1991

Confessions of an Ethics Chairman

Richard H. Underwood
University of Kentucky College of Law, runderwo@uky.edu

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Confessions of an Ethics Chairman

Richard H. Underwood*

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* Spears-Gilbert Professor of Law of the University of Kentucky College of Law; Chairman, Ethics, Unauthorized Practice, and Model Rules Committees of the Kentucky Bar Association; Co-Author of TRIAL ETHICS (Little Brown & Co. 1988); B.S. (1969), J.D. (1976), The Ohio State University.

I refer to Kentucky Bar Rules throughout this article. These rules are fairly typical. It is hoped that this article will serve an additional purpose of providing lawyers and law students with an introduction to the organization of, and the services provided by, a representative state bar association.
A generous confession
disarms slander.
Thomas Fuller (M.D.).
Gnomologia No. 26 (1732)

It is when the gods hate a
man with uncommon abhorrence
that they drive him into the
profession of a schoolmaster.
Senaca

I. INTRODUCTION

The pages of The American Lawyer recently carried an article styled "Advising Colleagues On the Ethics Minefield."¹ The essential elements of its message were that there is an ethics "minefield" out there, and that there is also considerable unsatisfied demand among lawyers for "paid"² legal ethics consultants.

Characteristically, the body of the article did not dwell on the size or shape of the "ethics minefield," or provide a map through it, but instead concentrated on the names of firms and individuals said to be emerging as leaders in the business of providing ethics counseling and expert witness services. This pitch appeared under the magazine's reg-

¹. December 1989, p. 3. For a similar "promo" that rounds up and touts "the usual suspects" see Goodrich, Ethics Business, CAL. LAW. 36 July, 1991, at 36.
². I use the term "paid" to distinguish such consultants from volunteer members of state and local ethics committees, members of law firms that are sufficiently respected or otherwise powerful enough to pass up enough "billables" to allow them to serve as "in house" ethicists, and that handful of public spirited academics who have not yet incorporated themselves, are not fully booked up on "Nightline," and are willing to advise their former students pro bono publico. "Blessed are they who expect nothing, for they shall not be disappointed." Shepard, Breaking into the Profession: Establishing a Law Practice in Antebellum Virginia, 48 J. S. HIST. 393, 409 (1982) (quoting a 19th Century practitioner).
ular heading of “Product-Development.”³

This “market,” or the market for this “product,” was also discussed at a recent meeting of the National Organization of Bar Counsel and in a companion program of the Association of Professional Responsibility Lawyers. At these meetings, no less a luminary that the Reporter for the ABA Model Rules alluded to the “pitfalls inherent in [bar association ethics] ‘hotline’ arrangement[s].”⁴ Other experts presented programs along the lines of “How to Market Yourself as a Professional Responsibility Lawyer.”⁵ Intended or not, one is left with the following impressions: that lawyers are being targeted, if not by clients then by other lawyers (if not as defendants then as clients); that our ethics rules are more or less indecipherable to anyone other than a specialist; and that practitioners had better take their questions to paid legal ethics consultants if they know what’s good for them.

Assuming, arguendo, that the average lawyer can no longer identify and research a question of legal ethics or potential legal liability,⁶ whatever happened to bar association ethics committees? According to academics, at least, these traditional sources of professional advice are staffed by the inexperienced or incompetent, and when operating at their best are inefficient and unresponsive. Bar committee procedures deny interested parties their deserved portions of daylight and due process. And, strangely enough, bar committees accomplish all of this studied, and presumably significant unfairness while inviting only “niggling and peripheral questions of a kind that might be raised about one’s conduct on a lawyer’s own letterhead.”⁷

This article responds to the critics of state bar ethics committees. Indirectly, it raises some questions about the need, or at least the extent of the need, for yet another law-related cottage industry (the for-hire legal ethics consultant). It also provides some friendly advice for those well-meaning types in every jurisdiction who are perennially “reforming” or “energizing” their bar associations and demanding for the “membership” a dazzling new array of services. It discusses practical

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3. “Ours is a learned profession, not a mere money-getting trade.” Anon.
4. See ABA/BNA Law. Man. Prof. Con. 37 (Vol. 7, 1991) reporting the proceedings of the Midyear Meeting of the NOBC.
6. As opposed to “will not”—see parts II and IV. Hopefully it is not contended that the average lawyer cannot read, understand, and research the Model Rules. See the passing reference to “due process” considerations in part III.
problems that have gone unmentioned in the limited literature, just as it
takes issue with many of the assertions that have been made in that
literature.

Of course, the real aim of the article is to give the reader some
observations, and some comments about other peoples’ observations,
from the point of view of a member of the much maligned “Ethics
Committee.” I also hope that I may be forgiven for making a few irreverent
remarks on the subject of lawyers and lawyers’ ethics, the misuse
of the professional codes, and the abuse of bar committees. After
practicing law, teaching legal ethics for eleven years at a state univer-
sity, chairing a state bar ethics committee for seven years, serving as
the chairman of a state’s Model Rules committee, and co-authoring an
eerily unread but “pithy” book on ethics in litigation, it would be un-
natural if I did not have a few personal anecdotes, comments and com-
plaints to offer. Having suffered the part of the “schoolmaster,” it is my
turn to whine a bit.

A. Discipline, the Courts, and Ethics Committees

From my perspective, laymen and lawyers alike seem hopelessly
confused about the roles of disciplinary agencies (which serve a
prosecutorial function triggered by client, attorney, or court complaints
of acts of misconduct) the courts (which are charged with the supervi-
sory function of policing the conduct of lawyers practicing before
them), and national, state, and local bar associations (which serve in an
interpretive or advisory capacity) in “enforcing” professional

The work of lawyer disciplinary agencies is initiated by the filing of
complaints with the bar counsel. Students of the disciplinary system are
all in agreement that reports by lawyers of the ethical misconduct of
other lawyers account for a relatively small percentage of the workload
of disciplinary agencies. Critics of the disciplinary system argue that
the same socio-economic and emotional pressures that militate against
lawyer reporting also militate against judicial reporting or involvement

8. Trial, Vol. 25 No. 5 (May 1989). I was upset until I looked up “pithy” in the
dictionary. A Canadian reviewer speaks of “l’ouvrage eclaire d’une maniere particulier-
emment vivante le deroulement d’un litige.” I still do not know what that means.
9. Part of the material in this section (IA) first appeared in Chapter 20 of RICHARD H.
10. John M. Levy, The Judge’s Role in the Enforcement of Ethics — Fear and Learn-
ing in the Profession, 22 SANTA CLARA L. REV. 95, 103 (1982).
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in informal discipline. Accordingly, most complaints to bar counsel come from laymen (clients), and describe the sort of deeds that are easily discovered, understood, and described by laymen. So it should come as no surprise that actual disciplinary adjudications resulting in serious discipline tend to involve instances of conversion, fraud, or other felony conduct, and unwelcome solicitation. Other types of misconduct, such as inadequate preparation, failure to show up on scheduled court dates, presentation of false testimony or false or distorted documentary evidence, the filing of sham pleadings, instances of discovery abuse, and even conflicts of interest, are likely to surface only as a result of the diligence of the court or the willingness of opposing counsel to raise them. Opposing counsel bring them to the attention of the court (by way of a motion to disqualify, a motion for money sanctions, or a motion for exclusion of evidence) only when there is some "tactical" advantage to be gained. In all but the most egregious circumstances no parallel bar complaint (request for disciplinary action) is filed.

Insofar as judicial enforcement is concerned, it is common knowledge that many judges view the injection of ethical issues into lawsuits

11. Id. at 106.
12. Kentucky statistics relating to complaints filed during the period Oct. 29, 1990 to Nov. 29, 1990, reveal that 36% of complaints were based on a lawyer's alleged failure to communicate with his or her client (Rule 1.4) or alleged failure to act with reasonable diligence (Rule 1.3). Roughly 9% of filings complained of "unreasonable fees" (Rule 1.5(a)), and another 8% (roughly) alleged that a lawyer did not surrender papers or property to his or her client or refund "unearned" fees (Rule 1.6(d)). See Clooney, The Disciplinary Process and Often Heard Complaints, 13 THE ADVOCATE NO. 3 46-49 (Apr. 1991). Bar counsel (the "prosecutor") may or may not have the time to interview a dissatisfied client and translate his or her disappointment into an intelligible bar complaint. This suggests an interesting opportunity for pro bono work, though one doubts that lawyers will queue up to provide it.

16. The trial court could be viewed as a "tribunal" or "professional authority" for reporting purposes (DR 1-103(A) and Model Rule 8.3) and a judicial resolution of a complaint might eliminate the need for further reporting. See Richard H. Underwood & William H. Fortune, TRIAL ETHICS § 20.3.3 (Supp. 1990).
as mere tactical ploys, diverting the court from its “primary business of disposing of cases.” Judicial activity has varied depending upon the individual judge’s perception of the relative importance of doing something about lawyer misconduct. Furthermore, many judges are unfamiliar with the lawyer codes and related gloss. Many more judges attempt to refer questions and disputes to bar counsel (the office of disciplinary counsel) or the bar association’s ethics committee. This can result in unnecessary delay to the litigants, and deprive them of a meaningful opportunity for a hearing as well as an effective remedy. "Initiating” disciplinary action (to use the terminology of Canon 3 of the Code of Judicial Conduct) by referring a matter to bar counsel may not protect the interests of the complaining party-litigant, since the remedy most appropriate for a particular situation may be disqualification of counsel, the preclusion of evidence, or the like, rather than an after the fact (and an after the injury) reprimand or suspension. Moreover, a “forward pass” to bar counsel may be the prelude to a “hike” right back to the court, or a “lateral” of the issue into oblivion. Most disciplinary agencies follow the lead suggested by ABA Standard for Lawyer Discipline and Disciplinary Proceedings Rule 8.10, which calls for disciplinary proceedings to be stayed when there is pending a civil proceeding to which the respondent is a party, or a criminal proceeding in which the respondent is a defendant, if the proceeding involves substantially the same subject matter as the disciplinary proceeding. Given human nature and the availability of judicial remedies in all cases pending before a court, most bar counsel, and many ethics committees, stretch


   A judge should [either] take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

20. “You can't unring a bell” goes the cliche. A variation [recently recited at a CLE program by a former Governor of Kentucky and former federal judge] goes: “It doesn't do any good to strain the milk once the cow's pee'd in the bucket.”

21. Kentucky Supreme Court Rule 3.180(2) provides:

   Proceedings may be deferred by the Tribunal if there is pending civil or criminal litigation directly involving the Respondent [lawyer] or proposed Respondent involving substantially similar material allegations to that or those in the disciplinary proceedings, provided however, that the respondent-attorney proceeds with reasonable dispatch to insure the prompt disposition of the pending litigation.
the policy of restraint embodied in the ABA rule and refuse to become involved in matters that are "in litigation."\(^{22}\) This may be a reasonable position for an ethics committee to take, but given judicial indifference or timidity when it comes to matters of lawyer discipline, complaints tend to get lost in a sort of Alphonse and Gaston circuit.\(^ {23}\)

In short, only a portion of all potential disciplinary cases will be initiated at, stay in the hands of, or even come to the attention of, the office of bar (disciplinary) counsel. Some of the work of "educating" the deviant lawyer may be picked up by the courts. But much more will be funneled to bar ethics committees, which have become, by education and suasion as well as "advisory opinions." All too frequently such committees are also expected to serve as a forum for decision. Parts III through V of this article address the practical consequences of this funneling and role confusion.

**B. The Literature and the Critics of Ethics Committees**

Blow, blow thou winter wind,
Thou art not so unkind
As man's ingratitude; . . .
Freeze, freeze, thou bitter sky,
That dost not bite so nigh
as benefits forgot: . . . \(^ {24}\)

1. **Critics of the Substance of Bar Opinions.**—Although there has been little professional commentary on the work of bar ethics committees,\(^ {25}\) virtually all that has appeared to date includes (a) at least some

\(^{22}\) See discussion at lB1(a) below. Committees prefer not to become involved in *ex parte* resolution of actively litigated issues on a one-sided presentation. One solution might be for a court to request guidance pursuant to Canon 3(A)(4) of the Code of Judicial Conduct (1972) [Canon 3(B)(7)(b) of the new 1990 Code] which allows the judge to obtain:

... the advice of a disinterested expert on the law applicable to a proceeding before [the judge] if [the judge] gives notice to the parties of the person consulted and the substance of the advice, and affords the parties a reasonable opportunity to respond.

\(^{23}\) The allusion is to a cartoon series popular in the 1920s involving two Frenchmen who could never get anywhere because they were constantly yielding the right-of-way as in the exchange "After you, Alphonse—No! No! No! After you, Gaston!"


\(^{25}\) The existing literature includes, alphabetically by author: Chanin, *The Scope and Use of State Ethics Opinions*, 14 J. LEGAL PROF. 161 (1989); Cheatum & Lewis, *Com-
criticism of the types of questions that are addressed in committee opinions as well as (b) complaints regarding the "thoroughness" and "accuracy" of the opinions surveyed.

a. Questions Addressed.—Professor Wolfram is certainly one of the more influential commentators in the field of legal ethics, and he has very little that is good to say about bar association ethics committees. Indeed the very first sentence in his book dealing with the subject exudes something like contempt:

At one time relatively significant disciplinary control over lawyers was exerted by local, state, and national bar associations through the promulgation of "opinions" by so-called ethics committees.

After making a point that is difficult to refute—that at times such opinions (the ABA opinions at least) have tended to be excessively devoted to "advertising and solicitation issues"—Professor Wolfram moves on to denigrate the importance of all ethics opinions by suggesting that academics aren't interested in them, and that courts rarely cite or rely upon them. Stylistically, such opinions are described as "dogmatic," and characterized by "strong statement rather than flawless reasoning" as well as verbiage that is unnecessarily "righteous."

Insofar as the substance of bar ethics opinions is concerned, Wolfram finds that their "conclusions are often difficult to reconcile with other, often uncited opinions or to trace to specific provisions of the relevant lawyer codes." Of course, the same, could be said of many judicial opinions (and not just judicial opinions dealing with lawyers’ eth-


27. WOLFRAM, supra note 7, at 65 (1986). It is worth noting that Arthur Train had his cult hero Ephraim Tutt identify one of his scurviest and most unethical (certainly the most hypocritical) enemies as the chairman of a bar association ethics committee. A. TRAIN, THE AUTOBIOGRAPHY OF EPHRAIM TUTT 158-88 (1943). One may well question the fairness of Train's indirect criticism of contemporary bar committees. See infra note 68.


29. WOLFRAM, supra note 7, at 66.
ics). After lamenting this problem of inconsistency, Wolfram goes on to attribute many (perceived) problems of "quality," or at least relevance, to what some would call jurisdictional problems. Wolfram cites an ABA rule and ABA opinions, which contain or allude to what Wolfram calls "structural" limitations on the types of questions that committees are allowed to field. These limitations are imposed on most, if not all, state bar ethics committees. For example, a Kentucky Opinion provides a conventional checklist: Supreme Court Rule 3.530(1) provides: [that] "[a]ny attorney who is in doubt as to the propriety of any professional act contemplated by him . . . may in writing to the Director petition for an advisory opinion thereon." (Emphasis added). Consistent with this language, the Committee does not answer questions relating to the past or anticipated conduct of opposing counsel or other third parties, or an attorney's own past conduct unless it is tied to his or her future conduct. [T]he Committee does not answer questions of law. The resolution of disagreements between attorneys, attorneys and clients, and attorneys and third parties, is not in the Committee's jurisdiction. Similarly, responding to media inquiries regarding pending requests for opinions would be inconsistent with the language of the Rule and the proper function of the Committee. Finally, the Committee does not have jurisdiction to render a legal analysis of the powers of any government official.

