was recommended to permit development of expertise while avoiding complacency and isolation. *Id.* at 39–45.

91. *Id.* at 46. The committee expressed concern about the need to include previously unrepresented segments of the bar. *Id.* at 46–47.

92. *Id.* at 49. The Clark Committee found that volunteers, while dedicated, were unable to meet the disciplinary agencies' needs; so too were other law enforcement agency or bar examiner personnel. *Id.* at 48–49. It identified the following problems associated with reliance upon volunteers in the investigation and prosecution of discipline cases: delay; non-uniform standards; lack of expertise; inability to conduct intense investigations; inadequate records; and potential due process problems with the combination of investigative and adjudicative roles. *Id.* at 49–54. Instead, the committee recommended that volunteers conversant with the realities of practice be utilized to adjudicate the cases developed by a professional investigative and prosecutorial staff. *Id.* at 55–56.

93. *Id.* at 57. The committee recommended establishment of a National Conference on Disciplinary Enforcement to periodically convene individuals engaged in disciplinary enforcement, with a permanent staff to assist disciplinary agencies. *Id.* The ABA responded in 1971 by establishing a national Center for Professional Responsibility. Jeanne Gray & Mark I. Harrison, *Standards for Lawyer Discipline and Disability Proceedings and the Evaluation of Lawyer Discipline Systems*, 11 CAP. U.L.REV. 529, 530 (1982). Today, the Center for Professional Responsibility has a professional staff of twenty supporting five standing committees and numerous research and publication initiatives. The ABA Center has held an annual National Conference on Professional Responsibility for twenty years. (These statistics are based on the author's personal knowledge as Regulation Counsel for the ABA Center for Professional Responsibility.)

The next twenty recommendations dealt with disciplinary practice and procedure. The committee recommended: (8) that disciplinary agencies initiate investigations *sua sponte*;⁹⁴ (9) that any lawyer who regularly practices in the jurisdiction or is admitted *pro hac vice* be subject to its disciplinary authority;⁹⁵ (10) that the requirement that complaints be verified and other formalities be abolished;⁹⁶ (11) that complainants be given absolute immunity;⁹⁷ (12) that centralized records be kept of every complaint;⁹⁸ (13) that disciplinary proceedings should be deferred when there is pending criminal or civil litigation involving substantially similar material allegations;⁹⁹ (14) that the disciplinary agency and the accused lawyer be given subpoena power;¹⁰⁰ (15) that witnesses and accused attorneys be granted immunity from criminal prosecution;¹⁰¹ (16) that admonitions be given for minor misconduct;¹⁰² (17) that disciplinary cases not be terminated upon payment of restitution by the attorney;¹⁰³ (18) that an attorney should be disbarred on consent when he acknowledges in writing that the material facts of the complaint are true;¹⁰⁴ (19) that

94. CLARK REPORT, *supra* note 67, at 61. The committee recommended use of newspaper clipping services and liaison relationships with groups like local law enforcement agencies. *Id.* at 63.

95. *Id.* at 68. The committee had learned that government lawyers and corporate counsel were escaping the disciplinary power of jurisdictions in which they practiced but were not admitted. *Id.* at 67.

96. *Id.* at 71. The committee was concerned about the effect that the intimidating nature of the procedure was having on good faith complainants in view of the likelihood that bad faith complaints would be screened out. *Id.* at 71–73.

97. *Id.* at 74. The committee noted that, while most states provided absolute immunity to complainants, instances of attorney intimidation of complainants had occurred in those jurisdictions which had only qualified immunity. *Id.* at 75. It also felt that the confidentiality of the disciplinary process during the investigative stage adequately protected the lawyer in the face of even a malicious complainant. *Id.* at 76.

98. *Id.* at 77. The committee based its recommendation on the need to document dismissals for the benefit of the accused lawyer and the agency's need to later identify a pattern of misconduct if further complaints were received. *Id.* at 78–81.

99. *Id.* at 82. The recommendation was predicated on the lack of any delay caused by the respondent. *Id.* The committee was concerned: (a) that inconsistent results might occur; (b) that the outcome of the disciplinary proceeding might prejudice pending civil or criminal litigation; and (c) that evidence might have to be deferred or be prematurely disclosed in the disciplinary proceeding. *Id.* at 82–85.

100. *Id.* at 86.

101. *Id.* at 90. The Clark Committee believed that witnesses' and attorneys' rights to claim the Fifth Amendment were consistent with *Spevak v. Klein*, 385 U.S. 511 (1967) (holding that attorneys could claim the Fifth Amendment in disciplinary proceedings). CLARK REPORT, *supra* note 67, at 90.

102. CLARK REPORT, *supra* note 67, at 92. The committee was concerned about the practice of dismissing complaints alleging minor misconduct when there was no minor sanction available. *Id.* at 93–94.

103. *Id.* at 97. The committee believed that disciplinary cases should not be treated as private disputes between attorney and client. *Id.* at 99. While amenable to restitution as a mitigating factor in determining a sanction, the committee was concerned that a defalcating or neglectful attorney not be turned loose upon an unsuspecting public. *Id.* at 97–100.

104. *Id.* at 101. The committee wanted to conserve the disciplinary agency's resources in prosecuting formal disbarment proceedings while retaining evidence of the misconduct should the respondent later seek reinstatement. *Id.* at 103.

substituted service on the accused lawyer should suffice;¹⁰⁵ (20) that attorneys incapacitated by mental illness or substance abuse should be placed on inactive status;¹⁰⁶ (21) that jurisdictions should recognize reciprocal discipline;¹⁰⁷ (22) that attorneys should be immediately suspended upon conviction of a serious crime;¹⁰⁸ (23) that a criminal conviction should be considered conclusive evidence of guilt in a disciplinary proceeding based on the conviction;¹⁰⁹ (24) that there be no jury trial in disciplinary proceedings;¹¹⁰ (25) that the agency should disclose disciplinary proceedings to the public if the charges are based on conviction of a crime or the respondent requests a public hearing;¹¹¹ (26) that the work of disciplinary agencies should be publicized;¹¹² (27) that the clients of a disbarred or suspended attorney should be notified;¹¹³ and (28) that disbarred attorneys only should be reinstated after a specified period of time exceeding the maximum period of suspension and upon an affirmative showing that the applicant possesses the requisite qualities of character and learning.¹¹⁴

105. *Id.* at 106. The committee was concerned about the problem of attorneys avoiding service of process. *Id.* at 107.

106. *Id.* at 110. The committee sought to provide a mechanism to deal with those lawyers over whom the disciplinary agency had no jurisdiction because no misconduct had yet occurred. *Id.* at 110–11.

107. *Id.* at 118. The Clark Committee was very concerned about the ability of disciplined lawyers to set up practice in other jurisdictions. *Id.* at 116–21. The recommendation incorporated the due process safeguards of several Supreme Court cases. *See* *Selling v. Radford*, 243 U.S. 46 (1917) (holding that the United States Supreme Court would recognize a state court's disbarment provided that proof of disbarred attorney had been afforded due process); *But cf.* *Theard v. United States*, 354 U.S. 278 (1957) (holding that disbarment from federal district courts should not be automatically presumed from disbarment from state courts). CLARK REPORT, *supra* note 67, at 119–20.

