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Committees on Legal Ethics

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Committees on Legal Ethics

In the first edition of his pioneer casebook on The Legal Profession and Its Ethics, Professor George P. Costigan, Jr., drew on a new source of casebook material, the answers and opinions of the committees on professional ethics of bar organizations. In the second edition of the casebook the number of the opinions used came to well over one hundred. Most of the opinions were drawn from the committee of the New York County Lawyers' Association, but in addition the book drew on the opinions of the committees of the American Bar Association, the State Bar of California, and the Chicago and Cleveland Bar Associations, on the Statements of the General Council of the Bar of England, and on the opinions of the Council of The Law Society. The present article is devoted to a brief consideration of the history and working of such committees.

The Development in England

The Barristers. The control and discipline of the English bar has remained with the four Inns of Court free from interference by the courts. In the benchers of each Inn is vested the disciplinary power over its members. The independence of the Inns of one another meant that until recently there was no organization of the whole bar of England. In 1883 at a meeting of the English bar, the “Bar Committee” was constituted. In 1894 the Bar Committee was supplanted by the General Council of the Bar. The Council is made up of forty-eight practicing barristers elected by the whole bar, of the Attorney General and the Solicitor General for the time being and the former holders of these offices still in active practice, and of a few additional members appointed by the Council itself. The regulations constituting the Council make it the representative of the bar and impose on it the duty “to deal with all matters affecting the profession and to take such action thereon as may be deemed expedient.”

The Council, though it has a Committee on Matters Relating to Professional Conduct, answers in its own name questions as to professional conduct and practice. Each year ten or fifteen of the rulings are published in the Annual Statement of the Council. The more important rulings have been briefed and collated, and are now published in the standard practice manual, “The Annual Practice.” Many of the Council’s rulings relate to conditions which have no counterpart in the United States. The separation of the profession into its two parts, the barristers and the solicitors, and the divisions of the bar territorially

and by rank, raise many questions of jurisdiction and etiquette which
never trouble American lawyers. Some of the rulings, however, concern
professional standards applicable to the bar wherever the common law
prevails.2

The Solicitors. The solicitors have long had The Law Society, in
which body or its committees are vested large powers of control over the
members of that branch of the profession.3 In addition to a statutory
Discipline Committee, the Council of the Society has the Professional
Purposes Committee, which deals "with all complaints against solicitors
and unqualified persons other than cases referred direct to the Discipline
Committee and all questions of etiquette and professional conduct,"4
and the Scale Committee which deals "with all matters submitted for
the advice or decision of the Council which relate to costs or to the
general conduct of a Solicitor's business other than questions of eti-
quette or professional conduct."5 These committees are active and
influential. The more important of their opinions are published
periodically as the opinions of the Council of The Law Society for the
guidance of the profession. These opinions, along with digests of the
relevant court decisions, are made available in two books issued by
The Law Society, "Law, Practice and Usage in the Solicitors' Profes-
sion" (1923) and the "Digest" (1923). Like the rulings of the General
Council of the Bar, the rulings of the Council of The Law Society are
frequently on matters which, though of high importance to the profes-
sion in England, do not arise under American conditions; but a
considerable number relate to problems common to the profession
everywhere.

The English committees, it may be observed, have a variety of
functions. Four different functions should be differentiated from one
another: (1) The expression of opinion on the construction of statutes
and on other legal questions affecting the profession. (2) The settle-
ment of actual controversies among members of the profession. (3) The
discipline of lawyers. (4) Ruling on questions of legal ethics and
professional conduct.

The first of these functions is not performed, it is believed, by any
bar association committee in the United States. The second, likewise,
is given little if any attention by bar organizations here, though it
would seem the bar associations might usefully set up committees,

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2 For an entertaining discussion of some of the Council's rulings, see LEAMING,
A PHILADELPHIA LAWYER IN THE LONDON COURTS, Chap. VII (1911).
3 For a history of The Law Society, see HANDBOOK OF THE LAW SOCIETY, Part I
(1933); CENTENARY OF THE LAW SOCIETY, PRESIDENTIAL ADDRESS OF MR. HERBERT
GIBSON (1925).
4 HANDBOOK OF THE LAW SOCIETY, p. 84 (1933).
5 Ibid.
especially in the larger cities, to deal with those controversies between lawyers or between lawyer and client which call for adjustment instead of discipline. The third of these functions, the discipline of lawyers, is performed, actually or on paper, by almost every bar association through its committee on grievances. The present article does not deal with any of these three activities. It is confined to a consideration of the fourth, the expression of opinion on questions of legal ethics or professional conduct.