Without discussing the possibility that such limitations might have some sound basis in policy or practicality, Wolfram seems to be suggesting that if past conduct, the conduct of opposing counsel, and questions of law cannot be the subject of "advisory ethics opinions," then little if anything of real value can be expected to turn up in any committee opinion.

(b) Quality of Opinions

Professor Wolfram observes that the work product of the ABA Committee typifies "the best, as well as the worst" of the opinions of ethics committees. Wolfram goes on to state the obvious, and that which could be said of almost any undertaking—that the quality of opinions is "uneven, reflecting the talents and interests of volunteer members." More detailed criticism of the ABA work product is pro-

30. Id. (citing ABA Standing Committee on Ethics and Prof. Resp., Rules of Proc., rules 3 & 4, in 1 ABA Informal Ethics Opinions at 5 (1975)).
32. WOLFRAM, supra note 7, at 66-67.
33. Id. at 65.
34. Id. at 66.
vided in an article by Professors Finman and Schneyer. The latter attempts to demonstrate the "striking inadequacy" of the formal opinions of the ABA, and to propose "reforms."

Finman and Schneyer select as a data base only twenty-one ABA Formal Opinions issued in the first ten years following the adoption of the ABA Model Code. This extremely limited data base was thought to "accurately depict" the work of the ABA Committee "as a whole." The opinions were examined for "merit" and for the "validity of their reasoning." This examination revealed that the Committee made forty-eight "holdings." Only twenty-one of these "holdings" were pronounced "correct," and only seven of these "correct holdings" were found to have "added" anything to the "obvious meaning of the Code." Seven of the holdings were "clearly wrong." Twenty "holdings" were found to be "based on value choices that are debatable, i.e., choices which some reasonable lawyers would accept and others reject." The opinions scored more poorly on "reasoning." Indeed the Professors contended that the Committee's reasoning was sound only when the rule applicable to a problem and the meaning of that rule were obvious." This occurred in only three opinions! It is not entirely clear how significant these "findings" about "holdings" are if one's concern is the practical importance of local and state bar committees and hotlines.

A more general, and common, criticism of the substance of bar committee opinions is that they do not take account of relevant and frequently controlling "laws of general applicability." Once again, the reader is asked to overlook the jurisdictional or prudential limitations

36. Id. at 93.
37. Id. at 97.
38. Id. at 102. One might ask if all questions of ethics (and law, for that matter) do not involve "value choices," and if it is not a characteristic of "value choices" that they are "debatable." And if an "answer" to an ethics question were not the product of debatable interpretations and value choices, then how could such an answer be anything but "obvious." One might ask if these academics are not attempting just a little too hard to sound a little too logical, qualitative, and scientific.
39. Id. at 104.
40. The title of the Finman & Schneyer article suggests that it has something to do with the subject, and the article has been cited for the proposition that it does shed some light on the subject.
imposed on bar ethics committees—in this instance, that a committee should try to avoid answering questions of law. Some critics suggest that bar committees can and should incorporate what would ordinarily be considered legal analysis and legal advice into “advisory ethics opinions.” Other critics suggest that they are not criticizing bar committees at all, but are simply recommending something more holistic and more professional (again, the paid consultant). 42 The failure or inability of bar ethics committees to provide such advice is characterized as their principle “weakness” and “drawback.” 43

2. The Proceduralists. — The most plaintive critics with a fascination for things procedural are, once again, Professors Finman and Schneyer. They attribute much of the weakness of the ABA formal opinions to (a) the composition or staffing of, and “lack of accountability” of, ethics committees, as well as (b) the decision-making procedures employed by them. To be fair to these academics, their complaints and reform proposals seem to be directed almost exclusively to the ABA Committee [which they refer to as the CEPR]. It is not clear whether they intend for their “reforms” to be implemented “below” the ABA level. 44 It must be acknowledged that by focusing on matters of form and procedure, they are speaking the language of lawyers and describing “solutions” that have a superficial appeal. On the other hand, some of their proposals are a bit whimsical, and would likely prove to be fiscally profligate if implemented at the state or local level.

(a) Composition and Accountability of Committees. — There have been complaints about the small size of state bar committees, as well as complaints that such committees are dominated by particular lawyer elites (presumably in some states by corporate “big city” types, and in

42. Wolfram rails at the distinction alluded to in committee rules and standing operating procedures against the giving of opinions on the “law,” setting up as a straw man and then knocking down the proposition (attributed to unknown and unnamed, possibly hypothetical, committee members) that the Code and Rules are not “law.” WOLFRAM, supra note 7, at 67.

43. The message is that if you have a good ethics expert, you should either trade in that expert for an expert in the “substantive area of law involved” (presumably the area in which the consultee-lawyer is attempting to practice) or at least hire one of those too. See HAZARD & KONIAK, supra note 41, at 13. I am not disputing the value of an additional expert who is familiar with the particular area of practice involved.

44. At least one commentator has interpreted the Finman & Schneyer article as calling for implementation of more adversarial procedures at the state level as well. Chanin, The Scope and Use of State Bar Ethics Opinions, 14 J. LEGAL PROF. 161, 170-71 (1989).
other states by small town "horse and buggy" types). 45 However, no concrete recommendations have been made as to how these supposed evils might be remedied. 46

It has also been suggested that accountability of committee members is lacking, and that greater accountability might result in improved quality. So it has been argued that opinions should be signed, and that concurring and dissenting opinions should be filed, suggesting reliance on a judicial model. The proponents of these "improvements" contend that this would let "outsider's" know the views of specific members and enhance the leadership's capacity to use reappointment decisions for accountability purposes. 47

In criticizing the work and work product of the ABA Committee, Professors Finman and Schneyer count "appellate review" as essential for "accountability," without explaining what appellate system the ABA Committee is supposed to hook up with. Many state bar rules already provide for appellate review of formal committee opinions in order to provide interested persons an opportunity to object and argue opposing views, and, oddly enough perhaps, alleviate antitrust concerns. 48 Finman and Schneyer concede, in the same paragraph in which they praise judicial review, that review might be time-consuming, and the value of ethics opinions, at least as a guide to the lawyers who request them, depends on prompt service . . . review might improve the quality of CEPR opinions and yet impair their value. 49

(b) The Decision-Making Process.—Throughout their article, Finman and Schneyer treat the work product of ethics committees as a body of common law. 50 They talk of the "precedent" set by ABA opin-

45. The rural-urban hostility is supplemented by a "trial lawyer"—"office lawyer" enmity. The latter exemplified by the Preface to the American Trial Lawyer's Code of Conduct:

   Lawyers are not licensed to write prospectuses for giant corporations, or to haggle with federal agencies over regulations and operating rights. We are licensed to represent people in court . . . .

   Interest group self-glorification, as well as interest group lobbying and the formation of interest group ethics committees, are all negative developments, perhaps signaling the beginning of the end of the guild (self-regulation, or the proverbial "goose that laid the golden egg"). See discussion at Part V.
46. FINMAN & SCHNEYER, supra note 24, at 150-56.
47. Id. at 148-49.
49. FINMAN & SCHNEYER, supra note 24, at 149-50.
50. Id. at 43.
ions, and they describe something like a “hierarchy” of committees with the ABA Committee “at the apex.” While acknowledging that this hierarchy is informal, there are suggestions that the whole operates as something analogous to a judicial system. Having flirted with such an analogy, it is only natural that these critics insist on the introduction of “adversarial procedures” into the generation of advisory opinions:

CEPR’s [again, shorthand for the ABA on Ethics and Professional Responsibility] responsibilities are more like a court’s than a typical committee’s: both the CEPR and courts must identify and carefully consider the rules, interpretive problems, precedents, and policies relevant to their decisions. . . . In our judgment, many of the [substantive] flaws in CEPR’s opinions could be avoided by making the Committee’s procedures more adversarial, and the procedures should be structured accordingly. 52

After several more pages of journal ink the authors inform us that the introduction of adversarial procedures “would not be difficult”:

Two advocates could be appointed to do independent research on the subject of each prospective opinion and to develop contrary positions on these subjects. Ideally, the advocates would not be Committee members and would have special expertise in the professional responsibility field . . . [The Committee could also issue] a general invitation for comments . . . . 53

In addition to the participation of these knowledgeable and eager-beaver advocates, the authors allude to “notice-and-comment or hearing procedures”; or as an alternative to dueling advocates, the appointment of a “single, neutral analyst [staff member and full time employee]” to provide the committee with “objective memoranda.” 54

Perhaps it will come as no surprise to the reader that the costs of the proposed reforms might prove to be significant, if not prohibitive, even in the limited context of the operation of the ABA Committee. The authors simply announce that “these modifications in CEPR’s procedures seem both workable and worthwhile” and “feasible.” 55 It is acknowledged that the employment of a single neutral staff member providing research and memoranda to the committee “would probably be less expensive than [the suggested] adversarial reforms,” although

51. Id. at 82.
52. Id. at 156-57.
53. Id. at 163.
54. Id. at 166.
55. Id. at 163, 165.
one guesses that a staff member with skills, talents, and insights equivalent to those provided by two expert advocates might be expected to demand some "competitive" level of professional compensation. Then, almost as an afterthought, the authors observe that there will be only a "relatively small number of [formal opinions]" — and that costs might be minimized by reliance on committee members or other "volunteers" [as advocates] rather than "paid experts." Again, one is forced to consider the possibility that these critics are only talking about formal opinions published in a bar journal of some sort, and that they might be satisfied with the work of unpaid volunteers (as serve on the ABA Committee in its present form) after all.

Aside from considerations of cost, it is clear that the time-delay associated with the "adversarial process" advanced by these academics would mean that the end product generated by that process would be of little use to any lawyer needing a quick answer in a fact specific situation. Nevertheless, these critics leave us with the comforting thought that "half a loaf" of their reform bread "may be better than none"; and as a coup de grace for the ABA Committee - "if no reforms are instituted . . . the entire system could profitably be abandoned."

3. The Pragmatists.—Not all of the critics recommend the abolition of bar ethics committees, nor do they waste any time sketching out elaborate procedural reforms. Instead, they are content to downplay the practical significance of bar committees and "hotlines" by pointing out what are perceived to be their inherent limitations.

These pragmatists go beyond the "structural [jurisdictional] limitations" mentioned by other critics. Among their best points are the

56. Id. at 166.
57. Id. at 167.
58. Id. at 167. Those of us who pay royalties to the ABA for the right to reprint the Code or the Rules that we labored to see implemented at the state level, not to mention ethics opinions that we, ourselves, authored, can see some merit in "abolition." Cf. Ethics Aren't Always Free; An Intra-ABA Royalty Tussle, THE NAT'L J. p. 9 (Apr. 1, 1991) (reporting the problems endured by lawyer Jay Foonberg, who discovered that his ABA sponsored publication was expected to pay royalties to the ABA Committee).
59. Charles Kettlewell, who in 1990-91 served as President of the Association of Professional Liability Lawyers, has written an excellent, but as yet unpublished, set of guidelines for those who would serve as a professional ethics consultant, under the title "Representing Lawyers." He observes that in his experience "[bar association committees] generally will not provide an advisory opinion on a matter that is presently pending . . . and . . . often require a longer period of time [to respond] than the lawyer can afford."
following: (a) that there is no attorney-client relationship between an ethics committee and the lawyer requesting an opinion, and therefore no attorney-client privilege;\textsuperscript{60} (b) that the facts related to a committee, and especially to a "hotline," will be limited or controlled by, and subject to manipulation by, the requesting lawyer\textsuperscript{61}—committees can be taken advantage of; (c) that the proper formulation of opinions takes an investment in time and research that bar committees and hotlines will not or cannot commit;\textsuperscript{62} (d) that a bar committee member or "local expert" may not have sufficient background in the substantive law that touches on or controls the scenario—the local authority may advise incorrectly by relying solely on the Code or the Rules (a complaint mentioned in part IB1(b));\textsuperscript{63} and (e) that since ethics opinions "do not have the force of law," they are a "legal anomaly"—"ethics opinions could be more useful if they articulated a norm for general guidance," or, if your prefer, general guidelines for routine and recurring situations.\textsuperscript{64} These criticisms are overblown, but nevertheless are deserving of some consideration and discussion.

II. A RESPONSE TO THE CRITICS

Here as in life generally the need for plausible hypocrisy serves as a

\textsuperscript{60} Kettlewell, note 59, at page 2 of 12; Professor Geoffrey Hazard's comments to the National Association of Bar Counsel, quoted at ABA/BNA Law. Man. Prof. Con. 36 (Vol. 7 No. 2, Feb. 27, 1991).

\textsuperscript{61} Cf. Kettlewell, note 59, and Hazard, note 60. I have encountered "lying" lawyers. I am also plagued by lawyers who misrepresent their interest in the course of requesting opinions. For example, it is not uncommon for a lawyer to represent that he or she is concerned with his or her own future conduct, when, in fact, the lawyer plans to use any opinion against some other lawyer [as a condemnation of the other lawyers conduct]. And during one period in which I was forced to declare a moratorium on telephone requests for opinions (which were never explicitly authorized by the governing rule) at least one lawyer represented herself to be my personal physician in order to get by my secretary.

\textsuperscript{62} Kettlewell at page 5 of 12. Lawyer Kettlewell contends that a bar association hotline "would not... suffice in 90% of the instances [in which he is] retained to provide advisory opinions. See also Zitrin, Attorney, Heal Thyself, CAL. LAW. 38 (July 1991). The California "hotline" apparently refuses to give advice or opinions, and provides only references or resource materials. This is a rather luke-warm "hotline" by my standards. But I'll bet it's well staffed and expensive.

\textsuperscript{63} GEOFFREY HAZARD & S. KONIAK, THE LAW AND ETHICS OF LAWYERING: TEACHER'S MANUAL 12-13 (1990); Kettlewell at 3, 5.

\textsuperscript{64} Hazard, as reported at ABA/BNA Law. Man. Prof. Con. 36-37 (Vol. 7 No. 2, Feb. 27, 1991).
restraint on misconduct. 65

Academics have inspected and "analyzed" ethics committees and have pronounced them hypocritical and inefficient. 66 However, much of their criticism is founded on misunderstanding; and much more is grotesque exaggeration. In spite of their inefficiencies and imperfections, ethics committees provide important services in an increasingly whimsical 67 and increasingly hostile "real" world.