108. CLARK REPORT, *supra* note 67, at 122. The committee was concerned about the ability of convicted lawyers to continue to practice. *Id.* at 122–38. It also noted the imprecision and consequent doubtful outcome of the use of the “moral turpitude” standard in determining whether a convicted lawyer should be disciplined. *Id.* at 126. Hence the committee defined serious crime as “a felony or any specified lesser crime a necessary element of which, as determined by the statute defining such crime, reflects upon the attorney’s fitness.” *Id.* at 128.

109. *Id.* at 131. The committee sought to prevent re-litigation of the criminal conviction given the criminal proceeding’s higher standard of proof. *Id.* at 132–34.

110. *Id.* at 136. The committee noted the availability of jury trial in three states and expressed concern about the potential for delay and the inexpertise of a lay jury in disciplinary matters. *Id.* at 136–37.

111. *Id.* at 138. Where there is no connection or request for public hearing, the Clark Committee endorsed maintaining the confidentiality of disciplinary hearings. *Id.* at 139–40. It did not go as far as those jurisdictions that maintained confidentiality until a public sanction was imposed by the court, but it advocated confidentiality prior to a finding of misconduct. *Id.* at 138–42.

112. *Id.* at 143. The committee’s recommendation was based on the need to educate the public and the profession and to deter misconduct. *Id.* at 143–46.

113. *Id.* at 148. The committee also recommended notification and protection of the interests of a lawyer who is suspended for disability or who disappears or dies while under investigation. *Id.*

114. *Id.* at 151. The committee noted that, while three states had policies to never readmit a disbarred lawyer, the practice varied elsewhere. *Id.* at 150. The committee expressed its intent that

Recommendations of the Clark Committee regarding interagency relations included: (29) establishment of a National Discipline Data Bank,¹¹⁵ and (30) creation of a National Conference on Disciplinary Enforcement with a permanent staff.¹¹⁶

Finally, the Clark Committee had six recommendations regarding ancillary problems. The committee recommended: (31) that greater emphasis be placed on the responsibility of lawyers and judges to report misconduct;¹¹⁷ (32) that attorneys be required to maintain complete records of client funds in their possession with annual audits of them;¹¹⁸ (33) that judges should be instructed in substantive and procedural problems in disciplinary enforcement;¹¹⁹ (34) that disciplinary agencies should establish a liaison with law enforcement agencies and criminal courts;¹²⁰

“[p]roper application of this standard means that it should be as difficult for the disbarred attorney to be reinstated as it is for the law school graduate who has been convicted of a crime to be licensed.” *Id.* at 152. While the committee was divided over the question of permanent disbarment versus reinstatement under strict standards, it agreed that automatic reinstatement “seriously impairs disciplinary enforcement.” *Id.* at 153.

115. *Id.* at 158. The Clark Committee envisioned that every court and administrative agency would report all public sanctions imposed against attorneys to the data bank for dissemination to every disciplinary agency. *Id.* In 1968, the ABA Board of Governors established the National Discipline Data Bank which, today, receives reports of public discipline from every state, most federal courts, and federal agencies. Gray & Harrison, *supra* note 93, at 556–57. Reports are then disseminated to every jurisdiction in which the reporting agency indicates the lawyer is also licensed. *Id.* at 557. West Publishing Company has agreed to make the National Discipline Data Bank available on a private file accessible to designated agencies in each jurisdiction, pursuant to a recommendation of the Commission on Evaluation of Disciplinary Enforcement. (This information is based on the author’s personal knowledge as Regulation Counsel for the ABA Center for Professional Responsibility.)

116. CLARK REPORT, *supra* note 67, at 162. The staff was to arrange meetings of those involved in disciplinary enforcement, to provide leadership in review of practices and procedures in disciplinary enforcement, to maintain the National Discipline Data Bank, and to implement the recommendations of the Clark Committee. *Id.* The Clark Committee noted that, while the ABA had adopted *Model Rules of Court for Disciplinary Proceedings* in 1956, no efforts were undertaken to implement them and, thus, “most, jurisdictions do not appear to have given these rules serious consideration.” *Id.* at 165. In 1971, the ABA established the Center for Professional Responsibility. Gray & Harrison, *supra* note 93, at 530. In 1973, it established the Standing Committee on Professional Discipline. *Id.*

117. CLARK REPORT, *supra* note 67, at 167.

118. *Id.* at 173.

119. *Id.* at 175. The ABA Standing Committee on Professional Discipline published a text on *The Judicial Response to Misconduct* and, under a grant from the State Justice Institute, has developed a videotape program on the subject. CENTER FOR PROFESSIONAL RESPONSIBILITY, AM. BAR ASS’N, RESOURCE GUIDE TO PUBLICATIONS AND SERVICES 11 (1993). Further, to address the problem of inconsistency in the determination of appropriate sanctions, in 1986 it developed *Standards for Imposing Lawyer Sanctions* which sets forth a framework requiring a court imposing a sanction to determine: (1) What ethical duty did the lawyer violate? (2) What was the lawyer’s mental state? (3) What was the extent of the actual or potential injury caused by the misconduct? and (4) Are there aggravating or mitigating circumstances? (This information is based on the author’s personal knowledge as Regulation Counsel for the ABA Center for Professional Responsibility.)

120. CLARK REPORT, *supra* note 67, at 179. The purpose was to prevent lenient treatment of accused attorneys. *Id.*

(35) that all attorneys should be required to register periodically and immediately notify the agency of any changes in address;¹²¹ and (36) that bar association services should be established to handle claims against attorneys and to arbitrate fee disputes and other disputes involving client security funds.¹²²

The *Clark Report* signalled the emergence of a new age in lawyer discipline with its call for a professional disciplinary staff to conduct investigations and prosecute charges of misconduct.¹²³ Under the *Clark Report's* recommendations, the professional staff would conduct investigations, present evidence to the committee deciding probable cause, prosecute charges before the hearing committee, prepare briefs, and conduct oral argument before the disciplinary board and the state's highest court.¹²⁴ The major thrust of the *Clark Report* was its recognition of the need to professionalize lawyer disciplinary agencies.¹²⁵ Its impact was immediate. By 1975, at least twenty-four jurisdictions employed lawyers in their disciplinary agencies.¹²⁶

Further, the *Clark Report* set forth an ideal or model disciplinary structure under the aegis of the jurisdiction's highest court. The committee wrote that:

All matters involving allegations of misconduct on the part of an attorney [should be] submitted initially to a professional staff for investigation. At the conclusion of the investigation, matters that do not warrant dismissal and cannot be concluded appropriately by administrative warning letter [should be] referred for hearing before an inquiry committee. At the conclusion of this hearing, the matter [should] either [be] dismissed, terminated by admonition, or referred for formal hearing before a formal hearing committee. At the conclusion of the formal hearing, the record, together with the hearing body's findings of fact and conclusions, [should be] transmitted to the governing board of the state bar or of the state bar association or to a statewide disciplinary board established in those jurisdictions in which the governing board would be overwhelmed by becoming directly involved in the disciplinary process. In states with a small lawyer population, the statewide board could itself conduct the formal hearing and file its report and findings with the court, thereby eliminating one of the procedural stages. The reviewing board [should be] authorized to review the proceedings held before the hearing committee, to approve or modify the recommendations, and to file the proceeding with the state's highest court. The court [would] determine the matter finally on the basis of the record before the formal hearing committee and the briefs and oral arguments of the parties.¹²⁷

121. *Id.* at 183.

122. *Id.* at 186.