**THE DEVELOPMENT IN THE UNITED STATES**

**Local Bar Associations.** In the United States, a local bar association was the first to have such a committee. The New York County Lawyers' Association, on its organization in 1908, created a Committee on Professional Ethics. In 1912 the committee was “empowered when consulted to advise inquirers respecting questions of proper professional conduct, reporting its action to the Board of Directors from time to time.” Mr. Charles A. Boston, who was the most active and influential lawyer of his time in matters of professional conduct and who devoted much of his energy to the work of the committee, has told how the extension of its functions was suggested by an account of the influence exercised on the English Bar by the General Council of the Bar in its rulings on matters of professional etiquette.

Other local associations have similar committees, the Chicago Bar Association and the Cleveland Bar Association creating them early. In 1923, the Association of the Bar of the City of New York likewise created such a committee.

**American Bar Association.** In 1922, the by-laws of the American Bar Association were amended so as to authorize the Committee on Professional Ethics and Grievances to express its opinion concerning proper professional conduct “when consulted by officers or committees of state or local bar associations.” The by-laws as since amended extend the authority to situations when the committee is consulted by members of the Association. The committee “promulgates and publishes such opinions as it believes to be of general interest to the profession.”

**State Bar Organizations.** An examination of the recent reports of

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7 Boston, Practical Activities in Legal Ethics (1913) 62 U. of Pa. L. Rev. 103, 111.

8 Ibid. at p. 113.


10 By-Laws, American Bar Association, Article VIII, Section 13.

11 Foreword to the Compilation of the Opinions of the Committee.
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the state bar organizations reveals a wide diversity of conditions. Some of the organizations have no committees with power to answer questions concerning professional conduct. In probably a majority of the states, committees of the state bar organizations have this power; but most of the committees either have not exercised the power or have done so only occasionally and without publishing their opinions. In one state, the committee chairman lamented that in the three years of its existence no one had ever sought its advice.12 A few of the committees have been active and have published their opinions in the state bar journals.

There is a like diversity in the sources of the power and in the bodies that exercise it. The constitution or by-laws of some of the state bar associations explicitly create the power, vesting it either in the committee charged also with the duty of investigating complaints and grievances,13 or in a separate committee on professional ethics.14 In at least two states, the committee on grievances, feeling this power essential to its functions, exercised it without explicit authorization.15 In California the Board of Governors of the State Bar appointed a committee in which it vested the power.16 The committee, however, was discontinued because the Board of Governors, on whose behalf the committee acted, was called upon by the State Bar Act to sit in judgment on actual cases of alleged misconduct of lawyers. In Oklahoma, the Board of Governors of the State Bar itself exercises the power, and publishes its opinions in the State Bar Journal. In Louisiana some years ago, there was an unusual development. The Supreme Court, which had jurisdiction in all cases of discipline with powers to make appropriate procedural rules, vested in a committee of lawyers, the Disbarment Committee, the power of investigating complaints and initiating proceedings. The Disbarment Committee undertook to answer questions of professional conduct because, as it stated, "there does not exist in Louisiana at this time any recognized official agency vested with the right or authority to advise members of the Bar with reference to questions of ethical conduct in their professional relations" though there was "obvious need for some such agency."17

15 (1932) 1 Kansas Bar Ass'n Jour., p. 58; (1933) 2 ibid., p. 61; (1932) Proc. Minn. Bar Ass'n, p. 130.
16 (1928) 3 Calif. St. Bar Jour., No. 3, Pt. 1, p. 54.
17 (1930) 4 Tulane L. Rev. 224, 225. At that time the Louisiana State Bar Association apparently had a committee empowered to answer such questions, though of course it was not an "official agency." (1929) Rep. La. St. Bar Ass'n, p. 221. The government of the Louisiana bar has since been modified by the state bar act, passed in 1934.
There is diversity, likewise, in the scope of the opinions to be expressed. A few of the committees are confined to interpretation of the Canons of Professional Ethics, though the majority, fortunately, are not so restricted.