A. Substance

The only data that I have access to and that I can vouch for—provided by questions lawyers have asked me over the last seven years—convinces me that the questions that are presented to bar association ethics committees are neither "niggling" nor "peripheral." 68 My committee's records from a sample one-year period reveal that 30-35% of all requests dealt with conflicts of interest. Another 20% involved important ethical issues in the context of litigation, dealing with the merit of claims and contentions, the obligation of candor to the tribunal, client and witness perjury, expediting (or delaying) litigation, discovery obligations, contacting represented and unrepresented persons and

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65. Bryden, How to Select a Supreme Court Justice: The Case of Robert Bork, 57 The American Scholar 201, 205 (Spring 1988) (commenting on the Senate's rejection of Haynsworth and Fortes [for Chief Justice]).
66. A wise old judge for whom I used to work would mutter the same one-liner when he would encounter any professional critic, or any lawyer or academic who was loaded up with an excess of gravidas. He would say that such an almighty person "ought to have to run for County Sheriff." The precise origin of the expression was never revealed to me, but the sense of it seems to me to be that the person referred to might benefit from some extremely traumatic and humbling experience . . . preferably one calling for unsatisfying compromises in the face of harsh realities.
This Note will . . . [use] Reinhold Niebuhr's moral realism as a basis to criticize and reconstruct the conventional approaches to litigation ethics. The Note will argue that litigation ethics cannot be fully understood except in the broader context of political philosophy . . . [c]onventional legal ethicists have failed to see that political philosophy is an essential framework in which to understand the study of legal ethics.
68. A table of raw data covering the period July 1984 to July 1985 was published in RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, TRIAL ETHICS, § 20.4.2. (1988).
problems relating to investigation, lawyer-as-witness problems, and the mechanics of withdrawal. Only 12% dealt with economic (and presumably "peripheral") questions such as advertising, solicitation, and firm names and letterheads. These figures are consistent with those produced in the limited empirical studies that have been done in an effort to document the ethical problems that practicing lawyers encounter and report as the most important and the most difficult.69 It is also worth noting that the same mix of serious questions are found in the records of state bar ethics committees from the 1920’s.70

Continuing with the checklist provided by Professor Wolfram, it must also be said that academic indifference to the work product of state bar committees hardly rises to the level of substantial criticism. Professional ethics and professional etiquette have never been given center stage in any law school. Furthermore, one of the union rules among academic lawyers, at least from the 1970’s on, has been that no time should be wasted on mundane, and peculiarly local ("parochial") matters such as state ethics rules and ethics opinions.71 Without casting

69. See, e.g., Trotter Finn, Ethical Problems in the Legal Profession: The View From the Inside Out, 14 J. LEGAL PROF. 73 (1989) (survey ranking conflicts of interest as the most important category for lawyer concern, with 18% of lawyers also citing fee problems as a major concern). Questions regarding fees accounted for only 3% of the workload of my ethics committee during the sample one year reporting period.

70. See, e.g., ABA Annotated Canons 165 (1926), which presents extracts from the Yearbooks of the Chairman of the Comm. on Professional Ethics of the New York County Lawyer’s Association for the years 1925 through 1925 ("Indicating Subjects Upon Which Inquirers Have Consulted The Chairman, Without Requiring Submission to the Committee"). These Yearbooks describe what is essentially an informal hotline service. Professor Wolfram’s historical criticism of ethics committees relies on J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 331 (1950) which observes that half of the ABA ethics opinions (presumably formal or informal opinions written by the ABA Committee and published in the ABA Journal) between 1924 and 1936 “dealt simply with the business aspects of the profession.”

71. The teaching of "law" will soon be dominated by extremely eccentric persons. Everything will have to be acknowledged to be "political," and all discourse will be couched in terms of "economics" (hopelessly simplistic, politically "conservative," often goofy economics, but always masquerading as "scientific") and "philosophy" (mostly "liberal," sometimes Marxist, as philosophy goes almost always yesterday’s newspapers, frequently silly philosophy, but always masquerading as "scientific"). First rate law schools will be turned into second rate graduate schools; second rate law schools will be turned into third rate graduate schools; . . . and so on. I sometimes feel that my own institution (usually a pretty quiet place) can degenerate into "The Law School That Is Run Like The Spanish Civil War" — the Authoritarians on the Right competing with the Authoritarians on the Left, to see who will win the privilege of obliterating the last safe place for the cello players.
any stones at Professor Wolfram, whose accomplishments do not need my endorsement, there are those among us who feel that much of the academic "work" in "professional ethics" amounts to little more than pedantry and obscuritism.

While Professor Wolfram states categorically that "[e]thics opinions continue to be rarely cited and relied upon in judicial decisions," the judicial reaction to bar ethics opinions has been very much of a "mixed bag," ranging from rare instances of outright hostility to total deference to committee opinions. It seems fair to say that most judges consider bar opinions to be of some persuasive value. But there is also at least anecdotal evidence that judges are no more familiar with the "issues" and "sources" than the average lawyer. For these reasons, generalizations should be viewed with some skepticism.

The remaining complaints regarding the quality of state bar ethics opinions are not really very substantial. Indeed, some are quite trivial. Judicial opinions are often inconsistent, and frequently fail to account for all preceding opinions, even within the same judicial circuit. There is no particular reason to expect the work product of ethics committees to be any more of a seamless web. Even academics have been known to be inconsistent, incomplete, and "righteous." Given the limited funding of bar committees, it is no wonder that their work product is not art work. Furthermore, I contend (based on some considerable first hand, real world experience) that ethics committees should serve only a very limited, yet very important purpose—to provide limited (disciplinary) protection of lawyers who come to the committee in good faith.

72. WOLFRAM, supra note 7, at 65.
73. Chanin, supra note 24, cites In re Ark. Supreme Court Comm. on Advisory Ethics Opinions, 272 Ark. 525, 611 S.W.2d 761 (1981), in which the highest court of that state declared that "[t]he opinions of an ethics committee would . . . be of such slight and inconsequential value as not to justify the imposition of the necessary expenses upon the members of the bar and ultimately upon the public."
74. Judges in my jurisdiction carry deference to the extreme, and even attempt to refer motions involving ethical issues (motions to disqualify counsel or exclude evidence) to the committee for decision.
for the purpose of obtaining practical answers to difficult questions on an expedited basis. Consistency, elegance of expression, and footnote form are not really necessary (although I would be the last to say that such frills are undesirable). Even in formal published opinions, they are of secondary importance.

Finally, something must be said in favor of the prudential limitations placed upon the types of questions ethics committees will address. While procedures may, in fact, impact on quality, that will be the subject of the next section.

The "jurisdictional" or prudential rules imposed on committees are much misunderstood and are a common subject of complaint from practicing lawyers as well as academic commentators. In practice, none of these limitations is iron-clad. Some of the constraints are more "formal" than others, but each serves a useful purpose.

It should be apparent that there is no way a committee can provide guidance that will protect a lawyer from discipline for conduct that has already occurred. Hence the suggestion that committees do not answer questions regarding "past conduct." Such an opinion would not be advisory at all. Furthermore, it is desirable that committees not become directly involved as players in the disciplinary process. While this point is discussed in more detail in a later section of this article, the integrity of the ethics committee will be compromised, and the willingness of lawyers to consult it will decline, if it cannot keep an arms length away from the disciplinary system. Also, the opportunities and incentive to manipulate committees by distortion of fact are much greater in this context. Of course, there must be some flexibility, and committees frequently give opinions on past conduct if it is tied to anticipated (future) conduct (as in, "Where do I go from here?").

Other limitations are designed to discourage misuse and abuse of a committee's services. In order to fully understand these limitations, one must remember that ethics committees are neither equipped for nor are they expected to hold hearings or take evidence. They are to respond to an ex parte presentation of the "facts" by a requestor concerning the requestor's own contemplated (future) conduct. At the same time, resort to ethics committees can be encouraged only if some degree of confidentiality is accorded, at least at the outset.

These considerations account in large part for the rule against the generation of opinions about the conduct of other (non-requestor) lawyers, the reluctance of committees to provide information to nonre-
questing lawyers, clients and the press, and rules cautioning against involvement in matters that have already been presented, or are about to be presented, to the court (matters "in litigation"). An elimination of these prudential rules would invite offensive, and not defensive, use of opinions, and would encourage lawyers to seek and exploit the "definitive views" of the bar for tactical purposes. When matters involve another lawyer, or a matter pending before a court, there are other ways for ethics committees or other organs of the bar to "participate" that will provide notice to all parties, and an opportunity for them to be heard. 78

Many examples of misuse and abuse of ethics committees are provided in Parts IV and V of this article, along with a discussion of the pitfalls inherent in answering "questions of law." At this point it is sufficient to note that lawyers can and do seek free legal research, and ask elaborate questions relating to the practical and tactical aspects of handling particular cases. The reluctance of committees to answer such questions does not flow from any misunderstanding over the "legal" status of the Code or Rules. Instead, the admittedly fuzzy distinction between legal questions and ethical questions (usually there are reasonably clear and fair distinctions to be drawn) provides committee members with a way to decline to serve as uncompensated law clerks, judges, and assistant attorneys general.

Finally, ethics committees are, or at least should be, participatory and democratic. These are values that ought to be weighed in the balance, along with the other "realities" that may impact on "quality" as the critics define quality. This returns us to the subject of procedure.

B. Procedure

Consider, for a moment, the problems of democracy. On the one hand, the increasing fragmentation of and specialization within the bar calls for some democratic process, or hint of representative government, at least at the Board of Governors level. 79 When a question is sufficiently important and recurring to justify the publication of a formal opinion (the type of published work product that the critics have homed in on) the ethics committee chairman will usually seek input from the full committee and the Board, and rightly so. These are rules that govern lawyers; and they are rules that are based, in large part, on traditions which may not be intuitively obvious. Some degree of pro-

78. See discussion of Canon 3 of the Code of Judicial Conduct in part I.A.
79. Compare comments at note 45, supra.
fessional consensus is desirable, even if consensus does not yield a "perfect" answer.

On the other hand, opinion writing at the Board of Governors level can lead to the sort of "imprecision" and "righteousness" that so offends the academic critics of ethics committees. Board members tend to be drawn from the middle-aged and the successful. It is a well known fact that successful lawyers tend to hold opinions that are sufficiently strong to forestall curiosity in the actual text of the Code and Rules, let alone curiosity in case law and like esoterica. Committee draftspersons and their "research" are apt to receive the same short shrift given to servile associates in very large law firms and other creatures down the evolutionary ladder. As an academic lawyer, I am frequently thanked for my scholarship and dismissed with contrary instructions, sometimes without a hint of any coherent rationale to support the Board's ultimate position on a matter. There are times when it is difficult for the professional player (the ethics expert or academic) to give democracy its due, and resist the political players, who would reduce his or her role to that of scrivener or clerk.

Along the same lines, some questions invite a division along practice lines. Indeed, there have been times when I have determined that the submission of a question to "the higher authority" was best delayed or avoided altogether.

The fragmentation and specialization of the bar has other "quality" implications. Just as it is true that "among barbarians, all are slaves save one," it is also a fact that among academics (again, the critics of bar opinions are, for the most part, academics) all are constitutional law teachers save a couple of us who teach insurance law. I must bow in

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80. See Wolfram's criticisms in part I.B.1.a.
81. In this regard, Geoffrey Hazard, the ABA Reporter has been subjected to a great deal of unfair, indeed petty, criticism. The Model Rules were the product of a legislative process, with all that entails. His critics can write all of the codes they want—the trick is to get someone to adopt them.
82. Should a defense lawyer be permitted to talk to a plaintiff's treating physician without notice to the plaintiff's lawyer? Should a defense lawyer in a civil rights class action be permitted to make a settlement offer contingent on a waiver of statutory attorney fees? Should relevant evidence be excluded because a prosecutor talked to a suspect that he knew might already be represented by a lawyer? Lawyers do not choose up sides on such questions without regard to the "bottom line."
83. Euripides.
84. For an accurate assessment of the curriculum see James D. Gordon, Ill, How Not To Succeed In Law School, 100 YALE L.J. 1679, 1683-84 (1991) ("... A good law school's curriculum is not tied to the law of any particular state ... [and an] 'elite' law
the direction of the critics to the extent of conceding that it is difficult for a generalist or an academic, or even a specialist, to answer questions arising in the context of unfamiliar specialty areas of practice. On the other hand, this problem will not be remedied by a "call" for comments, or a standing invitation for comments set forth in a rule. Participation is not so easy to come by. Nor does the answer lie in professional demographics—quota-like selection of Committee and Board members to guarantee appropriate measures of "input" and "insight." Most people are more willing to criticize than they are willing to invest any effort in a solution. Furthermore, intraprofessional class struggle is moving from rhetoric to reality.85

There have been numerous occasions on which "my" Board has invited input and argument from interested parties in the hope of securing enlightenment.86 Unfortunately, to ask is not to receive, even from persons who claim an interest. The "aggrieved" all too often prefer to lie in wait. When "affected" or otherwise interested parties do participate, the level of input and argument they provide tends to be disappointing. Such "briefs" as are submitted seldom stoop to the citation of any authority. The debate that follows such submissions usually wanders far afield into war stories, or degenerates into the inevitable argument between the plaintiffs' personal injury lawyers on the Board and the insurance defense lawyers on the Board about the adequacy of the substantive law or a particular rule of procedure (especially when the ethics question relates to real estate or ERISA practice) or the moral bankruptcy of one or the other of the contending viewpoints. There is a lot of truth that "[a] camel is a horse that was made by a committee."

85. Again, compare The American Trial Lawyer's Code of Conduct (Revised Draft 1982), Preface:

It [referring to the ABA Model Rules] is the sort of thinking you get from a commission made up of lawyers who work for institutional clients, in institutional firms, and who have lost sight of the lawyer's basic function . . . .

86. The sort of occasions that come to mind involved questions relating to title insurance and the relevance of RESPA, the proper disclosures to be made when filling out HUD forms, and other esoteric matters. See part IV.E. It is very difficult to get input from "experts" and "specialists." The Virginia State Bar apparently permits non-requests to request "reconsideration" of opinions, and also provides for circulation of opinions to specialized "sections" of the bar association. See ABA/BNA Law. Man. Prof. Con. 37 (Vol. 7, No. 2, Feb. 27, 1991). The New York State Bar Association is to be commended for its effort to publish materials on legal ethics in the context of specialty practice. In particular I refer to ETHICS AND ENVIRONMENTAL LAW: CASE STUDIES, a publication of the NYSBA's Environmental Law Section.
As far as the need for accountability is concerned, I suspect that few lawyers would consider a slot on a volunteer ethics committee to be a professional plum providing sufficient compensation for torment at the hands of critics and overseers, academic or otherwise. I consider wildly implausible the prediction that signed opinions, academic or democratic (popular) "review," and the threat of replacement for unsatisfactory performance, would have any impact on the quality of bar ethics opinions. Furthermore, a proliferation of signed majority, concurring, and dissenting opinions is not needed. 87 The 40 page, heavily footnoted, law clerk generated, Supreme Court opinion is a poor model, at least in this context.

C. Pragmatic Considerations

I have labeled as "pragmatists" those critics who focus on confidentiality, the problem of manipulation, the problem of limited resources, and the difficulty of giving "ethics advice" to lawyers in specialty areas of practice. I will spend little time trying to dismiss or refute their criticisms. I simply disagree with their bottom line—that ethics committees are necessarily second rate, or that ethics committees should be abolished, shunned or prevented from issuing anything other than general "guidelines."