123. *Id.* at xvi.

124. *Id.*

125. Dorf, *supra* note 45, at 14.

126. *Id.* at 39.

127. CLARK REPORT, *supra* note 67, at xiv-xv.

With some modifications, the *Clark Report's* model disciplinary structure has remained the ABA's model structure for lawyer discipline.¹²⁸ In professionalizing the investigation and prosecution of lawyer discipline cases, the role of volunteer lawyers was reallocated to adjudication where their knowledge of the realities of practice would best be utilized.¹²⁹

The *Clark Report's* recommendations that lawyers with substance abuse problems be dealt with before they engaged in misconduct and that lawyers establish client security funds realigned the function of lawyer regulation.¹³⁰ Some twenty years later this would culminate in a new model in which lawyer discipline would become exclusively an arm of the highest court of the jurisdiction while programs oriented toward prevention, dispute resolution, and rehabilitation would be undertaken by the bar.¹³¹

B. Toward a New Model

In the mid 1970s, the ABA Standing Committee on Professional Discipline developed *Suggested Guidelines for Rules of Disciplinary Enforcement (Suggested Guidelines)* which incorporated the Clark Committee's recommendations with two important exceptions.¹³² The *Suggested Guidelines* eliminated the hearing to determine probable cause from the model disciplinary structure, thus streamlining the process further.¹³³ The ABA Standing Committee on Professional Discipline also recommended that members of the public be included in disciplinary agencies.¹³⁴ By 1982, thirty-two states plus the District of Columbia had public members serving on their disciplinary agencies.¹³⁵

In February 1979, the ABA House of Delegates adopted *Standards for Lawyer Discipline and Disability Proceedings (Lawyer Discipline Standards)* which incorporated these policy changes.¹³⁶ The *Lawyer Discipline Standards* recommended one-third public membership on the nine member disciplinary board¹³⁷ and one public member on each three member hearing committee.¹³⁸ The inclusion of

128. For further discussion of the ABA's current model, see *infra* Part IV. C.

129. CLARK REPORT, *supra* note 67, at 55.

130. *Id.* at 110–15 (noting that the primary goal of lawyer discipline is to protect the public).

131. COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, *LAWYER REGULATION FOR A NEW CENTURY* 16, 23 (1992) [hereinafter MCKAY REPORT]. For further discussion of this report, see *infra* Part IV.C.

132. Gray & Harrison, *supra* note 93, at 530 (citing STANDING COMM. ON PROFESSIONAL DISCIPLINE, NAT'L CTR. FOR PROFESSIONAL DISCIPLINE, *SUGGESTED GUIDELINES FOR RULES OF DISCIPLINARY ENFORCEMENT* (3rd ed. 1977)).

133. Gray & Harrison, *supra* note 93, at 530.

134. *Id.*

135. *Id.* at 545.

136. ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1979) [hereinafter *LAWYER DISCIPLINE STANDARDS*], *reprinted in* PROFESSIONAL DISCIPLINE FOR LAWYERS AND JUDGES 67–144 (1979).

137. *LAWYER DISCIPLINE STANDARDS* Standard 3.4.

138. *LAWYER DISCIPLINE STANDARDS* Standard 3.6.

public members was recommended in order to increase the credibility of the process and to provide “a more balanced evaluation of complaints in the full context of the lawyer-client relationship.”¹³⁹

The *Lawyer Discipline Standards* also provided that the proceedings would become public upon the filing and service of formal charges.¹⁴⁰ This was a major innovation, as only nine states provided public access to lawyer disciplinary hearings by 1982.¹⁴¹ The rationale was that:

Once a finding of probable cause ha[d] been made, there [was] no longer a danger that the allegations against the respondent [were] frivolous. The need to assure the integrity of the disciplinary process in the eyes of the public require[d] that at this point further proceedings be open to the public. An announcement that a lawyer accused of serious misconduct ha[d] been exonerated after a hearing behind closed doors [would] be suspect. The same disposition [would] command respect if the public . . . had access to the evidence.¹⁴²

Another innovation in the *Lawyer Discipline Standards* was notification of the complainant regarding the disposition of a matter following investigation,¹⁴³ with the right to appeal to a panel of the board if not satisfied,¹⁴⁴ and to the court if the agency acted arbitrarily, capriciously, or unreasonably.¹⁴⁵

The ABA Standing Committee on Professional Discipline formulated *Model Rules for Lawyer Disciplinary Enforcement (Model Lawyer Discipline Rules)* embodying these policies in court rule format.¹⁴⁶ The *Model Lawyer Discipline Rules*, were adopted by the ABA House of Delegates at its July 1985 Annual Meeting.¹⁴⁷ In 1989, the Committee completed a new draft of the *Model Lawyer Discipline Rules*, incorporating the *Lawyer Discipline Standards*, in order to provide a single, cohesive statement of ABA policy with respect to disciplinary procedures.¹⁴⁸ The new *Model Rules for Lawyer Disciplinary Enforcement* were adopted by the ABA House of Delegates at its August 1989 annual meeting.¹⁴⁹

139. LAWYER DISCIPLINE STANDARDS Standard 3.4 cmt.

140. LAWYER DISCIPLINE STANDARDS Standard 8.25. Deliberations of the hearing committee, board or court and information with respect to which a protective order is issued would not be public. *Id.*

141. Gray & Harrison, *supra* note 93, at 549 n.82.

142. LAWYER DISCIPLINE STANDARDS Standard 8.25 cmt.

143. LAWYER DISCIPLINE STANDARDS Standard 8.14.

144. LAWYER DISCIPLINE STANDARDS Standard 8.15.

145. LAWYER DISCIPLINE STANDARDS Standard 8.16.

146. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT executive summary (1989) [hereinafter MODEL LAWYER DISCIPLINE RULES].

147. *Id.*

148. *Id.*

149. *Id.* The ABA House of Delegates approved the most recent version of the *Model Lawyer Discipline Rules* on August 11, 1993. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT iii (1993).

By the end of the 1980s, ABA policy had moved toward accommodation of the public in lawyer disciplinary agencies with public representatives on hearing panels and review boards, open hearings, and enhanced complainants' rights.¹⁵⁰ Many of the *Clark Report's* recommendations had been implemented.¹⁵¹ The Clark Committee's impact on the professionalization of lawyer discipline is evident in the fact that today "almost all states have professional disciplinary counsel on staff."¹⁵²

The National Organization of Bar Counsel (NOBC), a professional organization comprised of disciplinary agencies, was over twenty years old and met twice a year to share insights on common problems.¹⁵³ The ABA Standing Committee on Professional Discipline had conducted over thirty visits to study and report on state discipline systems. The NOBC and the Discipline Committee determined that the time was ripe for an assessment of what had been accomplished and what remained to be done.¹⁵⁴

C. The McKay Commission

In February 1989, the ABA Board of Governors established a Commission on Evaluation of Disciplinary Enforcement to study the functioning of lawyer disciplinary systems, examine the implementation of the *Clark Report*, and make recommendations.¹⁵⁵ It was chaired by Robert B. McKay, former Dean of New York University School of Law, until his death on July 13, 1990.¹⁵⁶ It is now known as the McKay Commission in his honor.¹⁵⁷ The ABA House of Delegates acted upon the McKay Commission's report at its February 1992 midyear meeting by adopting all except four of its twenty-two recommendations without revision, "with the understanding that each jurisdiction should determine for itself whether to accept or modify the individual recommendations."¹⁵⁸ One recommendation was later withdrawn.¹⁵⁹

Like the Clark Committee, the McKay Commission examined legislative versus judicial regulation of the profession.¹⁶⁰ Unlike the Clark Committee, the bases for its rejection of legislative regulation were practical rather than doctrinal.¹⁶¹

150. MCKAY REPORT, *supra* note 131, at xiv.

151. *Id.*

152. *Id.*

153. *Id.* at 98.