On two matters, there is widespread uniformity. For the most part, the committees are authorized to answer only questions propounded by members of the organizations represented by the respective committees or by lawyers residing in the area covered by the organizations. Furthermore, the opinions of the committees of bar associations are not given authoritative character. In Virginia, the by-law authorizing the giving of opinions cautiously provides that "such advice and opinions shall not be binding upon the Association nor upon the individual members thereof, and shall impose no responsibility upon the members of the Committee but they shall be in the nature of friendly advice and counsel." The by-laws of the Association of the Bar of the City of New York provide that "in any such answers or publication it shall be stated that the answers express the opinion of the Committee alone and have not been passed upon by the Association."

**The Operation of the Committees**

The operation of the committees is illustrated below by a description of the procedure of the American Bar Association Committee, which is national in scope, and of three local committees with which the writers are acquainted: the New York County Committee, which is the oldest in service; the New York City Committee, which is very active and probably has rendered more opinions than any other committee in the field; and the New York State Committee, which is typical of the less active state organizations. Grateful acknowledgment is made to the respective chairmen of these committees for information with respect to their procedures. The steps in the process are described in chronological order.

1. **Preliminary Sifting.** Inquiries are handled initially by the chairman. If the question seems to him to be answerable by reference to previous opinions, it is so answered. Answers thus rendered by the chairman of any of the New York committees are always accompanied by a statement that they represent his individual views as to the application of the prior opinions. This initial sifting is useful in various ways.

   a. It restricts to the chairman (or his delegate, in case of necessity) knowledge of the identity of the inquirer and other persons involved. This is desirable because of the *ex parte* nature of the proceeding.

   b. It expedites the answering of questions of which the chairman

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can so dispose. Expedition is often vital to the inquiry, and is especially advantageous where the committee meets at long intervals.

c. It withholds from consideration by the committee those questions which the chairman finds repetitious, frivolous, trivial, obviously beyond the jurisdiction of the committee, or otherwise inappropriate for submission to it. This conserves the time of the committee members, heightens interest in the work, and permits concentrated rather than scattered consideration of the questions reaching the committee. There is some danger the chairman will err in classifying a particular question. It seems clear, however, that the advantages of the sifting process far outweigh this disadvantage, and that the method should be thoroughly applied. A safeguard, moreover, can be provided by giving each inquirer notice that he may subsequently ask to have his question referred to the full committee. This leaves opportunity for a limited number of committee answers to questions which present serious problems only to those lawyers who are ignorant of the best traditions of the profession. It also permits the committee to direct professional and public attention to reprehensible practices which are indulged in or seem likely to be adopted in the absence of such warning.

d. Careful selection from the questions submitted is further necessitated by their tendency to narrow down to insignificant minutiae. Though it is doubtful that advertising, for instance, is a matter of ethics, the Canons of Professional Ethics of the American Bar Association clearly place it within the cognizance of committees on professional ethics. Such a committee is asked to advise as to the propriety of a specific advertisement in a medium of specified sort, say, a daily newspaper. The committee gives its opinion. Thereupon, it may be asked whether the same advertisement may be inserted in a foreign-language paper, published in the mother-tongue of the advertising attorney. The committee again advises. Slight modifications, either in the proposed advertisement or in the proposed medium or in both, lead to an infinite series of permutations and combinations. What profits this the bar or the general public?