Confidentiality is a problem. Lawyers are generally enjoined from discussing information relating to the representation of their clients, and are naturally reluctant to discuss matters that may be embarrassing to themselves and others, particularly with "the Establishment." 88 Indeed, it has been my experience that lawyers naturally drift into a vague and hypothetical style, even when assured of confidentiality. In the absence of a statutory or rule based privilege, one must rely upon the discretion of committee members 88 who must argue something akin to an attorney-client relationship. This is not ideal for two reasons. First of all, today's judges seem to have a limited appreciation of professional eti-

87. The terse opinions of the Virginia Committee may be the best model. See VA. STATE BAR PROFESSIONAL HANDBOOK (Michie) (published annually).
88. See Ethics Consulting Takes Root as an Important Legal Field, THE BAR LEADER (May-June 1990, at 6, 7) (quoting John Berry, staff counsel of the Florida Bar and President of the National Organization of Bar Counsel).
89. I boldly claim that my discussions are privileged, and I suspect that the claim would be upheld, mainly because no one else wants my "job." Keith Kaap, an "ethics advisor" for the Wisconsin State Bar, also claims a privilege, and reports that in twelve years of giving advice, he has encountered only one (unsuccessful) challenge. ABA/BNA Law. Man. Prof. Con. 37 (Vol. 7, No. 2, Feb. 27, 1991).
quette and professional solidarity, and tend to give matters of privilege short shrift. 90 Secondly, recognition of an attorney-client privilege will invite overreaching in the form of claims of reliance on advice of counsel [the committee] that go beyond the intent of the governing committee rules. 91 On the other hand, it seems to me that these problems can be solved by an explicit legislative recognition of a privilege, coupled with a disclaimer of any attorney-client relationship. 92

Ethics Committees can be manipulated. Indeed, the language of most "bar rules" admits as much. 93 Clearly, the ex parte nature of the process, and confidentiality, invite abuse and manipulation; and a commitment to a "hotline" approach to problems of legal ethics exacerbates the problem. 94 However, serious problems of abuse can be minimized if committees will adhere to their "jurisdictional" rules, and if the bar and the courts will recognize the limited, albeit important, role of the advisory opinion. Paid ethics consultants are manipulated too, 95 and are also vulnerable to charges of "interest." About the only thing unique about manipulation of ethics committees is that they must serve all comers. Work can be forced upon them, and they can be worked by "both sides" at the same time. It is not uncommon for me to get calls from lawyers on opposite sides of a running vendetta—and not realize [or be informed of] the fact!

Finally, it is apparent that problems flowing from insufficient resources or expertise in a particular area of law are not, in fact, 90. There have been several instances in which I have given what I considered well supported and "conventional" opinions to lawyers urging them to maintain confidentiality, or at least assert the privilege, in the context of requests for information regarding clients (including fugitive clients), in the classic sentencing scenario, and in the context of enumerating grounds for withdrawal. See RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, TRIAL ETHICS §§ 14.5, 18.5.1, and 18.5.2 (1988). I have learned that some judges have rather unorthodox views on these matters. Furthermore, it would appear that "judging" can blunt the sensibilities. A protective opinion from the bar association will not assure that a lawyer will not be "excoriated" (or worse).

91. See discussion in text at note 33.

92. Id.

93. Such opinions only protect a lawyer from discipline, and then only if the lawyer has made a good faith effort to give a truthful and complete characterization of the circumstances of the requested opinion. See note 172.

94. In my experience, the "facts" can be a moving target, and I generally insist on either restating my understanding of the facts in my letter opinions, or insisting that the requestor provide a written version of his or her question so that the "facts" can be documented.

problems peculiar to ethics committees. Furthermore, there are many situations in which it is simply unreasonable for lawyers to expect bar committees to "bail them out."

III. THE PROPER ROLE OF AN ETHICS COMMITTEE

You better stop, look around,
Here it comes, here comes your
nineteenth nervous breakdown.96

If there is one point to be made in responding to critics of ethics committees, or in advising bar associations, members of ethics committees, and consumers of advisory opinions, it is that complex advocacy models complete with "the usual" appellate review are fiscally profligate and delay creating, and may defeat the very purpose of having bar sponsored committees and "hotlines." As a prime corollary, I would suggest that a cult of precedent and a methodology of priestly casuistry are likewise undesirable. The ethics rules can and should be applied as rules of reason.97 Their application is fact-sensitive. To the extent that resources and prudential considerations permit, answers should be direct and timely, even if that means, on occasion, that the "answers" appear inelegant, inconsistent, or even "wrong."

I do not wish to denigrate the value of well researched and persuasively written formal opinions and general guidelines. Nevertheless, what lawyers want and need most is a disinterested and knowledgeable sounding board that can provide a quick "yes" or "no" to the easy questions, and plausible, protective guidance in the really hard cases in which there is not, in fact, any definitive answer, and insufficient time for the discovery of a political consensus.

Perhaps I am willing to accept "wrong" answers asked for and given in good faith simply because I know that "right answers" are elusive.98 It is not clear to me that resources should be expended disci-

97. See MODEL RULES OF PROFESSIONAL CONDUCT, Scope [1].
98. Should a lawyer be disciplined for failing to disclose the death of his personal injury client [in the absence of deliberate violation of a procedural rule of the forum—e.g., a rule requiring timely substitution of parties]? Virzi v. Grand Trunk Warehouse and Cold Storage Co., 571 F. Supp. 507 (E.D. Mich 1983) suggests that the answer is obvious—that it must be "Yes." But it might interest the reader to know that the Virginia State Bar Committee has suggested the contrary in a persuasive, process oriented, opinion. See Va. Op. 952 (1987). Furthermore, I suggest that it is difficult to
plining lawyers when the "answers" are debatable and when no benefit is being conferred on the lawyer's client. Indeed, I would suggest that a winning defense in many disciplinary cases would be that discipline in the particular case would offend due process, much in the same way that common law crimes offended our ancestors' sense of due process. In any event, the principle value of bar association ethics committees lies in their ability to keep the "honest" practitioner on track, and keep him or her from making stupid mistakes or having unnecessary "nervous breakdowns." Committees can also provide some "ethics" education through formal opinions, assuming that lawyers will read them, but that role may be "secondary."

Indeed, the importance of protective "informal" opinions is demonstrated by the fact that the formal opinions targeted by the "critics" amount to a very small percentage of the "output" of bar association ethics committees.  

IV. IMPROPER ROLES: MISUSE OF ETHICS COMMITTEES

"... I didn't think I'd be allowed to handle it, but I agreed to send a letter to the Ethics Committee. I'd figured I'd tell them the facts and leave it up to them."

"That's hopeless," Ashley said. "If you have a serious ethical question, they never give you an answer in time."

This scenario points up the need for an "ethics hotline," if qualified and meaningful advice is to be provided "on tap." On the other hand, in Wishman's scenario, and all too frequently in the "real world," the lawyer involved in the discussion concedes that he thinks he knows the correct answer and is only using the committee for "client relations" purposes. Committees and other intermediaries are frequently used as

square Virzi with the constricted definition of fraud contained in the definitions of the Model Rules, or with Model Rule 4.1(b) and the Comments thereto. It is not that I disagree with the approach set forth in Virzi. Timely disclosures, even of adverse fact, may be in the client's best interests in at least some contexts. I simply insist that there are more judgment calls out there than many "experts" acknowledge.

99. Cf. In re Ruffalo, 390 U.S. 544 (1968); In re A. 554 P.2d 479 (Or. 1976). My other suggestions for defending disciplinary cases are (1) be humble and (2) get someone else to do the lawyering for you.

100. See ABA/BNA Law. Man. Prof. Con. 37 (Vol. 7, No. 2, Feb. 27, 1991) (reporting that of 2,500 to 3,000 calls a year to the Virginia State Bar ethics counsel, only 200 to 250 requests are for traditional formal opinions, and of that small number 90 to 100 can be disposed of by reference to existing formal opinions).

a "lightning rod" to draw fire coming from clients, or to provide the necessary and authoritative "no" answer that the lawyer would rather not give to the client direct.\textsuperscript{102}

But the Wishman excerpt also exposes another overlooked and undesirable "side-effect" of bar association furnished, "on call," ethics advice, and committee willingness to be "helpful." Specifically, a significant number of lawyers who otherwise might struggle with the Code or Rules\textsuperscript{103} will begin to rely on committee letter opinions as a crutch, and ultimately, a justification for overlooking conflicts and other ethical problems. The lawyer will simply take on any case, no matter how "smelly" the circumstances,\textsuperscript{104} send in a request in the hope of being "covered," and ignore the problem until "the Ethics Committee intervenes."\textsuperscript{105} In other words, in a rather cynical fashion, these "frequent

\begin{enumerate}
\item Chanin, supra note 24 at 167-68 points out that an advisory opinion might help a lawyer "when circumstances require that [the lawyer] take certain actions which are adverse to the interests of [the] client (what should the lawyer do with the fruits or instrumentalties of a crime that he or she has inadvertently taken possession of) or (when the lawyer is asked to) enter into an agreement which the client desires or demands (involving advancement of living expenses, particular disbursements of client funds, etc.)." Committee opinions may also be sought to break deadlocks that cannot be resolved in law firm "conflicts" or "new business" committees.

\item It is frequently assumed that the "lawyers who take the time and concern to make an ethics inquiry are not the ones with whom bar counsel will likely ever be concerned." ABA/BNA Law. Man. Prof. Con. 36 (Feb. 27, 1991). See also Rule 1.7 Comments ("The lawyer should adopt reasonable procedures . . . to determine whether there are actual or potential conflicts of interest . . . Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking representation.").

\item My committee members frequently opine that scenarios do not pass their "nose test" or "smell test." The classicists on my committee have Roman noses, and resort to application of the "Rule of Caesars's Wife" (Thou shalt not suffer an appearance of impropriety). That rule has remarkable staying power. See First Am. Carriers, Inc. v. Kroger Co., 787 S.W.2d 669 (Ark. 1990).

\item In Wishman's book a rather sleazy assistant prosecutor obtained the conviction of a dirty cop (in part by resorting to outrageous trial tactics and improper jury argument). The prosecutor then left the prosecutor's office and entered private practice. The dirty cop then asked the former prosecutor to handle the criminal appeal as well as the cop's civil service appeal of the loss of his pension benefits resulting from his conviction. Regarding the civil case the former prosecutor explained to his lawyer cronies (including Wishman):

\begin{quote}
\ldots I didn't think I'd be allowed to handle it, but I agreed to send a letter to the ethics committee. I figured I'd tell them the facts and leave it up to them.
\end{quote}

By the time the ethics committee published an opinion in the bar journal saying essentially "What kind of a lawyer would even ask such a question?" the criminal case had
"fliers" use ethics committees as a means of avoiding the exercise of professional judgment. They evade their professional responsibility. This phenomenon may account for the fact that between 10% and (lately) 20% of all the requests for opinions that come to my committee involve straightforward applications of Rule 1.9 (former client or "closed file" conflicts). Lawyers simply cannot be confused about the rule to be applied in such cases. The issues raised by these repetitive requests are factual. The requestor lawyers do not want to turn away any work if the decision can be delayed, avoided all together, or passed off onto someone else. In such instances, ethics committees are not being asked for opinions, guidance, or advice, as much as they are being asked to make decisions that the requestor-lawyer should be making. One suspects that in many instances the requestor lawyer does not anticipate or even want a timely reply, but simply wants to delay the day of reckoning in the hope of persuading a court or (in the worst case scenario) a disciplinary tribunal that some "hardship" exception should apply, or that the situation is, after all, "all the fault of the Ethics Committee."

When this kind of ethical "buck passing" becomes commonplace, the ethics committee is being "misused" in the sense that it is being forced to play a role that it should not have to play. But there are still other ways in which committees are asked to perform improper roles which are not at all obvious to lawyers, or to all bar officials, or even to all committee members.

A. Lawmaking

1. Deciding Questions of Law.—Contrary to the claims of the critics, ethics committee members are fully aware of the "legal" status of the Code or Rules, as well as the increasing "legalization" of "ethics" through court rules, the common law, statutes, and administrative regulations. The prudential limitation that committees "will not issue opinions on questions of law" is not technical "lawyer stuff," but

been reversed because of the prosecutor's "inflammatory and overreaching . . . summation."

"So you not only got the guy's conviction, but his acquittal and pension too," Ashley said.

"Terrific!" I said. "Some lawyer!"

106. See supra note 103. For the somewhat different problem of the lawyer who is not asking for advice, but who is insisting on approval, see discussion in part IV.

107. WOLFRAM, supra note 7, at 67.

more in the nature of garlic nailed on the door to keep away the vampires. It provides an "excuse" allowing committee members to drive off lawyer-looters who would turn them into law clerks, free lawyers for lawyers, judges, and assistant attorneys general. The "no law" gimmick is also a useful emergency brake. It provides a hook for reining in overly enthusiastic committee members. Bright lawyers are more often than not opinionated lawyers; and the need of bright and opinionated lawyers to "edify the bench and bar" can get out of control. At the risk of being branded a hopeless reactionary, let me provide a few examples that illustrate how committee members subtly "hold court."

One of the most interesting examples is provided by bar opinions dealing with settlement offers tendered by defense counsel in civil rights cases, conditioning settlement on a waiver of statutory attorney fees. When the question of the propriety of such offers is viewed solely from the standpoint of the Model Code or Model Rules, it is difficult to see why they should be deemed unethical. While such an offer may introduce a degree of conflict between the interests of the plaintiff (or the plaintiff class if the case is a class action) and the plaintiff's counsel, there is no ethics rule to the effect that defense counsel must sacrifice his or her client's interests, or provide that client with less than zealous advocacy, to spare the plaintiff's lawyer discomfort. This is just the sort of ethics question that leads to a choosing up of sides along practice lines, without regard to the language of the ethics rules. Many state bar associations issued opinions declaring that if a defense lawyer served as a conduit for such an offer, then that lawyer would commit a disciplinary violation for "creating a conflict" and, more importantly, for frustrating the "statutory purpose of the civil rights laws." One detects a strong odor or partisanship here, but my immediate point is that committees holding forth in such fashion are opining on their perception of the law in order to get a result that they like, for one reason or another. The ethics committee is the forum, but the "decision" of the committee is an ethics opinion in name only. Of course, many committees promptly changed course following the

110. See supra discussion at note 80.
111. See, e.g., DC Op. 147 (1985); N.Y. City Op. 80-94 (1980); N.Y. City Op. 82-80 (1982). These opinions attempt to tie the perceived "misconduct" to the Code by suggesting that if such offers offend the "statutory purpose" then they also amount to conduct "prejudicial to the administration of justice" (citing DR 1-102(A)(5)).
Supreme Court’s opinion in *Evans v. Jeff,*\textsuperscript{113} which undermined the rationale of their opinions. But my point is not that the committee opinions were “wrong” in their interpretation of the law or legislative policy. My point is that the committee could have answered the “ethics” question, and left the legal question for the courts; and they could have left the matter of backup fee arrangements to the attorney and client or client class.