154. This information is based on the author's personal knowledge as Regulation Counsel for the ABA Center for Professional Responsibility.

155. MCKAY REPORT, *supra* note 131, at xiii.

156. *Id.* at 133. Raymond R. Trombadore became Chair upon the death of Robert McKay. *Id.* The other members were Hon. Oscar W. Adams, Jr., Don Mike Anthony, John T. Berry, Ellen Feingold, Donald M. Haskell, and Charles W. Kettlewell. *Id.* at v. It was staffed by Charlotte (Becky) Stretch and Timothy McPike. *Id.* at xii.

157. *Id.* at iii.

158. *Id.* at 1.

159. *Id.* at 42. *See infra* notes 179–84 and accompanying text.

160. MCKAY REPORT, *supra* note 131, at 1–9.

161. *See Id.* at 9 (noting the need to efficiently coordinate the various activities of many different legal groups).

It found that legislative regulation of other professions was not superior.¹⁶² Also, the McKay Commission was concerned that legislative regulation, subject to political influence, would impair the independence of lawyers.¹⁶³ Therefore, it recommended that regulation of the profession remain in the judicial branch of government¹⁶⁴ and that the ABA support judicial regulation.¹⁶⁵

In asserting its preference for judicial regulation, the McKay Commission went further by recommending that the highest court control the disciplinary system rather than elected bar officials.¹⁶⁶ It recommended that the jurisdiction's highest court appoint disciplinary officials¹⁶⁷ and disciplinary counsel directly.¹⁶⁸

The McKay Commission expanded the model structure beyond discipline to a lawyer regulatory system composed of several additional elements:¹⁶⁹ client protection or security funds;¹⁷⁰ voluntary arbitration of lawyer malpractice claims and other disputes; mediation;¹⁷¹ mandatory fee arbitrations;¹⁷² law practice assistance;¹⁷³ and lawyer substance abuse recovery.¹⁷⁴ Unlike discipline, these components of the expanded lawyer regulatory system were to be conducted by the bar.¹⁷⁵ The commission envisioned that unified bars would continue supporting lawyer discipline by providing facilities and equipment and such services as accounting, financing, and registration of lawyers.¹⁷⁶

162. *Id.* at 4–5.

163. *Id.* at 6.

164. *Id.* at 5 (Recommendation 1). Threats of legislative regulation in the 1980s impelled the analysis. *Id.* at 1–3.

165. *Id.* at 8 (Recommendation 2).

166. *Id.* at 7–8, 23–31.

167. *Id.* at 24 (Recommendation 5).

168. *Id.* at 27–9 (Recommendation 6). The original version of Recommendation 6 would have provided removal of disciplinary counsel only for cause and would have allowed disciplinary counsel to make a probable cause determination without review by a hearing committee chair. *Id.* at 30–31.

169. *Id.* at 14 (Recommendation 3.1).

170. *Id.* at 14. Client security or protection funds exist in all but two jurisdictions in 1994. STANDING COMM. ON PROFESSIONAL DISCIPLINE, AM. BAR ASS'N, LAWYER REGULATION BULLETIN, vol. 1, no. 1, at 3 (Aug. 1, 1993) (on file with author) [hereinafter LAWYER REGULATION BULLETIN].

171. McKay Report, *supra* note 131, at 14. New York's First Department and the Los Angeles County Bar Association have mediation programs for attorney-client disputes. Lawyer Regulation Bulletin, *supra* note 170, at 2.

172. McKay Report, *supra* note 131, at 17. Six states have mandatory fee arbitration: Alaska, California, Maine, New Jersey, South Carolina, and Wyoming. *Id.* at 17 n.10. Twenty-seven have voluntary fee arbitration. Lawyer Regulation Bulletin, *supra* note 170, at 2–3.

173. MCKAY REPORT, *supra* note 131, at 17. Programs exist in Florida, Illinois, Nebraska, North Carolina, and Utah. LAWYER REGULATION BULLETIN, *supra* note 170, at 2.

174. MCKAY REPORT, *supra* note 131, at 17. All states have impairment counseling programs. Memorandum from the ABA Center for Professional Responsibility to Mike Scanlon 3 (July 21, 1993) (on file with author) [hereinafter ABA Memorandum].

175. MCKAY REPORT, *supra* note 131, at 16.

176. *Id.* at 28.

Under the system proposed by the McKay Commission, all inquiries or complaints are to feed into the expanded system of lawyer regulation through a central intake office which is to assist complainants, evaluate the complaints, make appropriate referrals, and coordinate among the system's components.¹⁷⁷ Complainants are to be informed of the status of disciplinary proceedings at every stage.¹⁷⁸

Perhaps the most controversial recommendation of the McKay Commission was to make disciplinary matters public from the time of the complainant's initial contact with the agency.¹⁷⁹ The recommendation was based upon the experiences of Florida, Oregon, and West Virginia.¹⁸⁰ In addition, the commission recommended retention of absolute immunity for complainants¹⁸¹ in the proposed fully open system.¹⁸² The ABA House of Delegates amended the recommendation to retain confidentiality until a determination has been made that there is probable cause to believe that misconduct occurred.¹⁸³ In the face of this amendment, the commission withdrew this recommendation, thereby reverting to existing ABA policy that disciplinary proceedings be open after a determination of probable cause and the filing and service of charges.¹⁸⁴

The McKay Commission held five public hearings during which it heard from many dissatisfied complainants who objected mainly to what the disciplinary system was not able to handle, i.e., the common situation where the lawyer's misconduct was minor and the complaint was dismissed.¹⁸⁵ The commission recommended procedures in lieu of discipline¹⁸⁶ and expedited procedures for instances of minor

177. *Id.* at 16 (Recommendation 3.2).

178. *Id.* at 42–43 (Recommendation 8).

179. *Id.* at 34–39.

180. *Id.* at 35.

181. *Id.* at 39–42.

182. *Id.* at 34–35.

183. *Id.* at 35.

184. *Id.* at 39. Today, disciplinary hearings are public in thirty-one jurisdictions, including: Alaska, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. ABA Memorandum, *supra* note 174, at 4–7 (Chart I: McKay implementation).

185. *Id.* at 131, xv. As it is questionable whether any complainant views lawyer misconduct as “minor,” the amendments to the *Model Lawyer Discipline Rules* that were adopted by the House of Delegates in August 1993 to conform to the McKay Commission policies use the term “lesser” misconduct. MODEL LAWYER DISCIPLINE RULES Rule 9B (1993). “Lesser” misconduct is defined in Rule 9B as not including misconduct involving: (1) misappropriation of funds; (2) substantial prejudice to a client or other person; (3) a respondent who has been publicly disciplined in the last three years; (4) misconduct for which the respondent has been disciplined in the last five years; (5) dishonesty, deceit, fraud, or misrepresentation; (6) a “serious crime”; or (7) a pattern of similar misconduct. *Id.*

186. MCKAY REPORT, *supra* note 131, at 48 (Recommendation 9). These procedures include arbitration, mediation, law practice assistance, substance abuse, or other counseling. *Id.*

misconduct.¹⁸⁷ These expedited procedures would allow the bar to engage in peer-to-peer assistance while addressing the concerns of dissatisfied clients.