This piecemeal answering of connected problems and the seriatim treatment of disconnected problems should be supplemented and so far as possible supplanted by careful analyses of general problems and the application of established principles to various phases of each general problem so considered. An excellent example of what can and should be done is the study by the New York County committee of the relations between attorneys and collection agencies.19

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19 Answer No. 47. See also that committee's Announcement of Opinion (with the concurrence of the Committee on Unlawful Practice of the Law) on Relations of Lawyers and Lawful Trade Organizations and Other Organizations, May 2, 1921.
2. Drafting the Question. Questions selected for submission to the Committee are redrafted, if necessary, by the chairmen. The prolix are shortened. Those which reveal either directly or by obvious inference the identity of persons involved are stated in a more general form. If a particular inquiry is one of a number concerning the same subject, all of which can be answered by a single opinion, it may become part of a composite question. "Opinion 43 [of the American Bar Association Committee] presents a typical instance of this practice. The question there presented is actually a composite of over thirty similar questions covering the same subject, all of which were completely answered by the opinion adopted." In the practice of the New York City committee, the original inquiry with names deleted is frequently submitted to a sub-committee for redrafting as well as the preparation of a proposed answer. This procedure does not lend itself to the grouping of cognate questions referred to above.

3. Distribution of Question. When the question is in proper form, a copy is sent to each member of the committee.

4. Consideration and Report by Sub-Committee. There is a variance in procedure at the next step. In the case of the American Bar Association Committee, the question is discussed at the first meeting following the distribution of the question, and if there is unanimity of view it is assigned to a member to draft an opinion. This draft is presented and discussed at the next meeting. The Chairman of the New York State Bar Association Committee has followed the practice of personally preparing a proposed answer and sending a copy of it to each member of the Committee for criticisms and suggestions. In the New York County and New York City committees, the chairman appoints a sub-committee to prepare a report on the question and a proposed answer. The form of transmittal to the sub-committee of the New York County Committee indicates the duty of the sub-committee.

"Gentlemen:
Will you please act as a sub-committee on the enclosed question, No............? If you can conveniently do so, kindly have your written report in my hands at least one day in advance of the next meeting of the Committee.

At the April, 1917, meeting of the committee, it was decided that sub-committees, in considering questions referred to them, should be asked to make a careful examination of the Committee's previous questions and answers, of the Canons of the American Bar Association, and of any points of law suggested by the question in hand, so as to avoid, if possible, giving an answer in conflict with any previous answer of the Committee, or with any controlling authority.

It is desirable that every sub-committee report consist of two parts,—the first setting forth the reasons of the sub-committee, with citations of

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authority, if any, and the second being the form of answer proposed by the sub-committee.

The sub-committee, in order to report on questions, is requested to report within ten days after receipt of the questions to Esq., [Secretary of the Committee,] and Mr. will see that the sub-committee's report is mimeographed and circulated among the members of the Committee by the Assistant Secretary of the Association, Mr. Very truly yours,

CHAIRMAN, Committee on Professional Ethics.

5. Discussion. Discussion by the full committee is based, in the American Bar Association Committee, on the single opinion drafted as indicated above, but in the New York County Committee proposed answers in addition to the one drafted by the sub-committee are frequently submitted by individual members. The Committee of the New York State Bar Association has its members scattered throughout the State, and is therefore compelled to conduct its discussion through the mails. The disadvantages of that method indicate that if it can be avoided by the functioning of local committees in a limited area, or otherwise, centralization should not be carried to the point where it becomes necessary to dispense with oral discussion. Surprisingly often, a proposed answer which at first sight or to its proponent seems fairly obvious evokes in a group meeting opposition that wins over even the proponent. Discussion sometimes extends through several sessions of the committee. The extent to which this preliminary discussion should be carried over into the opinion itself is debatable. A categorical "No" or "Yes" is seldom a satisfactory answer and never the most serviceable. At the other extreme, the inclusion in every opinion of all the reasoning back of it leads to much repetition of elementary and familiar matter.

6. Publication and Distribution. The opinion finally adopted, if deemed of sufficient importance, is published and circulated. The selective process, if not strictly applied in the earlier stages, should certainly be emphasized at this point. It is, of course, necessary to eliminate trivial and repetitious questions. It is also futile to clutter the published record with platitudinous generalities and fulminations de minimis. 1

As a rule, divergent views held by members of the same committee are eventually reconciled and composed in an opinion to which all subscribe. The rule in the New York City and New York County committees is that if on the final vote no more than one or two members dissent, the fact of such dissent is noted in the committee's minutes but not
published; in a few instances it has seemed advisable to announce both a majority and a minority opinion. The only fair alternative, where the dissent is concurred in by a substantial number, is to render no opinion. Publication of both opinions has the advantage of acquainting the profession with the issues involved, the merits of the question and the main reasons for the respective opinions.