Another example of law-making may be identified in the opinions of bar committees that have addressed the propriety of “attorney subpoena” by prosecutors. Again, I risk ostracism in saying this, but it seems to me that it is one thing for an ethics committee to advise a defense lawyer as to his or her options upon receipt of a subpoena.\textsuperscript{114} It is another for the committee to provide an opinion commenting on the motives behind or the propriety of the prosecutor’s conduct\textsuperscript{115} or on the desirability or legality of such subpoenas as a general matter.\textsuperscript{116} I refer the reader back to the conventional, if much-maligned, checklist of “jurisdictional” rules.

Instances in which ethics committees have openly strayed into constitutional adjudication are less common, but they are not hard to find.\textsuperscript{117} Opportunities for such “adjudication” arise most frequently in connection with questions of advertising, prepaid legal services, lawyer referral, and the like.\textsuperscript{118} This problem leads us to and overlaps with the following discussion of bar association rule making.

2. *Making and Amending Bar Rules.*—Most bar associations have a Rules Committee, which is “empowered” to review proposals for changes in the rules governing professional conduct, advertising, group legal services, lawyer-referral services, bar admission, practice by out-of-state lawyers, and the like. Furthermore, every state has one or more committees that consider proposed changes to the civil, criminal, and appellate rules. Ordinarily such committees report to the high court

\textsuperscript{113} 475 U.S. 717 (1986).
\textsuperscript{115} See infra note 181.
\textsuperscript{117} See, e.g., Kentucky Op. E-277 (1984), in which the committee opined that the Code did not prohibit lawyer contributions to the campaign coffers of judicial candidates. The committee opined that a state statute prohibiting the practice was unconstitutional. Here the committee’s intrusion into the law was innocent, and probably unavoidable.
\textsuperscript{118} See, e.g., Kentucky Ops. E-344 and E-346 (1991) (discussing efforts by promoters of referral services and pre-paid legal services plans to submit constitutional questions to the committee).
of the state, which serves as the ultimate "legislative" body in the context of professional regulation and the regulation of the judicial system.

For reasons that are not apparent to me, lawyers seem to turn to their Ethics Committees rather than to their Rules Committees. It may be that the Ethics Committee is the only "familiar" committee (I suspect that the rules governing the organization and operation of the bar are consulted infrequently, if at all). Lawyers are also understandably confused as to whether a question is one of legal ethics or procedural law. I also suspect that there have been occasions when lawyers have attempted to slip decidedly minority or partisan views onto the books by way of advisory opinions. The Ethics Committee should steer proponents of such legislation to the proper forum.

B. Alternative Dispute Resolution (ADR)

When requesting lawyers to learn that they cannot obtain opinions about their opponents' conduct they are prone to shift gears and ask the committee or committee chairman to accept "arguments" from both sides, or to serve as a mediator or arbitrator in some other fashion. Laymen and expert witnesses also attempt to obtain mediation services from ethics committees. An expert witness (usually a physician) who has not been paid may seek an opinion to use as "leverage," or may expect the committee to serve as a "go-between" to effect a favorable settlement of a dispute. Lawyers most often call for committee "mediation" in the hope of persuading a present or former client of the absence or insignificance of a conflict of interest, or for an informal and "friendly" forum in which to resolve a dispute over who "owns" a client or a client's file. As one might expect, firm break-ups are a fruitful source of requests for mediation services.

A number of state bar associations have initiated ADR programs to handle disputes arising from firm break-ups and disputes over division

119. See, e.g., Kentucky Op. E-304 (1985) (propriety of ex parte subpoena is first and foremost a question of procedural law, although such a subpoena is suspect if it violates the procedural rules or is known to be contrary to accepted practice in the forum); see also Georgia Op. 40 (1984).

120. See discussion of advisory opinions (or more properly "advocacy opinions") issued by "specialty" bar associations, in part VII.

121. See discussion at part IIB1(a).

122. The attitude that clients are property has been given a boost by recent amendments to the ABA Model Rules. See Model Rule 1.17.

123. See Chanin, supra note 24, at 168. The 80's generation has provided the grist for an entire book on law firm breakups. ROBERT W. HILLMAN, LAW FIRM BREAKUPS (1990).
of fees. Credit for the first such program has been claimed by the Pennsylvania Bar Association.\textsuperscript{124} The Kentucky Rules have for some time provided for legal negligence arbitration and legal fee arbitration,\textsuperscript{125} and a proposed rule "establish[ing] a procedure whereby disputes arising among attorneys from their professional and economic relationships may be resolved by submission to mediation, binding arbitration, or non-binding arbitration" is before the membership for adoption.\textsuperscript{126}

Ethics committees simply do not have the resources to serve as centers for alternative dispute resolution, and in the absence of enabling legislation and adequate staffing committee members should reject ADR initiatives. In many instances disputes will have ripened to the point they are no longer "mediable" when they are "offered" to the committee, and the fallout from unsuccessful efforts to "officiate" can undermine confidence in, and destroy any goodwill earned by, the well-meaning committee.\textsuperscript{127}

C. Fee Disputes

Many disciplinary committees routinely and cheerfully reject complaints about fees. Moreover, judges are notoriously insensitive to consumer complaints about fees, and are more than willing to serve as collection agents for their professional kith and kin. This leaves a lot of people disillusioned and angry. They come to the ethics committee expecting relief, because they assume that it has something to do with lawyer discipline. Lawyers and judges compound the confusion because they regularly funnel (pass off) complaints to ethics committees, knowing that such committees have no authority to act in the matters so referred. Ethics committees are simply used as convenient

\textsuperscript{125} Kentucky Supreme Court Rule 3.800 (Legal negligence arbitration); Kentucky Supreme Court Rule 3.810 (Legal fee arbitration).
\textsuperscript{126} Proposed Kentucky Supreme Court Rule 3.815 (Untitled) can be found in 55 Kentucky Bench and Bar, No. 2, Spring 1991. One of the principle weaknesses of the proposed rule is that it requires that such services be provided to lawyers free of charge. This means that the membership at large must pay for the cost of such services, and the usual suspects will have to be rounded up as volunteers. The Pennsylvania plan contemplates that there will be at least some charge to the individual lawyers benefiting from the services.
\textsuperscript{127} Something like this frequently happens when law firms attempt to keep two clients whose interests conflict by offering the firm's good offices for "mediation" under Model Rule 2.2. The usual result will be that the mediation will break down, and the firm will end up losing both (unhappy) clients anyway.
Many state bar associations have attempted to provide a sane alternative to litigation of fee disputes (which, after all, invite malpractice claims as well as disciplinary gridlock). Furthermore, the Comments to Model Rule 1.5 (which most states have adopted) provide that a "lawyer should conscientiously consider submitting to . . . any procedure that has been established for the resolution of fee disputes, such as an arbitration or mediation procedure established by the bar." Ironically, more often than not, it is the lawyer who refuses to arbitrate or mediate, and the lawyer who insists on forcing such matters into the courts or the disciplinary arena.

Until lawyers are persuaded or forced to accept arbitration of fee disputes, and until judges show that they are willing to take disciplinary action or otherwise exercise some kind of supervisory authority over the lawyers that practice before them, or at least refer fee complaints for mediation or arbitration under bar rules, we cannot hope for improved "public relations." In any event, there is no reason for an ethics committee to take up this burden.

D. Advertising

"Honest Abe" advertised in the newspaper, and turn of the century lawyers' codes permitted "[N]ewspaper advertisements, [and] circulars . . . tendering professional services to the general public." But some time around 1969 someone decided to ban advertising altogether and drew the proverbial "line in the sand" in the Code. The credibility of the organized bar and the future of self-regulation were put at risk, if not squandered, in a battle over economics. The fight goes on, as the bar seems to be divided into three large camps. At one extreme are those who cling to the hope of a return to a pre-Bates, prohibitionist, era. The other extreme is comprised of those who

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128. See, e.g., KY. SUPT. CT. R. 3.810 (Legal Fee Arbitration).
129. CODE OF LEGAL ETHICS ADOPTED BY THE KENTUCKY STATE BAR ASS'N (1903), reprinted in RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, TRIAL ETHICS (Supp. 1990). The code did suggest that such advertisements "are to be dealt in sparingly."
130. There are still many "powerful" people in my neck of the woods who would prefer that lawyers practice in that atmosphere of discreet anonymity epitomized by Frobisher & Haslit, the firm of solicitors profiled in A.E.W. Mason's THE HOUSE OF THE ARROW (1920). The following excerpt from that work (which is also reported in F.A.R. BENNION, PROFESSIONAL ETHICS (1969)) relates the reaction of a senior partner of that august establishment when a "newcomer" suggested that "there ought to be a brass plate upon the door":

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would like to lobby through an “ethics rule” allowing lawyers to knock people down on the streets and take their money. The middle-of-the-roaders [possibly a majority of lawyers] are attacked from both of these extreme professional flanks.

Experience teaches me that questions about advertising and other business-getting schemes (including such promotional activities as seminars, lawyer referral services, and the like) should be assigned to some special committee or commission that is court appointed rather than bar appointed. In my opinion, these matters are frequently as much “economics” as “ethics” or “professional etiquette.” The “requestors” are not really asking for guidance or advice. They are asking for, and in many cases demanding, approval.

My worst experience in this area came by way of the “direct targeted mail” controversy, which was resolved in the case of Shapiro.

Mr. Haslitt’s eyebrows rose half the height of his forehead towards his thick white hair. He was really distressed by the Waberski incident, but this suggestion, and from a partner in the firm, shocked him like sacrilege.

“My dear boy, what are you thinking of?” he expostulated. “I hope I am not one of those obstinate old fogeys who refuse to march with the times. We have, as you know, a telephone instrument recently installed in the junior clerks office. I believe that I myself proposed it. But a brass plate upon the door! My dear Jim! Let us leave that to Harley Street and Southampton Row!”

A physician and surgeon of the hospital of St. John Lateran, [in Renaissance Rome] . . . “left the hospital every day early in the morning in a short tunic and with a cross bow and shot everyone who crossed his path and pocketed his money.” He collaborated with the hospital’s confessor, who named to him the patients who confessed to having money, whereat the physician gave these patient’s “an effective remedy” and divided the proceeds with his clerical informer.

Quoted material attributed to one John Burchard, the “master of ceremonies of the papal court”.

132. The proverbial “country dog” scenario (“If you stand still you get screwed and if you run you get bit”).


134. Kentucky Supreme Court Rule 3.135 provides for an Advertising Commission, which mostly approves whatever comes before it “conditioned upon approval by the Ethics Committee.” Since its members are Court appointed, they are less likely to be hassled or sued than the Ethics Committee. The method of conditional approval (or is it conditional disapproval) leaves requestors yelping about bar association delaying tactics, and shifts the onus of criticism onto the Ethics Committee.
v. Kentucky Bar Association.\textsuperscript{135} The case provides an object lesson for well-meaning ethics committee members, to-wit: Don’t Try To Be Helpful.

Louisville lawyer Richard Shapiro\textsuperscript{136} asked the Advertising Commission of the Kentucky Bar Association to approve direct targeted mail. Specifically, Mr. Shapiro wanted to mail letters to persons he had identified (by way of the newspaper) as the victims of foreclosure actions. Of course, this was not an original idea. Direct Targeted Mail was a hot “ethics” issue, and at about the same time that Mr. Shapiro was making his request I was receiving correspondence from a lawyer who wanted to send a direct mail “advertisement” to the widow of an electrocution victim a couple of days after the unfortunate event caught the attention of the local newspaper.\textsuperscript{137}

The Advertising Commission refused to approve of the proposed mailings, while gratuitously adding that the Supreme Court Rule prohibiting direct targeted mailings was unconstitutional under Zauderer.\textsuperscript{138} Mr. Shapiro then asked the KBA Ethics Committee for a Formal Advisory Opinion on the subject, while he also approached the bar Rules Committee for a legislative rules change. The Rules Committee refused

\begin{itemize}
\item \textsuperscript{135} 486 U.S. 466 (1988).
\item \textsuperscript{136} A nice fellow who supplies me with a fascinating array of samples of advertising gimmickry, from stenciled pens and carry-alls to refrigerator magnets.
\item \textsuperscript{137} By 1987 the Virginia Bar had given up and allowed lawyers to mail “solicitation letters” to individuals whose homes were subject to foreclosure. Va. Op. 904 (1987). New York had even gone so far as to allow for direct targeted mailings to identifiable tort victims. See In re Von Wiegen, 63 N.Y.2d 163 (1984). But the vast majority of state bar associations and the ABA viewed direct targeted mailings with alarm, fearing that the family’s of accident victim would be victimized by insensitive lawyers. The Shapiro Court rather clearly told the organized bar that its concerns were overblown, insignificant, or irrelevant. Oddly enough, an Alabama lawyer was recently suspended for two years for sending a $25 wreath of flowers along with a note of condolence and a firm brochure to the funeral of a 19 month old victim of a “day care tragedy.” See Mark Hansen, Solicitation or Sympathy: A Law-firm Brochure and Funeral Wreath Bring Lawyer’s Suspension, 77 A.B.A. J. (Sept. 1991), at 34. It is difficult to see how this disciplinary action can be squared with the Shapiro case.
\item \textsuperscript{138} The particular Rule alluded to by the Commission was SCR 3.135. The adoption of that rules followed in time a Kentucky decision which treated non-targeted direct mail (which I will define for convenience as mailings to groups of individuals or businesses not triggered by a specific event) as protected advertising. Again, the Ethics Committee is not a body empowered to declare the law or the constitutionality of particular laws. See infra part IV.A. One assumes that the same is true of the Advertising Commission. On the other hand, the SCR was almost certainly unconstitutional under the authority of In re Primus, 436 U.S. 412 (1978), since Primus protects direct mail and even solicitation when the lawyer’s motives are “non-pecuniary.”
\end{itemize}
to change the Code or the Supreme Court Rule, and with some reluctance, the Ethics Committee finally agreed to issue an opinion stating the obvious... that there was no room for interpretation or opinion, since for better or for worse the Code as well as the Supreme Court Rule clearly prohibited the activity. We pointed out that we could not change the rule (the Rules Committee and the Court legislate in this area), interpret it away, or declare it unconstitutional. Our thought was that our Supreme Court could address Mr. Shapiro's concerns by way of an appeal from our opinion. It was felt that this "route," might be the most economical and civil way to address what was really a legislative or judicial matter beyond our powers to resolve. The result was several rounds of appellate litigation, after which the victorious "appellant" demanded attorney fees from the Bar Association in an amount that would have roughly equalled five years worth of my salary as a full Professor of Law at the University of Kentucky. I do not know what fee award, if any, was ultimately paid from dues of the general membership of the Kentucky Bar, but I do know that one direct product of the "direct targeted mail revolution" has been increased poaching of "other lawyers' clients" with an attendant increase in complicated (three-party) fee disputes. If a client is induced to change horses in midstream as a result of a direct mail feeler, who should get how much of the ultimate fee? The poacher never explains the potential liabilities or disadvantages associated with a switch of lawyers. The consumer is almost always left surprised and demoralized, not to mention somewhat poorer, as a result of the inevitable complications. Many advocates of direct targeted mail have had second thoughts; and my ethics committee has received many an angry letter from lawyer and layman alike.