The commission also made other recommendations to expedite and facilitate the complaint process. They recommended that the court should not review disciplinary cases unless appealed by a party or upon its own vote.¹⁸⁸ They also proposed that a lawyer who poses a substantial threat of serious harm to the public should be immediately suspended.¹⁸⁹

The commission reported on implementation of the Clark Committee recommendations and formulated several recommendations as a follow-up to the *Clark Report*. With respect to staffing, the commission found that almost every state had professional disciplinary counsel, some with large staffs.¹⁹⁰ While funding amounted to over \$74 million in 1988,¹⁹¹ the commission found that inadequate funding remained a problem.¹⁹² Thus, it recommended adequate funding and staffing of the disciplinary agency for prompt processing of cases and of the components of the expanded system of lawyer regulation.¹⁹³ The commission also recommended that jurisdictions keep time and case load statistics and standards,¹⁹⁴ and that disciplinary counsel have adequate resources for investigations.¹⁹⁵ Furthermore, it recommended that information from the National Discipline Data Bank be disseminated by computer and telecommunications media to designated agencies¹⁹⁶ and that a universal identification number be assigned to each lawyer with a annual registration data collected by each state.¹⁹⁷

To prevent misconduct, the McKay Commission recommended several courses of action: that lawyers' trust accounts be randomly audited;¹⁹⁸ that the burden of proof in fee disputes be placed on the lawyer if there is no written agreement;¹⁹⁹ and that a study of mandatory malpractice insurance be undertaken.²⁰⁰

V. Conclusion

Lawyer disciplinary agencies are directly or indirectly part of the judicial branch of government. The practice of law is regulated by the highest court of

187. *Id.* at 49–50 (Recommendation 10). These, including referral to other component agencies, would apply where the sanction is less than suspension or disbarment. *Id.* at 51.

188. *Id.* at 53 (Recommendation 11).

189. *Id.* at 54 (Recommendation 12).

190. *Id.* at 89–90.

191. *Id.* at 90.

192. *Id.*

193. *Id.* at 70 (Recommendation 13).

194. *Id.* at 71–72 (Recommendation 14).

195. *Id.* at 73 (Recommendation 15).

196. *Id.* at 84 (Recommendation 20).

197. *Id.* at 85 (Recommendation 21).

198. *Id.* at 75 (Recommendation 16).

199. *Id.* at 79 (Recommendation 17).

200. *Id.* at 81 (Recommendation 18).

every state²⁰¹ and the District of Columbia.²⁰² This is in contrast to other professions and occupations which are typically regulated by agencies within the executive branch of state government.²⁰³ In thirty-three jurisdictions a lawyer must belong to the bar in order to practice law.²⁰⁴ In eleven unified bar jurisdictions, the lawyer disciplinary agency is separate from the bar.²⁰⁵ In the other eighteen states, an agency of the state's highest court regulates the practice of law, and lawyers pay an annual registration fee to this agency.²⁰⁶ They need not belong to the bar association in order to practice law.²⁰⁷

Courts have articulated the purposes of lawyer discipline in various ways. These purposes often include the protection of the public,²⁰⁸ the courts, and public

201. New York's highest court, the Court of Appeals, has delegated this power to its four Appellate Divisions. Dorf, *supra* note 45, at 15. Consequently, New York is divided into four separate disciplinary jurisdictions. *Id.* at 15, 37.

202. *Id.* at 2.

203. *Id.* at 4–5.

204. ABA Memorandum, *supra* note 174, at 1. Jurisdictions with unified bars include: Alabama, Alaska, Arizona, California, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 4–7 (Chart 1: McKay Implementation).

205. *Id.* at 4–7 (Chart I: McKay Implementation). The eleven jurisdictions with separate disciplinary agencies are: District of Columbia, Louisiana, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Mexico, Rhode Island, South Carolina, and Wisconsin. *Id.*

206. This information is based on the author's personal knowledge as Regulation Counsel for the ABA Center for Professional Responsibility.

207. *Id.*

208. See *In re Ruffalo*, 390 U.S. 544, 550 (1968) (noting that “[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer”); *In re Preston*, 616 P.2d 1, 5–6 (Alaska 1980) (holding the purpose of discipline is not to punish but to inquire into the fitness of an attorney to continue in that capacity to the end that the public, the courts, and the legal profession itself will be protected); *In re Schwartz*, 862 P.2d 215, 218 (Ariz. 1993) (stating that the purpose is not to punish the offender, but to protect the public, the profession, and the administration of justice and to deter similar conduct by other lawyers); *Colangelo v. State Bar of Cal.*, 812 P.2d 200, 206 (Cal. 1991) (focusing on protection of the public, preservation of confidence in the legal profession, and maintenance of highest possible standards for attorneys); *People v. Senn*, 824 P.2d 822, 825 (Colo. 1992) (holding that discipline is meant to maintain respect for the rule of law and protect the public); *In re Presnick*, 563 A.2d 299, 302 (Conn.App.Ct. 1989) (using discipline to protect the public from effects of possible future misconduct by an officer of the court); *In re Agostini*, 632 A.2d 80, 81 (Del. 1993) (asserting that sanctions are meant to protect the public, foster public confidence in the bar, preserve the integrity of the profession, and deter other lawyers from similar misconduct); *In re Temple*, 596 A.2d 585, 591 (D.C. 1991) (stating that disciplinary enforcement is not meant to punish but to protect the public and the profession); *Florida Bar v. Helinger*, 620 So. 2d 993, 995 (Fla. 1993) (noting that discipline is primarily designed to protect the public); *In re Haupt*, 297 S.E.2d 284, 285–86 (Ga. 1982) (designing enforcement to protect the public from improprieties that injure the trust in an attorney-client relationship, not necessarily to punish the attorney); *Disciplinary Bd. of Haw. Supreme Court v. Kim*, 583 P.2d 333, 334 (Haw. 1978) (holding that discipline is not punishment of the attorney but is an effort to protect the public and to maintain the integrity of the profession).