It is also inevitable that conflicting opinions should occasionally be rendered by different committees. Independence of view and decision is as desirable in such bodies collectively as in their individual members. It permits them to apply in varying degree new social concepts affecting such problems as the socialization of law through the furnishing of legal services to members of mutual or non-profit associations and the recent growth of protective committees. Consideration of social developments is recognized as part of the judicial process, and must have its full place in the functioning of ethics committees. An independent opinion may also be of great value where it is based upon sound principle rather than expediency, and therefore conflicts with and weakens the force of a compromise forced upon another organization of lawyers by political exigencies.

Ethics committees should, however, make every effort to avoid conflicts of opinion which arise from unfamiliarity with the opinions of similar committees. Expressly "in order to avoid any conflict between the deliverance of two committees of the same association," the New York County Committee modified 21 a subdivision of one of its most exhaustive and carefully considered opinions 22 to make it conform with a position announced as fundamental by the Committee on the Unlawful Practice of the Law. It would seem at least equally desirable to avoid, where possible, the taking of inconsistent positions by two committees on ethics, even when they do not function in the same State. The situation in this respect is delicate where, as in the metropolitan district of New York City, there are several committees on ethics with concurrent or overlapping jurisdiction. In recent years many questions which are actually or practically identical have been simultaneously submitted to various committees in that district, apparently in the hope that with several hooks on his line the inquirer, anxious about his own conduct or disgruntled at his adversary's, might land a favorable response with at least one of them. The New York County Committee (with the approval and similar action of the New York City Committee) has announced that it will refrain from answering inquiries already submitted to another committee, though it reserves the right to answer such inquiries in special cases.

21 Answer 47-VIII-d, New York County Committee.
22 Answer 136, New York County Committee.
The American Bar Association Committee has published (to December 14, 1934) 124 opinions on questions of professional ethics. The New York County Committee has rendered 335 opinions, all of which are published in the Association Year-Books and available in print. Most of these have been reprinted in bound form, together with various announcements of the Committee, an explanatory statement of its activities, and a cumulative analytical index. The last-mentioned feature is indispensable to the Committee itself and a great convenience to all who consult its collected opinions. Such indexing would seem to be essential wherever the work of a committee is voluminous. The New York City Committee has rendered between 400 and 500 opinions, of which approximately one-third have appeared in the Association year-books and been reprinted in pamphlet form. The remaining two-thirds, with the exception of certain selections from opinions of the prior year which were published in the 1934 Year Book, are available only in the minutes of the Committee. The New York State Committee has compiled no record of its opinions. It renders only a few opinions each year, which lately have been published in the Bulletin of the State Bar Association.

Non-publication of worthwhile opinions is as ill-advised as publication without due selection. It is self-evident that no committee on professional ethics can attain its full potential usefulness if it functions solely for the edification of individual inquirers—and its own members. With adequate publication, “a body of rulings on the professional proprieties applicable to American conditions would be steadily forced upon the attention of the whole profession, instead of being locked in the breasts of the more reputable members, to govern merely their own conduct.”

CONCLUSION

It has been the purpose of this paper merely to describe the rise and operation of ethics committees, without attempt at evaluation. Two essentials to their usefulness, however, may be stated. First, the opinions published must be carefully considered rulings on matters of real interest and importance. Second, each committee in reaching its conclusions should go beyond the letter of the promulgated Canons of Professional Ethics and examine the situations in question in much the way stated by the oldest of the American committees:

“This Committee, therefore, watches tendencies, considers inspira-

24 Compilation of the Answers of Committee on Professional Ethics of the New York County Lawyers' Association, p. 6.
tion and rational and practical idealism. It tries, by its advice, to raise standards, and to make a better bar. It is not satisfied to base judgment purely upon accepted convention or etiquette; its judgments are based upon what its members consider to be foundation principles, the purposes of the judicial system and its jurisprudence, the privileges and duties of lawyers and the best and most reasonable and practical methods of attaining them."

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