139. It is not clear to me whether or not the time for "appealing" the Commission's determination had run at this point. I was informed that a suit by Mr. Shapiro challenging certain aspects of the bar rules was pending in a federal court (under § 1983) in Louisville. If it was "revived," or if it was still "live" one assumes that it might have been the vehicle for a fee award. In any event, it was my understanding that the case went to the United States Supreme Court after an unsuccessful appeal from the Ethics Committee to the Kentucky Supreme Court. Incidentally, the Kentucky Supreme Court's opinion surprised the Committee as much as it did the Committee, for the Court invalidated the SCR under Primus (not Zauderer) but then went on and adopted the ABA Model Rule prohibiting direct targeted mail, a step which the Ethics Committee did not take and could not have taken. Again, it is seems odd to me that an ethics committee's refusal to do that which it has no right or power to do should lead to a raid on the treasury of the state bar, but such is the wonderful world of the jurisprude.

140. I keep a gallery of "classics" in my office. My favorite is a letter to union workers, using the name of one of their union officers, urging each worker to get a
about such mailings—"Why are we allowing this?" It never ends.\(^{141}\)
Advertising questions? Who needs them? Let the FTC handle the problem. The FTC must be good for something.\(^{142}\)

E. Disciplinary Process

If there is a thread that joins my observations it is that ethics committees must not stray from their primary mission of providing protective, advisory opinions. Ethics committees should not function as legislative or judicial bodies, or political action committees. It is even more important that they be isolated from the disciplinary side of the Force.

Most bar counsel (disciplinary counsel) and bar governors recognize the need for a separation of functions. Nevertheless, decision makers at all levels are constantly acting as though bar association ethics committees are part of the disciplinary process. Specifically, ethics committees are frequently invited or “ordered” to:

(1) provide opinions condemning the conduct of “other” lawyers (a lawyer who is not making the request for an opinion); or
(2) provide opinions in actual disciplinary cases to disciplinary counsel, the inquiry tribunal, or the disciplinary board, particularly at early or “intake” stages.

I do not mean to imply that this is done as part of a diabolical plot. I am simply making the point that persons having legitimate roles to play in standard-setting attempt to shift their responsibilities to ethics committees, and attempt to use committee opinions as a short cut. I will provide some examples, and then discuss the unfortunate consequences.

\(^{141}\) The latest request of this genre proposes that the Committee must opine on the propriety of a lawyer’s use of a private mail delivery person who would hand deliver the lawyer’s message and then linger on the recipient’s stoop in case the recipient wishes to “ask questions.” The theory seems to be that there can be no “solicitation” if the target speaks first, as in . . . “What’s this?” I call this scenario “Ethics as a game of Chicken.”

\(^{142}\) Those of us who have served on state bar Model Rules Committees have all received veiled threats from a quasi-official “staff” of the FTC who have contended, among other things, that NAT rules prohibiting unreasonably high fees (Model Rule 1.5) violate the antitrust laws. This is consumer protection?
A good example of the offensive use of an advisory opinion is provided by a recent request in my jurisdiction. One group of lawyers complained that other lawyers were forming title insurance companies jointly owned by the lawyers and a mortgage company (or employees or shareholders of a mortgage company). The non-lawyer co-owner (mortgage company or mortgage company employees) would then channel all of its legal work (associated with real estate closings) to the lawyer co-owner. An additional requirement of every real estate transaction would be that the mortgagor purchase title insurance from the jointly owned title insurance company. The “profits” from the issuance of the title policy would be split between the lawyer and non-lawyer co-owners of the title insurance company.

Now I must confess that I have always had difficulty understanding how arrangements like this work, and even more trouble figuring out whether they are illegal or unethical. I am still not sure how I feel about this particular transaction, partly because the lawyers most concerned with the practice seemed to know little more about the law of title insurance and real estate practice than I. But for present purposes it is enough to note that one group of lawyers was upset with what another group of lawyers was doing. The contention was that the complaining lawyers were being cut out of work. Instead of reporting this to disciplinary counsel, the lawyers wanted an opinion criticizing the practice. The pitch was made that if this practice were not condemned, then they would be “forced” to engage in it themselves. I have to concede that the complaining lawyers technically complied with the “jurisdictional rules” of the committee by posing the question “as if” they intended to engage in the conduct themselves, but I have always been troubled by this sort of request. It seems to me that the “offended” lawyers should have complained to disciplinary counsel, and been willing to engage in a robust exchange of views before that body. In the alternative, they might have urged their “competitors” to seek an opinion.

As an example of my second category of problem cases, I recall the time when a lawyer home-buyer complained that a “closing attorney” had overcharged or double charged fees in a transaction. It was not clear to me whether there was an actual overcharge, but the complainant insisted that the closing documents had not been completed properly, and that insufficient “disclosures” had been made. The disciplinary panel assigned to this dispute referred the matter to me for guidelines as to the proper way to fill out the papers, and for a “ruling” as to whether or not the lawyer had committed an ethical violation. I
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returned the request for opinion with a note suggesting that the issue was whether the lawyer engaged in some kind of deception. There must be numerous ways to fill out closing documents, and an ethics committee should not be opining on such technicalities. When there is deception or misrepresentation, disciplinary authorities are at least as qualified to recognize it as an ethics committee.

I suspect that these examples of common requests for opinions will appear trivial to the reader, but I contend that they are a serious problem. Lawyers will not call ethics committees if they come to associate such committees with the disciplinary "establishment." In both of the cases I have described, the ethics committee was asked to act as a surrogate for disciplinary counsel. This sort of role confusion must, inevitably, undermine the credibility of an ethics committee.

F. Consumer Protection

As chairman of an ethics committee, I very quickly learned that laymen have little recourse when it comes to legal services. Although lawyer and non-lawyer entrepreneurs are busy marketing all sorts of "legal insurance," prepaid legal services, estate planning and tax-avoidance packages, it is virtually impossible to get any "Insurance Commissioner" or "Consumer Protection Agency" interested in exercising any oversight. Instead, all such matters are referred to unfunded, volunteer ethics committees. Bar leaders ask that the quality of these products (for example, the extent and value of "coverages") be evaluated. Ironically, the purveyors of these "products" even have the temerity to demand that committee members provide them with free legal services in structuring their "plans" and securing approval of them.\footnote{143. See Ky. Ops. E-344 and E-346 (1991). Bar officials rightly fear that products will be promoted as "Bar Association Approved."}

G. Expert Witness Services

It is difficult to tell whether the advertising by "ethics consultants" is directed at an existing market, or whether the effort is an exercise in market generation. I seldom get calls for advice from outside my state. Even malpractice insurers do not call. One suspects that the "firms" have already vacuumed up whatever work there is in this area.

On the other hand, I do get calls from within my state for "expert opinion" in lawyer malpractice\footnote{144. There is a remarkable diversity of views as to the admissibility of expert opinion in malpractice cases, and some lingering hostility to use of the lawyer codes in} and disciplinary cases, and in other

\textsuperscript{143.} See Ky. Ops. E-344 and E-346 (1991). Bar officials rightly fear that products will be promoted as "Bar Association Approved."

\textsuperscript{144.} There is a remarkable diversity of views as to the admissibility of expert opinion in malpractice cases, and some lingering hostility to use of the lawyer codes in
cases in which "ethics issues" arise. My personal view is that such "in-
state" offers of employment should be declined by committee mem-
bers. An ethics committee will not long enjoy the confidence of the bar—lawyers will not call committee members for advice—if its mem-
bers supply expert witness services for and, more particularly, against lawyers in the same jurisdiction. It is also unfair and unseemly to allow a litigant to trade on the present official or semi-official status of a wit-
ness, especially in a jury trial, which is exactly what lawyers want to do. I will admit that it is difficult for an academic, particularly an academic that participated in the formulation of the ethics rules of the forum, to resist an invitation to opine on their construction and application. More-
over, these are not entirely "private" disputes. But restraint is in order.

V. GAMES LAWYERS PLAY: ABUSE OF ETHICS COMMITTEES

_______ is very keen on the [book] proposal, but he believes it
must be restructured, if it is to appeal to practitioners: the focus
must be on "ethics as a tool and a weapon." . . . [P]ractitioners are
only interested in something they can use or "get screwed by!" 145

Some appeals to the ethics committee will be so clearly "out of
rule" as to justify a suspicion of incipient foul play. I classify as "abu-
sive" the standard methods employed by lawyers to use "advisory
opinions" as a "tool and a weapon." The beginner must also watch out
for other invitations, the acceptance of which will almost certainly mire
the committee and its members in controversy.

A. Tactical Use of Ethics Committees

Anyone bold enough to volunteer for service on a state or local
ethics committee had best have had at least basic training in the arts of
legal guerilla warfare, sufficient in duration and intensity to provide the
trainee with a nodding acquaintance with the techniques of "bad-
mouthing," "brow-beating," and "bully-ragging." 146 The recruit will find

malpractice litigation. For a particularly lawyer favorable (self-serving) view, see Mari-
145. From an Editor's memo to the file summarizing an anonymous reviewer's
comments on a proposal for a book on legal ethics.
146. "Bullyragging" is an American term. See Farmer, Legal Practice and Ethics in
be a British import. See J. BENTHAM, INTRODUCTORY VIEW OF THE RATIONALE OF EVIDENCE, Book
i, Ch. 10, Section 4, and Book ii, Ch. 9. See also CHARLES DICKENS, PICKWICK PAPERS, in 1 THE
ANNOTATED DICKENS 328 (E. Giuliano & P. Collins eds.) (examination of Mr. Winkle by Mr.
that a surprising number of lawyers have arrived at the conclusion that the members of their local ethics committee are to be treated with the same contempt and abuse that was once (in a kinder, more gentle, and more "civil" professional era) reserved for a lawyer's own secretary and associates. The recruit may even benefit from some fleeting exposure to the truly "hard" styles of adversarial close combat, like crotch-kicking and mustache-removal. I would recommend an additional, advanced course, in the "softer," indirect arts of manipulating courts and bar committees - a sort of Aikido of tactical abuse. How can a lawyer harness or deflect the moral force of a bar committee, and direct it against opposing counsel?

I have already argued that bar committee members should just "say no" when it comes to serving as expert witnesses in litigation. Although my policy of self-denial or self-restraint does not flow from any rule of the court or the bar, it has been announced, and should be well-understood. Nevertheless, three or four times a year I find (usu-
ally with some embarrassment) that I, or a member of my committee, have been named as an expert witness in a litigant’s pretrial statement. Lawyers simply list a member of the ethics committee as an expert witness in civil cases without any permission, contact, or notice. One assumes that the object is bluff—but this can backfire. Occasionally an opponent who is aware of the committee’s policy will challenge the “expert” designation before the court. More often the opposing counsel will automatically notice all experts (indeed, all witnesses) for depositions and will get an angry note from the surprised committee member. Sometimes the deception will come to light when the opponent attempts an ex parte interview with the designated expert.152

In Virginia Opinion 768153 the Standing Committee on Legal Ethics of the Virginia State Bar announced that it is a “fraud on the court” for a lawyer to list the name of a physician as a testifying expert when the lawyer has not contacted the person named. The particular scenario addressed by the committee involved the lawyer’s preparation of answers to interrogatories.154 The logic of the opinion, and the reference made in the opinion to DR 1-102(A)(4), would seem to apply to pretrial statements as well.155 Although I am aware of lawyer lobbied amendments to the Federal Rules that come very close to revoking the Thirteenth Amendment,156 and while I concede that unusual circumstances might justify the listing of a physician or other expert that the lawyer has not yet contacted, a court or an opponent would be justified in characterizing such a representation as “deceptive”—designed either to bluff or otherwise mislead, or to deny the named “expert” to the other side.157

A related problem arises as soon as ethics committees begin to

Chairman “will not serve as compensated expert witness either for or against a lawyer in Kentucky, while serving in that capacity).

151. But compare Fed. R. Civ. P. 26(b)(4)(A)(ii), which like the majority of state rules patterned after it, e.g., Ky. R. Civ. P. 26.02(4)(a)(i)), does not allow for depositions of experts except by agreement or by leave of court on motion.

152. In many states such contacts are viewed as unethical. See UNDERWOOD & FORTUNE, TRIAL ETHICS, § 5.4.2 (1988).


154. See MODEL CODE DR 1-102(A)(4); DR 7-102(A)(4)(S) and (8); Model Rules 4.1 and 8.3(c).

155. Such a designation could be used to discourage the opponent from contacting the person listed, and in an extreme case could result in a sort of “cornering of the market” of a category of experts.

156. FED. R. CIV. P. 45.

expand their services by providing informal letter opinions. Again, these opinions should serve only as "protection" in the event that a disciplinary charge is later filed and committees are advised to include stock disclaimers, or expressions of limitation or qualification in their informal letter opinions. Nevertheless, no matter what precautions are taken, some of these letters will be attached to motion papers and passed off as "expert testimony."\footnote{158} Such motions will usually be defensive—intended to head off or respond "definitively" to a motion to disqualify or the like. Sometimes the motions will be offensive in the tactical sense of the word, and seek disqualification or condemnation of the opponent's lawyer.\footnote{159} In response, opposing counsel will demand a meeting with the committee, or will insist on a "right" to "oral argument" before the committee, or some other "corrective" action (an opinion favorable to the opponent's side). The signitor of the letter opinion may receive a notice that his or her deposition [lawyers send out notices of depositions almost as a reflex action these days] will be taken in some remote corner of the state, or on some hilariously inconvenient date, like Thanksgiving or Christmas, and all in violation of the rules governing depositions.\footnote{160} Such demands, maneuvers, and "billable-hour" feeding frenzies will almost always be served up with a rather large side order of "moral indignation."

Even after accounting for the possibility that the lawyers involved in such practices may be pure of heart but monumentally dense, one must still come to the conclusion that some lawyers are more than willing to stoop to shameful levels to exploit the name or influence of the committee and bar association, to get free expert opinion, or in some cases to leverage opposing counsel by hinting at the possibility of disciplinary difficulties.\footnote{161}

\footnote{158. Id.}

\footnote{159. I have seen this referred to as "blindsiding"; the defensive use of such opinions being referred to as "sandbagging." Of course, these terms are commonly used to describe all kinds of "lawyer tricks."}

\footnote{160. See, e.g., KY. R. CIV. P. 26.02(4)(a)(i) (deposition of testifying expert only on motion after use of interrogatories); KY. R. CIV. P. 45.04(3) ("A resident of the state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of the court.").}

B. Politics, the Media, and Ethics Committees

Modern journalism may not be any worse than it was in the "Guilded Age," but it is probably not much better. It may be hard for lawyers to believe this, but on a slow day the print media in particular will almost always opt for some kind of "shorty" about a local judge or lawyer. Just as lawyers are loath to "fall back on the merits" of their cases, journalists are loath to do any spadework. The key to journalistic success these days is the production of grotesque and shocking quotes in time for the editorial deadlines. The call goes out to the bar association or to some well known local lawyer "source" (politician or other variety of big mouth). If the bar association or source wishes to dump the matter (to avoid controversy or whatever), then the caller will be referred to the Ethics Committee, to whom all blessings flow. The Unholy sea of politics also contributes calls of this genre, as one opponent attempts to trick the committee into serving up some official looking condemnation of the other. For example, I have had a lawyer office-seeker attempt to get an opinion that the incumbent lawyer office-holder was "unethical" because he was using a partnership style firm name while characterizing himself as a sole practitioner for public relations purposes, and justifying this on the ground that he and his partners were "office sharers." In another incident a reporter had been "tipped" to the red-hot fact that an assistant prosecutor was engaged in "unethical" and "illegal" conduct by living in a "foreign" county in violation of some obscure local law (which it is hard to believe anyone would actually care about). In another case a reporter wanted a verbal condemnation of a judge who had rather foolishly testified as a character witness for a former court employee. As news events go these items strike me as singularly uninteresting, but the point I wish to make is that it is assumed that the ethics committee is some sort of official "source." The furthest I have ever been willing to go by way of being "helpful" has been to provide information on the language of the Code and Rules as "background." To those who are more easily swayed by ingratiation or threat, I urge some consideration of my motto: "Never Trust A News Dog."