and the dignity of the courts); *In re Lutz*, 592 P.2d 1362, 1366 (Idaho 1979) (arguing that discipline should exact justice, purge the profession of unworthy and unscrupulous lawyers, and protect the public from those who are unfit to perform the duties of an attorney); *In re Neistein*, 547 N.E.2d 198, 201 (Ill. 1989) (focusing on maintaining the integrity of the profession and protecting the public); *In re Smith*, 572 N.E.2d 1280, 1286 (Ind. 1991) (asserting that discipline is meant not to punish but to determine fitness of an officer of the court and to protect the courts and the public from unfit persons); *In re Wilkinson*, 834 P.2d 1356, 1358 (Kan. 1992) (finding that the purpose of discipline is protection and benefit of the public); *Louisiana State Bar Ass'n v. Boutall*, 597 So. 2d 444, 445 (La. 1992) (protecting the public and the profession by deterring attorney misconduct); *Board of Overseers of Bar v. Dineen*, 557 A.2d 610, 614 (Me. 1989) (citing *Maine Bar Rule 2(a)*): “[the] purpose of [a] disciplinary proceeding ‘is not punishment but protection of the public and the courts from attorneys who by their conduct have demonstrated that they are unable, or likely to be unable, to discharge properly their professional duties’”); *Attorney Grievance Comm'n v. Sliffman*, 625 A.2d 314, 321 (Md. 1993) (holding that discipline should protect the public rather than punish attorneys); *In re Keenan*, 50 N.E.2d 785, 787 (Mass. 1943) (finding that considerations of public welfare are wholly dominant and that the question is not whether respondent has been “punished” enough); *In re Clements*, 502 N.W.2d 213, 214 (Minn. 1993) (stating that the purpose of discipline is not to punish the attorney but to protect the courts, the public, and the legal profession and to guard the administration of justice and to deter similar misconduct); *Mississippi Bar v. Strauss*, 601 So. 2d 840, 845 (Miss. 1992) (listing the purposes of discipline, including punishment of misconduct, deterrence of future misconduct, and protection of public confidence in the bar’s integrity, but finding that the primary purpose is to vindicate in the eyes of the public the overall reputation of the bar); *In re Westfall*, 808 S.W.2d 829, 836 (Mo. 1991) (holding that the aim of discipline is not punishment but protection of the public); *In re Goldman*, 588 P.2d 964, 977 (Mont. 1978) (focusing on protection of the public); *In re Cochrane*, 549 P.2d 328, 329 (Nev. 1976) (stating that discipline is not meant to punish but to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar as a whole); *Flint’s Case*, 582 A.2d 291, 293 (N.H. 1990) (noting that the primary purpose of discipline is not punishment but protection of the public from further acts of misconduct and protection of the integrity of the legal profession); *In re Bock*, 607 A.2d 1307, 1310 (N.J. 1992) (finding that the goal of enforcement is primarily to preserve public confidence in the legal system and not to punish but to protect the interests of the public and the bar); *In re Larson*, 485 N.W.2d 345, 351 (N.D. 1992) (holding that lawyer discipline is not focused on punishing the attorney but on protecting the public); *Ohio State Bar Ass'n v. Weaver*, 322, N.E.2d 665, 667 (Ohio 1975) (noting that the primary purpose is not to punish an offender, but to protect the public against members of the bar who are unworthy of the trust and confidence essential to the relationship of attorney and client; to ascertain whether the conduct of the attorney involved has demonstrated his unfitness to practice law, and if so, to deprive him of his privilege to serve as an officer of the court); *Oklahoma ex rel. Okla. Bar Ass'n v. Busch*, 853 P.2d 194, 196 (Okla. 1993) (listing the goals of discipline, including preserving the public’s confidence and trust in the bar, protecting the public and the courts, and deterring misconduct); *In re Gortmaker*, 782 P.2d 421, 424 (Or. 1989) (concluding that discipline should protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties); *Office of Disciplinary Counsel v. Keller*, 506 A.2d 872, 875 (Pa. 1986) (stating that “[d]isciplinary procedures have been established as a catharsis for the profession and a prophylactic for the public” (citation omitted)); *Carter v. Jones*, 549 A.2d 1380, 1381 (R.I. 1988) (focusing on protecting the public); *In re Galloway*, 300 S.E.2d 479, 480 (S.C. 1983) (attempting to protect the public and those charged with the administration of justice); *In re Hopewell*, 507 N.W.2d 911, 916 (S.D. 1993) (asserting that discipline is not designed to punish the attorney but to remove from the profession those whose misconduct has proven them unfit to be entrusted with the duties and responsibilities belonging to the office of attorney; to protect the public from further wrongdoing both by the attorney charged with misconduct and the bar in general); *In re Badger*, 493 P.2d 1273, 1275 (Utah 1972) (finding that the purpose is not to punish attorney but to protect the

confidence in the legal system's administration of justice.²⁰⁹ Other courts have focused upon protecting the legal system's reputation²¹⁰ or upon guaranteeing that

public); *In re Berk*, 602 A.2d 946, 950 (Vt. 1991) (holding that the focus of discipline is not punishment, but protection of the public from persons unfit to serve as attorneys, maintenance of public confidence in the bar, and deterrence of others from similar misconduct); *Cummings v. Virginia State Bar*, 355 S.E.2d 588, 591 (Va. 1987) (noting that discipline is meant to protect the public and maintain the integrity of the bar); *In re Petersen*, 846 P.2d 1330, 1354 n.74 (Wash. 1993) (listing as the purposes of discipline protection of the public, deterrence of similar misconduct, and preservation of confidence in the legal system); *In re Jacobs*, 467 N.W.2d 783, 792 (Wis. 1991) (finding that discipline is meant to protect the public and its legal system from further misconduct and to deter other attorneys from engaging in similar misconduct); *In re Clark*, 613 P.2d 1218, 1220–21 (Wyo. 1980) (focusing on protection of the public and maintenance of the dignity and integrity of the bar).

209. See *Elledge v. Alabama State Bar*, 572 So. 2d 424, 425 (Ala. 1990) (investigating to determine whether resumption of practice of law will not be detrimental to the integrity and standing of the bar or of the administration of justice, or subversive of the public interest); *In re Preston*, 616 P.2d 1, 5–6 (Alaska 1980) (holding that purpose of discipline is not to punish but to inquire into the fitness of an attorney to continue in that capacity to the end that the public, the courts, and the legal profession itself will be protected); *In re Schwartz*, 862 P.2d 215, 218 (Ariz. 1993) (stating that the purpose is not to punish the offender, but to protect the public, the profession, and the administration of justice and to deter similar conduct by other lawyers); *People v. Senn*, 824 P.2d 822, 825 (Colo. 1992) (holding that discipline is meant to maintain respect for the rule of law); *Disciplinary Bd. of Haw. Supreme Court v. Kim*, 583 P.2d 333, 334 (Haw. 1978) (holding that discipline is not punishment of the attorney but is an effort to protect the public and to maintain the integrity of the profession and the dignity of the courts); *In re Smith*, 572 N.E.2d 1280, 1286 (Ind. 1991) (asserting that disciplinary proceedings are meant not to punish but to determine fitness of an officer of the court and to protect the courts and the public from unfit persons); *Committee on Professional Ethics v. Behnke*, 486 N.W.2d 275, 278 (Iowa 1992) (holding that discipline is designed to assure the public that courts will maintain the ethics of the profession); *Board of Overseers of Bar v. Dineen*, 557 A.2d 610, 614 (Me. 1989) (citing *Maine Bar Rule 2(a)*: “[the] purpose of a disciplinary proceeding ‘is not punishment but protection of the public and the courts from attorneys who by their conduct have demonstrated that they are unable, or likely to be unable, to discharge properly their professional duties’”); *In re Cappiello*, 622 N.E.2d 268, 270 (Mass. 1993) (holding that disciplinary proceedings should determine if resumption of the practice of law will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest); *In re Trombly*, 247 N.W.2d 873, 875 (Mich. 1976) (stating that disciplinary powers of the courts do not exist for punishment, but so that the administration of justice may be protected by weeding out practitioners who are not trustworthy); *In re Clements*, 502 N.W.2d 213, 214 (Minn. 1993) (concluding that purpose of discipline is not to punish the attorney but to protect the courts, the public, and the legal profession and to guard the administration of justice and to deter similar misconduct); *Oklahoma ex rel. Okla. Bar Ass’n v. Busch*, 853 P.2d 194, 196 (Okla. 1993) (listing the goals of discipline, including preserving the public's confidence and trust in the bar, protecting the public and the courts, and deterring misconduct); *In re Gortmaker*, 782 P.2d 421, 424 (Or. 1989) (holding that discipline should protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties); *In re Galloway*, 300 S.E.2d 479, 480 (S.C. 1983) (attempting to protect the public and those charged with the administration of justice); *Daily Gazette Co., Inc. v. Committee on Legal Ethics*, 326 S.E.2d 705, 709–10 (W.Va. 1984) (safeguarding the public's interest in the administration of justice); *In re Jacobs*, 467 N.W.2d 783, 792 (Wis. 1991) (focusing on protecting the public and its legal system from further misconduct and deterring other attorneys from engaging in similar misconduct).

210. See *Elledge v. Alabama State Bar*, 572 So. 2d 424, 425 (Ala. 1990) (investigating to determine whether resumption of practice of law will not be detrimental to the integrity and standing

the lawyer whose conduct is at issue is fit to practice law.²¹¹ While deterrence is

of the bar or of the administration of justice, or subversive of the public interest); *In re Preston*, 616 P.2d 1, 5–6 (Alaska 1980) (holding that purpose of discipline is not to punish but to inquire into the fitness of an attorney to continue in that capacity to the end that the public, the courts, and the legal profession itself will be protected); *In re Schwartz*, 862 P.2d 215, 218 (Ariz. 1993) (stating that the purpose is not to punish the offender, but to protect the public, the profession, and the administration of justice and to deter similar conduct by other lawyers); *Colangelo v. State Bar of Cal.*, 812 P.2d 200, 206 (Cal. 1991) (focusing on protection of the public, preservation of confidence in the legal profession, and maintenance of highest possible standards for attorneys); *In re Agostini*, 632 A.2d 80, 81 (Del. 1993) (asserting that sanctions are meant to protect the public, foster public confidence in the bar, preserve the integrity of the profession, and deter other lawyers from similar misconduct); *Disciplinary Bd. of Haw. Supreme Court v. Kim*, 583 P.2d 333, 334 (Haw. 1978) (holding that discipline is not punishment of the attorney but is an effort to protect the public and to maintain the integrity of the profession and the dignity of the courts); *In re Neistein*, 547 N.E.2d 198, 201 (Ill. 1989) (focusing on maintaining the integrity of the profession and protecting the public); *Louisiana State Bar Ass'n v. Boutall*, 597 So. 2d 444, 445 (La. 1992) (protecting the public and the profession by deterring attorney misconduct); *In re Cappiello*, 622 N.E.2d 268, 270 (Mass. 1993) (holding that disciplinary proceedings should determine if resumption of the practice of law will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest); *In re Clements*, 502 N.W.2d 213, 214 (Minn. 1993) (concluding that purpose of discipline is not to punish the attorney but to protect the courts, the public, and the legal profession and to guard the administration of justice and to deter similar misconduct); *Mississippi Bar v. Strauss*, 601 So.2d 840, 845 (Miss. 1992) (listing the purposes of discipline, including punishment of misconduct, deterrence of future misconduct, and protection of public confidence in the bar's integrity, but finding that the primary purpose is to vindicate in the eyes of the public the overall reputation of the bar); *In re Cochrane*, 549 P.2d 328, 329 (Nev. 1976) (stating that discipline is not meant to punish but to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar as a whole); *Flint's Case*, 582 A.2d 291, 293 (N.H. 1990) (noting that the primary purpose of discipline is not punishment but protection of the public from further acts of misconduct and protection of the integrity of the legal profession); *In re Bock*, 607 A.2d 1307, 1310 (N.J. 1992) (finding that the goal of enforcement is primarily to preserve public confidence in the legal system, goal is not to punish but to protect the interests of the public and the bar); *Oklahoma ex rel. Okla. Bar Ass'n v. Busch*, 853 P.2d 194, 196 (Okla. 1993) (listing the goals of discipline, including preserving the public's confidence and trust in the bar, protecting the public and the courts, and deterring misconduct); *In re Hopewell*, 507 N.W.2d 911, 916 (S.D. 1993) (asserting that discipline is not designed to punish the attorney but to remove from the profession those whose misconduct has proven them unfit to be entrusted with the duties and responsibilities belonging to the office of attorney; to protect the public from further wrongdoing both by the attorney charged with misconduct and the bar in general); *In re Berk*, 602 A.2d 946, 950 (Vt. 1991) (holding that the focus of discipline is not punishment, but protection of the public from persons unfit to serve as attorneys, maintenance of public confidence in the bar, and deterrence of others from similar misconduct); *Cummings v. Virginia State Bar*, 355 S.E.2d 588, 591 (Va. 1987) (noting that discipline is meant to protect the public and maintain the integrity of the bar); *In re Clark*, 613 P.2d 1218, 1220–21 Wyo. 1980) (focusing on protection of the public and maintenance of the dignity and integrity of the bar).

211. See *In re Preston*, 616 P.2d 1, 5–6 (Alaska 1980) (holding that the purpose of discipline is not to punish but to inquire into the fitness of an attorney to continue in that capacity to the end that the public, the courts, and the legal profession itself will be protected); *In re Temple*, 596 A.2d 585, 591 (D.C. 1991) (stating that disciplinary enforcement is not meant to punish but to protect the public and the profession); *In re Lutz*, 592 P.2d 1362, 1366 (Idaho 1979) (asserting that discipline should exact justice, purge the profession of unworthy and unscrupulous lawyers, and protect the public

often mentioned as a purpose of lawyer discipline,²¹² almost all jurisdictions state that punishment is not a purpose of disciplinary proceedings.²¹³

from those who are unfit to perform the duties of an attorney); *In re Smith*, 572 N.E.2d 1280, 1286 (Ind. 1991) (finding that disciplinary proceedings are meant not to punish but to determine fitness of an officer of the court and to protect the courts and the public from unfit persons); *Committee on Professional Ethics v. Behnke*, 486 N.W.2d 275, 278 (Iowa 1992) (focusing on an attorney's fitness to practice law and the need to deter others from similar misconduct and to assure the public that courts will maintain the ethics of the profession); *In re Rowe*, 604 N.E.2d 728, 730 (N.Y. 1992) (focusing not on punishment but on fitness to practice law); *Ohio State Bar Ass'n v. Weaver*, 322, N.E.2d 665, 667 (Ohio 1975) (noting that the primary purpose is not to punish an offender, but to protect the public against members of the bar who are unworthy of the trust and confidence essential to the relationship of attorney and client, to ascertain whether the conduct of the attorney involved has demonstrated his unfitness to practice law, and if so, to deprive him of his privilege to serve as an officer of the court).