162. Ky. R. of Prof. Conduct 7.5, like the ABA Model Rule, prohibits lawyers who share office space but who are not in fact partners from using a partnership style name as, for example, "Smith and Jones."

163. KY. SUP. CT. R. 4.300 (Code of Judicial Conduct), Canon 2B., provides that "[A judge] should not testify voluntarily as a character witness."
C. The Ethics Committee and the Free Lunch

I have already noted that committees reject "questions of law" in the vain hope of rebutting the presumption that their members are free law clerks or "go-fors." Nevertheless, a "free-lunch" mentality prevails. Worse than that, the committee is treated as a sort of landfill for complaints from clients and others.

In the former category ("free-lunching") is the common practice of blending "ethics" questions with practice questions. This is understandable and to some extent unavoidable, if annoying. It is more difficult to understand why any question sent to the Attorney General dealing in some way or another with lawyers or the judicial system should be forwarded to the Ethics Committee, or why requests for copies of the Code, the Rules, the Judicial Code, the Bar Journal, and the like are routinely forwarded to the Committee. Perhaps the most annoying practice (other than secretarial screening out our return calls to lawyers who have, only moments before, called me and asked me to drop everything for their "emergency" has to do with lawyers who request copies of formal opinions that they could very well fetch for themselves, or requests for copies of letter opinions that "[we] sent them at around [such-and-such a date] but which [they] can't seem to find at the moment."  

In the latter (ethics committee as landfill) category are "requests" that are nothing more than referrals of angry clients of other lawyers. Lawyers simply will not report other lawyers and shuck off the unpleasant task. I have even had lawyers report other lawyers (knowing that I have nothing to do with the disciplinary system) and then lecture me on my ethical duty to report what has just been reported to me . . . professional responsibility as a game of tag, if you will. I sometimes wonder if the correspondence or phone call involved has been billed to some client.

VI. A LEGISLATIVE RESPONSE

Any fool can make a rule, and every fool will mind it.  

164. The Rules, like their Code counterparts, are loaded with circular references to the law. See Rules 3.4, 3.5, and 4.4. Furthermore, knowing disobedience to the rules of the tribunal may lead to discipline. See, e.g., Rule 3.4(c).
165. See infra at note 166.
166. See supra at notes 10-12.
Unlike many of my colleagues, I do not feel compelled to express unalloyed admiration for Mr. Thoreau. In any event, I know at least a few lawyers who are fools, and I doubt that they have ever had occasion to read, let alone follow, any rules.

In this instance the rule that concerns me is proposed Kentucky Supreme Court Rule 3.530. It reflects amendments authorizing what many would refer to as a telephone "hotline." It is not proferred as a Model Ethics Committee Rule. Choice of words, not to mention the flow of those words, is somewhat eccentric. It is not "complete"—the Rule does not address immunity, or even indemnity, for the protection of the volunteer members of the committee.168 However, the rule does provide an illustration of how a "small" bar association has attempted to deal with some of the problems alluded to in this article. Emphasis has been added to highlight important features of the rule, and the rule will be annotated with references to the rules of other state bar associations. I have divided the text of the rule in order to provide room for commentary on its various subsections.

RULE 3.530 ADVISORY OPINIONS—INFORMAL AND FORMAL

(1) Any attorney who is in doubt as to the propriety of
(a) any professional act contemplated by the requesting lawyer, or . . .

The rule only authorizes the committee to issue "advisory opinions" that relate to "contemplated" (future) conduct of the lawyer that is "requesting" the opinion. Once again, the sole purpose of an advisory opinion is to help a lawyer avoid an unnecessary mistake that might subject the lawyer to discipline. Lawyers should not be encouraged or permitted to use a committee as an expert witness for the defense or to obtain an opinion issued on an ex parte recitation of the facts in order to paper over conduct that has already occurred. Given the "advisory" and "protective" functions of opinions, it is neither necessary nor desirable for the committee to furnish opinions to non-lawyers or to lawyers who are concerned about the conduct of other lawyers.

. . . (b) course of conduct or any act of any person or entity which may constitute the unauthorized practice of law. . . .

The bar associations of many states issue opinions regarding unau-

The desirability of lawyer "regulation" of unauthorized practice is debatable. In the opinion of many, it would be preferable if "advisory opinions" regarding unauthorized practice were issued by the Attorney General or by the Court. Such a reassignment of responsibilities might alleviate some of the perennial concerns about the application of the antitrust laws to the activities of bar associations. Unfortunately, neither the courts nor the elected officials of the bar appear to share these concerns, and in my state, at least, neither the Court nor any agency or other official has indicated any willingness to take on the work.

The "system" allows anyone (judge, lawyer or layman) to request a "UP opinion," regardless of whose conduct is in question, regardless of motive, and regardless of whether the conduct has already occurred. Such requests are usually made in lieu of a complaint to the prosecutor or to the bar counsel. In fact, the bar counsel routinely requests such opinions prior to initiating "enforcement" activities, and often uses committee opinions to persuade alleged violators to "cease and desist." This is a cheap, generally efficient, and entirely logical method of operation from bar counsel's point of view, but it does have the unfortunate effect of turning the unauthorized practice committee into a de facto enforcement agency. Needless to say, virtually all requests for UP opinions come from judges and lawyers, who are able to remain anonymous by routing their "complaints" or demands for enforcement through the committee "... may request in writing, or in emergencies by telephone to the Committee Member designated for the requestor's Judicial District, for an Advisory opinion thereon. Local Bar Associations may also request advisory opinions... ."

Most bar rules require that requests be in writing, although the formalities are few. In my jurisdiction lawyers have a particular, not to mention peculiar, aversion to letter-writing, and the practice of telephoning the Chairman of the Ethics Committee arose early on. Phone requests for "instant" opinions soon became the norm. Expecta-

169. In most states unauthorized practice is a criminal offense, and an action may be initiated by a prosecutor. See, e.g., Va. R. of Ct., Part Six, Section I. (Unauthorized Practice Rules and Considerations - Introduction) ("By statute, any person practicing law without being duly licensed is guilty of a misdemeanor. The Attorney General of Virginia may leave the prosecution to the local attorney for the Commonwealth . . . .") Frequently the penalty or fine is the same as a year's worth of bar dues, which shows that somebody has a sense of humor anyway. Ky. Sup. Ct. R, 3.460 also provides for investigations and special enforcement proceedings initiated upon complaint to the Director of the Bar. Most complaints come from attorneys, who seek anonymity.
tions have become "demands" for "rights."

Now, it is a matter of common knowledge that clients do not like to be charged for lawyer time spent in securing ethics opinions, and lawyers prefer to avoid "non-billable" interruptions. For this reason, perhaps, calls tend to "clump" at the end of the day (or at night, to the Chairman's home). At one point the calls became so numerous that I [as Chairman] had to declare a moratorium pending the development of a more sensible "hot-line" arrangement. Unfortunately, this moratorium has provided little relief, since most lawyers do not read or honor anything announced in the bar journal anyway. Few have any interest in the tribulations of others. Lawyers call anyway, or "FAX" their questions and demand an immediate return "FAX."

The new Rule attempts to deal with this increasing demand for services, but it makes two assumptions which may prove unrealistic. The lawyer is asked to call in only a genuine emergency; and then to call the "hotline" volunteer assigned to his or her geographical area.

It seems perfectly clear that it would be more desirable for a state bar association to fund a full-time "hotline" staff. However, it also seems likely that only the bar associations of a few of the larger states will be able to support such bureaucracies. In the final analysis, the most fundamental problem with "hotlines" is not their "inherent limitations," but the fact that the majority of lawyers will not want to pay for services provided to "other" lawyers. On the other side of the counter, few qualified "experts" will be willing to invest their time and effort without the promise of some "professional" level of compensation for their services.

... The Committee Member to whom the request is directed shall attempt to promptly furnish the requestor with a written informal letter opinion as to the propriety of the act or course of conduct in question. A copy of any informal opinion should be provided to the Director for safekeeping and statistical purposes. Otherwise, all inquiries shall be treated as confidential, although the Rule does not create an attorney-client relationship...  

Informal letter opinions will be the norm. Formal opinions are too long in the oven, and even a half-baked loaf is better than starvation. In a small state such as my own, the "Chairman" can expect to write

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170. I am reporting the rule as it was proposed. It would appear that the language relating to confidentiality and the caveat (no "attorney-client relationship") was inadvertently left out of the version sent to the Supreme Court. Such is life. It's hard to be an Ethics Chairman.
several hundred such letter opinions a year. In larger states the workload must be staggering.\textsuperscript{171}

It is important that someone at the bar headquarters receive and keep a copy of formal and informal opinions, and not just for statistical purposes. In my experience, the lawyers that request opinions do not do a very good job of "keeping" them (particularly unfavorable opinions), and in no event will a lawyer invest any "billable-hours" actually looking for an opinion when it is needed. Since most committees will be understaffed and underfunded it is more than a little unfair to expect committee volunteers to warehouse and index their letter opinions (or even formal opinions) on their own time and at their own expense. It is unreasonable to expect them to ferret out, copy, and mail (or FAX) backup copies for the convenience of the requestor, bar counsel, or other interested (or simply curious) folk. Moreover, since the Director [chief administrative official] of the Bar will receive complaints against lawyers for appropriate processing,\textsuperscript{172} the Director’s office is the logical repository for "protective opinions" issued to "respondent" lawyers. Of course, there may be instances in which, for one reason or another, the requestor will not wish to have the advice received "on file." I have always honored such requests but I have tried to advise the requestor that I cannot assure them of the "retrievability" of any correspondence sent to them. In any event, the problem of lawyer reticence returns us to the need for some assurance of confidentiality.

The rule under discussion follows the ABA model by explicitly providing for confidentiality.\textsuperscript{173} However, it also adds an important disclaimer precluding belated claims of reliance on advice of the committee for purposes other than that set forth in the rule (protection from discipline). If lawyers want an "advice of counsel defense," or the back-up of someone else’s malpractice insurance policy, they should hire and pay a lawyer. Another desirable amendment might be an exemption of lawyer committee members from any reporting requirement or "snitch rule."\textsuperscript{174} Such an exemption is unnecessary in Kentucky

\begin{footnote}{171}{See ABA/BNA Law. Man. Prof. Con. 37 (Vol. 7, No. 2, Feb. 27, 1991) (reporting 2,500 to 3,000 calls per year to the Virginia bar counsel).}
\end{footnote}

\begin{footnote}{172}{See, e.g., Ky. Sup. Ct. R. 3.160 (initiation of disciplinary cases through the filing of a "sworn written statement" with the Director).}
\end{footnote}

\begin{footnote}{173}{See ABA Standing Comm. on Professional Resp., Rule of Procedure 13.}
\end{footnote}

\begin{footnote}{174}{Most states that have "Impaired Attorney" or "Lawyers Helping Lawyers Committees" exempt such committees from any reporting requirement. UNDERWOOD & FORTUNE, TRIAL ETHICS § 1.7.2. (1988). Kentucky Supreme Court Rule 3.130(2) used to}
due to the Supreme Court's deletion of the reporting requirement from that state's version of the Model Rules.¹⁷⁵

... (2) If the Chairman of either the Ethics or Unauthorized Practice Committees determines that a question is of sufficient importance, the Chairman may cause to be issued and furnish a Formal Advisory Opinion prepared by the Committee, to the Board of Governors, for approval as a Formal Opinion. Such approval shall require a vote of three-fourths of the voting members present at the meeting of the Board. If the Board is unable to adopt a Formal Opinion, the Committee shall furnish the requestor with an informal opinion, with a copy to the Director. . . .

This portion of the rule deals with the political¹⁷⁶ realities. It attempts to strike a balance by giving the Committee Chairman some discretion as to which opinions will be submitted for publication as formal opinions. On the other hand, publication invites Board editorship if not authorship. The "three-quarter vote" rule does provide some assurance that the "professional consensus" will be supported by more than a bare majority.

... (3) Such informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on [the attorney's] part performed in compliance with an opinion furnished to [the attorney] on [the attorney's] petition, provided his petition clearly, fairly, accurately and completely states his [or her] contemplated professional act. . . .

This is the "guts" of the rule. Any opinion issued is advisory only. Such an opinion does not bind any court. It does not bind an opponent, who, for example, wishes to move to disqualify a lawyer who has already obtained a "favorable" opinion on a conflict of interest issue. Indeed, an advisory opinion does not technically bind the "requesting" lawyer. It does not prevent that lawyer from doing anything. It simply provide that:

Members of the Association's Lawyers Helping Lawyers Committee . . . shall be under no ethical obligation to disclose to the Inquiry tribunal any evidence of unethical or unprofessional conduct discovered in the course of the committee's work, nor shall any committee member testify before a trial commissioner concerning a respondent in a disciplinary case without the written consent of the respondent.

¹⁷⁵. Rule 8.3 was deleted from the Kentucky version of the Model Rules at some point during the Supreme Court's deliberations.
¹⁷⁶. See discussion at part II.B.
Confessions of an Ethics Chairman protects a lawyer from discipline if he or she follows the advice given.\textsuperscript{177}

One assumes that the curious string of adverbial qualifiers (that the petition must "clearly, fairly, and accurately and completely" set forth the relevant facts) was added to respond to or to deter all the forms of clever manipulation known to practitioners.\textsuperscript{178} Implicit in the rule is the notion that an inquiry tribunal or other disciplinary body is entitled to look beyond the "four corners" of the protective opinion if reasonable suspicion warrants.