212. See *In re Schwartz*, 862 P.2d 215, 218 (Ariz. 1993) (stating that the purpose is not to punish the offender, but to protect the public, the profession, and the administration of justice and to deter similar conduct by other lawyers); *In re Agostini*, 632 A.2d 80, 81 (Del. 1993) (asserting that sanctions are meant to protect the public, foster public confidence in the bar, preserve the integrity of the profession, and deter other lawyers from similar misconduct); *Committee on Professional Ethics v. Behnke*, 486 N.W.2d 275, 278 (Iowa 1992) (focusing on attorney's fitness to practice law and the need to deter others from similar misconduct and to assure the public that courts will maintain the ethics of the profession); *In re Clements*, 502 N.W.2d 213, 214 (Minn. 1993) (concluding that the purpose of discipline is not to punish the attorney but to protect the courts, the public, and the legal profession, to guard the administration of justice, and to deter similar misconduct); *Mississippi Bar v. Strauss*, 601 So. 2d 840, 845 (Miss. 1992) (listing the purposes of discipline, including punishment of misconduct, deterrence of future misconduct, and protection of public confidence in the bar's integrity, but finding that the primary purpose is to vindicate in the eyes of the public the overall reputation of the bar); *Oklahoma ex rel. Okla. Bar Ass'n v. Busch*, 853 P.2d 194, 196 (Okla. 1993) (finding that discipline is meant to preserve the public's confidence and trust in the bar, to protect the public and the courts, and to deter misconduct); *In re Berk*, 602 A.2d 946, 950 (Vt. 1991) (holding that the focus of discipline is not punishment, but protection of the public from persons unfit to serve as attorneys, maintenance of public confidence in the bar, and deterrence of others from similar misconduct); *In re Petersen*, 846 P.2d 1330, 1354 n.74 (Wash. 1993) (listing the purposes of discipline, including protection of the public, deterrence of similar misconduct, and preservation of confidence in the legal system); *In re Jacobs*, 467 N.W.2d 783, 792 (Wis. 1991) (finding that discipline is meant to protect the public and its legal system from further misconduct and to deter other attorneys from engaging in similar misconduct).

213. See *In re Schwartz*, 862 P.2d 215, 218 (Ariz. 1993) (stating that the purpose of discipline is not to punish the offender, but to protect the public, the profession, and the administration of justice and to deter similar conduct by other lawyers); *People v. Abelman*, 804 P.2d 859, 863 (Colo. 1991) (focusing on protection of the public, not punishment of offending lawyer); *In re Temple*, 596 A.2d 585, 591 (D.C. 1991) (stating that disciplinary enforcement is not meant to punish but to protect the public and the profession); *Disciplinary Bd. of Haw. Supreme Court v. Kim*, 583 P.2d 333, 334 (Haw. 1978) (holding that the purpose of discipline is not punishment of the attorney but protection of the public and maintenance of the integrity of the profession and the dignity of the courts); *In re Neistein*, 547 N.E.2d 198, 201 (Ill. 1989) (focusing on maintaining the integrity of the profession and protecting the public); *In re Smith*, 572 N.E.2d 1280, 1286 (Ind. 1991) (asserting that discipline is meant not to punish but to determine fitness of an officer of the court and to protect the courts and the public from unfit persons); *Board of Overseers of Bar v. Dineen*, 557 A.2d 610, 614 (Me. 1989) (citing *Maine Bar Rule 2(a)*): "[the] purpose of a disciplinary proceeding 'is not punishment but protection

Judicial branch authority over a lawyer disciplinary system with public members²¹⁴ assures that protection of the public is the primary purpose. Direct involvement of the state's highest court should also foster another frequently recognized purpose of lawyer discipline: promotion of public confidence in the judicial system. Non-lawyer participation provides assurance to the public that the disciplinary system is serving its interests, rather than those of individual lawyers. While lawyer members of disciplinary agencies may be more sensitive to the nuances of technical violations of the rules of professional conduct, they frequently mention the common sense approach of their non-lawyer counterparts.

of the public and the courts from attorneys who by their conduct have demonstrated that they are unable, or likely to be unable, to discharge properly their professional duties”); *Attorney Grievance Comm'n v. Sliffman*, 625 A.2d 314, 321 (Md. 1993) (holding that discipline should protect the public rather than punish attorneys); *In re Trombly*, 247 N.W.2d 873, 875 (Mich. 1976) (stating that disciplinary powers of the courts do not exist for punishment, but so that the administration of justice may be protected by weeding out practitioners who are not trustworthy); *In re Clements*, 502 N.W.2d 213, 214 (Minn. 1993) (concluding that the purpose of discipline is not to punish the attorney but to protect the courts, the public, and the legal profession and to guard the administration of justice and to deter similar misconduct); *Culpepper v. Mississippi State Bar*, 588 So. 2d 413, 421 (Miss. 1991) (noting that the purpose is not to punish but to protect the public and deter similar misconduct); *In re Westfall*, 808 S.W.2d 829, 836 (Mo. 1991) (holding that the aim of discipline is not punishment but protection of the public); *In re Cochrane*, 549 P.2d. 328, 329 (Nev. 1976) (stating that discipline is not meant to punish but to protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar as a whole); *Flint's Case*, 582 A.2d 291, 293 (N.H. 1990) (noting that the primary purpose of discipline is not punishment but protection of the public from further acts of misconduct and protection of the integrity of the legal profession); *In re Bock*, 607 A.2d 1307, 1310 (N.J. 1992) (finding that the goal of enforcement is primarily to preserve public confidence in the legal system and not to punish but to protect the interests of the public and the bar); *In re Tapia*, 799 P.2d 129, 133 (N.M. 1990) (holding that disciplinary proceedings are not meant to punish attorneys for past wrongs or to prevent them from ever again using their training and skills to serve the public); *In re Rowe*, 604 N.E.2d 728, 730 (N.Y. 1992) (asserting that the goal of discipline is not to punish but to determine fitness to practice law); *In re Larson*, 485 N.W.2d 345, 351 (N.D. 1992) (holding that lawyer discipline is focused not on punishing the attorney but on protecting the public); *In re Hopewell*, 507 N.W.2d 911, 916 (S.D. 1993) (stating that discipline is not designed to punish the attorney but to remove from the profession those whose misconduct has proven them unfit to be entrusted with the duties and responsibilities belonging to the office of attorney; to protect the public from further wrongdoing both by the attorney charged with misconduct and the bar in general); *Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757, 761 (Tenn. 1989) (focusing on discipline and not on punishment); *In re Badger*, 493 P.2d 1273, 1275 (Utah 1972) (finding that the purpose is not to punish the attorney but to protect the public); *In re Berk*, 602 A.2d 946, 950 (Vt. 1991) (holding that the focus of discipline is not punishment, but protection of the public from persons unfit to serve as attorneys, maintenance of public confidence in the bar, and deterrence of others from similar misconduct). *But see In re Ruffalo*, 390 U.S. 544, 550 (1968) (stating that “[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer”); *In re Haupt*, 297 S.E.2d 284, 285–86 (Ga. 1982) (asserting that discipline is designed to protect the public from improprieties that injure the trust in an attorney-client relationship, not necessarily to punish the attorney); *Mississippi Bar v. Strauss*, 601 So. 2d 840, 845 (Miss. 1992) (listing punishment as one of the purposes of discipline).

214. Public input exists in the form of nonlawyer membership on disciplinary boards in forty-one jurisdictions and on hearing panels in thirty-one. ABA Memorandum, *supra* note 174, at 2.

Bar support of rehabilitative, preventative, and dispute resolution activities of an expanded system of lawyer regulation should enhance another frequently cited goal, protection of the legal profession and its reputation. Clearly, bar associations are best able to develop programs on law practice management, client relations, ethics, and substantive law for their members.

This emerging model of lawyer regulation—judicial branch control of lawyer discipline with public input and bar support of lawyer professional development—is a rational allocation of roles and responsibilities.