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\ldots \text{(4) All formal opinions of the Board shall be published in full or in synopsis form, as determined by the Director, in the edition of the [state bar journal] next issued after the adoption of the opinion.} \ldots
\]

As the next section of the statute indicates, publication in the bar journal is a precondition to "appealability." Furthermore, any lawyer who really wants a collection of opinions will have them in his or her collection of bar journals. Unfortunately, many lawyers throw away their copies, and there is a clamor in most states for some kind of "state bar handbook" containing the state professional code or rules as well as the interpretive "gloss."\textsuperscript{179}

\[
\ldots \text{(5) Any person or entity aggrieved or affected by a formal opinion of the Board may file with the Clerk within thirty (30) days after the end of the month of publication of the [state bar journal] in which the full opinion or synopsis thereof is published, a copy of the opinion, and upon motion and reasonable notice in writing to the Director, obtain a review of the Board's opinion by the Court. The Court's action thereon shall be final and the Clerk shall furnish copies of the formal order to the original petitioner, the movant, and the Director.} \ldots
\]

It was thought that a mechanism for appellate review would alleviate anti-trust concerns. Appellate review also provides an additional way for an interested party to seek legislative action (the Court is the body that "legislates" rules governing lawyers, at least in most states)

\textsuperscript{177} See part III.
\textsuperscript{178} See part VII.
\textsuperscript{179} The Virginia State Bar provides its members with a handbook containing the Code and published ethics opinions. The Young Lawyers Conference of the Tennessee Bar Association recently published a handbook on ethics containing the Code, formal ethics opinions, the rules governing disciplinary enforcement, and a bibliography. See \textit{Tennessee: Young Lawyers Publish Ethics Handbook}, PROF. LAW. 9, 10 (Aug. 1991).
since the Committee cannot change the rules. Appellate review also provides a forum for the resolution of "legal" and constitutional questions. Finally, appellate review invites meaningful, and serious, input in the relatively few cases (when formal opinions are issued) in which a large number of practitioners may be interested. It is important to note that the suggestion that someone might be "aggrieved by" or "adversely affected by" ethics opinions is the judicial language of "standing." In the context of appellate review of advisory opinions, the language is not really apropos—review should not be so restricted. Furthermore, the use of this familiar jargon tends to incite, in the truly paranoid at least; feelings of alienation and oppression. Since such opinions ordinarily have "no legal effect and [are] not binding on any judicial or administrative tribunal"\(^\text{180}\) it might be better if the right to appeal were given to any member of the bar "who disagrees with the result,"\(^\text{181}\) or if an invitation to give written comments were extended to any interested person.\(^\text{182}\)

My own view is that the appeal mechanism does provide a needed measure of democratic participation, and invites some measure of adversarial give-and-take. However, I must again emphasize that very few formal opinions are read, let alone appealed, and that the costs of such appeals frequently exceed any benefits derived from the process.

VII. REFLECTIONS: PROBLEMS WITH LAWYERS AND LAWYERS' ETHICS

"You will observe the Rules of Battle of course?" the White Knight remarked, putting on his helmet too.

"I always do," said the Red Knight, and they began banging away at each other with such fury that Alice got behind a tree to get out of the way of the blows.\(^\text{183}\)

Up to this point I have focused on the propositions that lawyers

\(^{180}\) Compare Virginia Rules of Court, Part Six: Section IV, ¶ 10(c)(vi) and 10 (f) (iv). However, if an opinion is reviewed by the Supreme Court of Virginia, it can become "a decision of the Court." Id. at ¶ 10(g)(v).

\(^{181}\) Id. at ¶ 10(c)(v) (appeal to Council).

\(^{182}\) Id. at ¶ 10(d),(e) and (g). The Virginia Rule contains an interesting provision requiring that in the event that an advisory opinion is reviewed by the Council of the Virginia State Bar, the Attorney General of Virginia must file comments analyzing any "restraint on competition which may result from the promulgation and implementation of the advisory opinion."

\(^{183}\) LEWIS CARROLL, THROUGH THE LOOKING GLASS (1872).
do need timely assistance in answering questions of professional ethics, and that state bar associations can be a valuable source of such assistance. Along the way I have suggested that much of the academic criticism of such committees, as well as much of the criticism from the "trenches," is more foul than fair.

Nevertheless, I have admitted that there is still room for the paid ethics consultant to operate. Ethics committees try not to become overly involved in disqualification motions, malpractice suits, and disciplinary and fee cases. Furthermore, ethics committees cannot serve as counsel, or insulate a lawyer from the consequences of his or her past conduct. For that reason, we can probably expect to see (or suffer) the emergence of yet another cadre of highly paid experts. I should probably cash in rather than complaining.

I have also pointed out that the principal problem with ethics committees may be something that no "critic" has ever mentioned. Specifically, if bar associations deliver on promises to provide instant opinions, lawyers will surely use their committees as "decision makers." Lawyers will not think these questions through on their own. Instead they will simply abdicate. They will become, if you will, systematically, professionally irresponsible.

I would like to close with some rather pessimistic observations about lawyers and their professional ethics. The reader may be shocked by these comments, and may dismiss them. I cannot prove that any of my observations are true, or that any of my predictions are more or less likely to come about. But I do not think that anything I am saying can safely be dismissed as the observations of a "lawyer baiter" or professional outsider who "does not understand."

My first point ties into my fear that lawyers will attempt to shift off responsibility for ethical decision making as bar "hotlines" are introduced. It is that while self-regulation may never have been very "efficient" or "effective," professional solidarity, peer pressure, and the shared, albeit artificial, morality of the guild was something. It was some restraint on misconduct. But the "psychological impact" of Bates was profound.184 The new politics of the profession are about what The Bar ["They"] is ["are"] doing to lawyers ["Us"], or preventing lawyers ["Us"] from doing. As Professor Hazard has put it (although I don’t know that he was making the same point), we have been in steady retreat from the enforcement of a body of "fraternal norms issuing

from an autonomous professional society,"¹⁸⁵ and we have been headed toward a minimalist legal model. Whatever professional ethics are left will amount to "a body of judicially enforced regulations."¹⁸⁶ Even these remaining minimalist rules will be under siege constantly, as lawyer lobby groups, each with their own interpretive committee, whittle away at them.

Ironically, this trend may have been invited by the "Ethics Revolution" that brought standardized ethics training to the law schools and the Continuing Legal Education circuit, as well as wholesale revision of the Canons, and more recently the of Code of Professional Responsibility. A new interest in the lawyer codes was sparked, but business was booming. Consequently the new interest was superficial. Lawyers did not identify values in the traditional rules to which they were being reintroduced (or in many cases, introduced to for the first time). Instead, all to many lawyers saw rules or values that were inconvenient for firms and clients. Moreover, lawyers learned that the rules could be rewritten or eliminated with relative ease.¹⁸⁷ Self-interest is the only justification for the language of Comment [20] to Model Rule 1.6:

Whether another provision of law supersedes Rule 1.6 [Confidentiality] is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

¹⁸⁶. Id. The Model Rules seem to concede the problem:
¹⁸⁷. Professor Sara Beale argues that new Model Rule 3.8 (lawyer subpoenas) is essentially special legislation requested by the private bar, which has greater power in the ABA than prosecutors and government lawyers. BEALE, LOOKING FOR LAW IN ALL THE WRONG PLACES: ETHICAL RESTRICTIONS ON LAWYER SUBPOENAS. She points out that Rules like 3.8 and 1.6 appeal to powerful interest groups like the corporate and securities bar, as well as the criminal defense bar. Her case may be overstated, but she is correct in observing that the Rules are being modified out of self interest. For a rule change based on economics see New Model Rule 1.17. For an ethics committee that seems unnecessary except as a lobbying force, consider the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers. My own view is that the opinions of such committees can be useful to folks like me, giving us a sense of "perspective." But they can also be hopelessly self-serving. They are not formally incorporated into the law of any forum for purposes of lawyer protection, and while they may be of some value as persuasive authority they may provide a false sense of security.
Along the same lines, in the Preamble, we find the notion that "the lawyer's exercise of discretion not to disclose information should not be subject to reexamination." Can an ethics code, drafted by a professional group, and pushed through a governing board and state supreme court actually override state law? Can it override federal law? The "presumption" built into the rules is worse than wishful thinking. It is dangerously misleading.

Or how about the following excerpts from the Model Rules:

[The Rules] are not designed to be a basis for civil liability. . . . The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. . . . [N]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.

It is not so much that I disagree with these comments. I simply think they send the wrong message. Lawyers read them as a grant of immunity. What I am driving at is that if lawyers are going to have a committee make their judgment calls, if lawyers are not going to police each other, if discipline is going to be short-circuited by secrecy, inefficiency, and indifference, if the professional rules are going to be deemed irrelevant in civil litigation, if judicial enforcement is going to be so limited as to deny meaningful remedies to aggrieved litigants, and if lawyers are going to continue to pretend that their privately drafted guide rules exempt them from compliance with the law, then all of this should be condemned as a public relations exercise.

Does the bar share any of my concerns? The word on the profes-

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188. For recent lobbying efforts by "Big Firms" to minimize the effect of conflicts rules by liberal provision for screening see Restatement of the Law Governing Lawyers, § 204(2) (Tentative Draft No. 4 1991). Compare Hazard, supra note 179, at 1259 (discussing the practicing bars reception of the Kutak Commission's work product). When these issues were candidly addressed in the Rules of Professional Conduct, the bar was inclined to blame the draftsmen for acknowledging legal realities and reacted with shock and outrage.

189. See U.S. CONST. art. VI, cl. 2.


191. One assumes that the SEC and the IRS do not entertain this "presumption."

192. Compare Lipton v. Boesky, 313 N.W.2d 163, 167 (Mich. 1981) (it would be "patently unfair" not to hold that a violation of the Code is "rebuttable evidence of malpractice").
sional "street" is that the really big problems we face are problems of "incivility" and frivolous litigation, and unreasonable consumer complaints stemming from overly restrictive and complex professional rules. I contend that the problem is not so much a lack of courtesy as it is an abundance of cupidity. The problem is not frivolous litigation or an excess of litigation. The problem is an excess of litigation that is fueled by lawyer self-interest ("file churning") as opposed to litigation in the client's interest. I would also submit that when lawyers get into trouble these days, it is not because they are being tripped up by tricky bar rules. They are simply being caught - usually in the act of "ripping off" a client, a third party payor, or, on a less personal but frequently more profitable basis, caught in the act of pillaging the bank account of the Taxpayer. Before the reader breaks out into the obligatory rash of indignation, I suggest that he or she flip through the pages of any recent issue of the ABA Journal or peruse the growing literature criticizing the modern law factory.

193. There are perfectly respectable critics of the use of the Codes and Rules in the context of disqualification. See, e.g., Steven H. Goldberg, The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly, 72 MINN. L. REV. 226 (1987). Some courts have gone so far as to deny standing to "nonclients" in order to discourage "tactical" motions. See In re Appeal of Infotechnology, Inc., 582 A.2d 215 (Del. 1990). But the nagging question is whether the bar will pay any attention to the conflicts rules if the courts will not enforce them.


195. See Blackburn v. Goettel-Blanton, 898 F.2d 95 (9th Cir. 1990). I have on my desk a "complaint" alleging that a lawyer took a divorce on a contingent fee (unethical) and then settled, no doubt after much grumping, for an hourly rate fee of approximately $160,000 out of a $500,000 cut of a marital estate (plaintiff presumably netting $340,000). Lawyers find this sort of efficiency acceptable, but the complainant suggested that multiple depositions of the same witness, and similar duplication, accounted for the fee.


197. See, e.g., A.L. Presser, The Case of the Vanishing Lawyer, A.B.A. J. 26 (May 1991) (a lawyer disappears with 15 million belonging to his clients, friends, and business partners; page 27, a lawyer is indicted for "overbilling," which is a rather bland label for a complaint that includes allegations that the lawyer charged his firm for an $86,221 Cartier ring); Edward Frost, Top P.I. Lawyer Convicted, A.B.A. J., 28 (May 1991) (prominent New York City lawyer is convicted of "orchestrat[ing) a web of fraud in his firm's lawsuits"); Steve Franco, Savings & Loan Lawyers, A.B.A. J. 52 (May, 1991) (a feature article on the role of lawyers in the S&L fiasco); Don J. DeBenedictis, The Alliance,
In the meantime, the dialogue about "ethics" will continue to go on all around us, but all too frequently in the form of finely spun technical arguments aimed at the generation of fees.\textsuperscript{198} Sometimes it is so rarefied that it seems lighter than air, like so much of the "entrail-learning"\textsuperscript{196} we already find too much of in those documents we so inappropriately label "briefs."\textsuperscript{197}

Perhaps it will eventually come to pass that I will be on a panel of lawyers at a CLE "show" delivering the mandatory two-hours of ethics, and, some lawyer will dismiss criticism of the ethics of the profession in the same way that a journalist recently dismissed criticism during another "show" in which I was a contributor. The journalist (or was it a lawyer for journalists, with all apparent sincerity, opined that he followed no ethical rules other than rule one—get the story—and was not bound to, since journalism is a trade and not a profession after all! I guess if you do not call yourself a professional, then you don’t have to have any "ethics," since "ethics" are a sort of formality. Tradespersons need only look to the market, which will take care of itself.\textsuperscript{198} If "[t]he

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195. Lisa G. Lerman, Lying to Clients, 138 U. PA. L. REV. 659 (1990). This important article was dismissed by one commentator from "the practice" with the observation that its author simply "does not like lawyers."

196. The use of ethics rules to thwart legitimate discovery is one of the worst examples. Compare what I have always considered the intended interpretation of Rule 4.2 in ABA Formal Op. 91-359 (1991) to the use of the rule by the defense bar in cases like Amarin Plastics, Inc. v. Maryland Cup Corp., 116 F.R.D. 36 (D. Mass. 1987) (lawyer argued that former corporate employees were not in control of the corporation and did not have to be produced, but simultaneously charged that the opponent was "unethical" for attempting to interview them).

197. Compare Aristophanes, The Clouds, lines 163-166, B.B. Rogers (Trans. and Barrister-at-Law), Loeb Classical Library: "So the rump is the trumpet of the gnats! O happy, happy in your entrail-learning!

Full surely need he fear nor debts nor duns, Who knows about the entrails of gnats."

198. "Legal Brief" is an oxymoron. See, e.g., Marson v. Jones and Laughlin Steel Corp., 87 F.R.D. 151, 152 n.1 (E.D. Wis. 1980). The New York Times Law section recently reported (May 24, 1991) that the Supreme Court of Texas had dismissed an appeal because the "brief" had violated both the spirit and the letter of the Court's rules. According to the article, the offending law firm's motion for leave to file a 103 page "brief" was denied, whereupon the firm squeezed 75 pages worth of material
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practice of law deals mostly with the getting and keeping of money,” what the hey.199

into 45 ½ pages by shrinking the print size. The “kicker” is that while one partner in the firm is continuing to challenge the “unreasonableness” of the Court’s rule, another partner is citing the rule offensively against another firm in an unrelated case, whining that the opponent’s brief exceeds the limits. Another lawyer who is challenging the Court’s rule is quoted as complaining “It’s rather strange to me that having been screwed up by the court, they’re willing to drop the thing on someone else. You don’t take a position that something is unfair, unequal, unreasonable, and all those jolly good words and then turn around and stuff someone else with it a month later.” David Margolick, At the Bar, N.Y. Times, May 24, 1991, at 136.

199. But see K. Lux, Adam Smith’s Mistake: How A Moral Philosopher Invented Economics and Ended Morality (1990). Efforts to “deprofessionalize” remind me of the recent efforts to “go private” to avoid business and securities regulation. Fortunately, not everyone is on the “deprofessionalizing” bandwagon. A student passed me a news clipping for my door [I have a well decorated office door]. I cannot identify the paper, since it was clipped off the excerpt. It reports that there was recently a convention of Elvis Impersonators. There were workshops involving such pressing questions as whether there was too much focus on the “Vegas Era” as opposed to the “Leather” and “Gold Lame” eras. But the most exciting topic under discussion was whether there should be a Code of Ethics for Elvis Impersonators. If you don’t believe me, come “read my clips.” Hazard, supra note 179, at 1239 (quotation attributed to “An Old Lawyer”).