BAR ASSOCIATION ETHICS COMMITTEES: ARE THEY BROKEN?

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I. INTRODUCTION

This Article explores the work of bar association ethics committees. These are committees established by bar associations to give advice to lawyers about how to comply with the applicable rules of professional conduct. My question is, are these committees broken? Over the past two decades, several legal academics have concluded that they are.2 At its harshest, the critique is that ethics committees, typified by the

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American Bar Association’s ("ABA") ethics committee,\(^3\) publish opinions that respond to trivial questions by providing poorly reasoned answers on which nobody can or does rely, and that the reason that the committees’ opinions are inadequate is that the committees themselves are poorly designed.\(^4\)

I take a more positive view, which is colored by my own experience. I have been a member of the New York State Bar Association’s ethics committee since 1992, and recently completed a three-year term as chair. I also spent three years as a member of the ethics committee of the Association of the Bar of the City of New York. These experiences, of course, make me less than objective about the work of the committees. Nonetheless, they enable me to offer an insider’s perspective.

I will start with some background—first, a short discussion of how lawyers resolve questions about the proper course of their professional conduct, and then, a short discussion of the help provided by ethics committees, using the New York State bar’s committee as an example. Next, I will summarize the problems that legal scholars have identified in the past. Finally, I will try to put the committees’ work in a more positive light and offer some reflections in response to the committees’ critics. I will not argue that ethics committees are perfect and have no room to improve. But I will suggest that they have been greatly undervalued by their critics and that they are not inherently flawed.

II. BACKGROUND: HOW LAWYERS RESOLVE QUESTIONS OF PROFESSIONAL CONDUCT

A. Sources of Interpretive Guidance

Like everyone, lawyers are subject to laws and regulations.\(^5\) For lawyers, these include the rules of professional conduct adopted by state courts. In New York, for example, lawyers must comply with disciplinary rules contained in the New York Code of Professional Responsibility.\(^6\) New York lawyers who violate these disciplinary rules

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3. Most bar association ethics committees have specific titles, such as the American Bar Association’s ("ABA") Committee on Ethics and Professional Responsibility. However, for ease of reference, this Article will use the more generic "ethics committee" to refer to all such committees.

4. See, e.g., Wolfram, supra note 2, § 2.6.6, at 65-66.

5. See Carro, supra note 2, at 1 (stating that "[b]oth legislatures and courts, from without, and the legal profession, from within, have adopted regulations governing the practice of law"); Hellman, Strained ABA Ethics Opinions, supra note 2, at 140-41.

are subject to professional sanction, including the possibility of disbarment.\textsuperscript{7}

Sometimes, lawyers are uncertain how to proceed in light of the rules that govern their conduct. For example, in recent years, many New York lawyers have sought the New York State Bar Association’s help. Some were grappling with fundamental questions about their professional role and responsibilities. A municipal lawyer asked whether he could give helpful advice to someone who was suing the town without the benefit of counsel, or whether doing so would violate the lawyer’s duty to represent the town zealously.\textsuperscript{8} A lawyer employed by a union sought the committee’s help in determining what duties he owed to union members.\textsuperscript{9} A lawyer hired by an insurance company to defend its policyholder asked whether he could take direction from the insurance company and provide it with information about his work in the lawsuit, or whether doing so would violate his duties to the defendant.\textsuperscript{10} A lawyer for an older client who was no longer able to manage her own personal and financial affairs wanted to know whether he could ask the court to appoint a guardian, even if the client did not consent.\textsuperscript{11}

How do lawyers such as these decide how to conduct their practices in the context of professional obligations and expectations? Most of the time, lawyers try to solve their ethical dilemmas on their own. This is one sense in which the legal profession is partly, although not entirely, self-regulating: Lawyers have a personal responsibility to act in conformity with professional norms; being trained in the law, lawyers are presumably capable of figuring out what is expected of them, at least most of the time.\textsuperscript{12}

Often, a lawyer’s question is not clearly answered simply by reading the code. The disciplinary rules are not written with absolute precision and specificity. Some express very general principles. For instance, lawyers may not “[e]ngage in conduct that is prejudicial to the administration of justice.”\textsuperscript{13} Other rules set forth a general framework for analyzing a question of professional conduct, as is true of the conflict-of-

\begin{itemize}
\item \textsuperscript{7} See WOLFRAM, supra note 2, § 3.5.1, at 117-18.
\item \textsuperscript{8} See N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 728 (2000).
\item \textsuperscript{9} See N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 743 (2001).
\item \textsuperscript{10} See N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 721 (1999).
\item \textsuperscript{11} See N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 746 (2001).
\item \textsuperscript{12} See, e.g., N.Y. CODE OF PROF’L RESPONSIBILITY pmbl. (2001).
\item \textsuperscript{13} Id. DR 1-102(A)(5). Likewise, lawyers may not engage “in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.” Id. DR 1-102(A)(7).
\end{itemize}
interest rules. To understand how imprecise provisions apply in individual cases, lawyers need to read them against the background of other sources of learning about what is, and is not, permissible.

When it is not clear what the rules mean or how they apply to a specific situation, lawyers have various sources of written guidance. The preferable source is case law. Judicial decisions interpreting the rules serve as the only definitive guide to their meaning. But, many questions are never reached by judicial decisions. Courts may interpret disciplinary rules in essentially two procedural contexts, but each provides only a limited number of opportunities to shed light on lawyers' professional obligations.

First, courts oversee the disciplinary process. Typically, the initial determination of whether a lawyer violated a disciplinary rule is made by a referee or panel, and that decision is then subject to judicial review. In the context of making decisions about whether lawyers have transgressed and, if so, what sanction to impose, courts are occasionally required to interpret an ambiguous disciplinary rule. However, only rarely is this the case. Most disciplinary cases involve criminal conduct or alleged conduct that, if it occurred, is unquestionably wrongful, such as mishandling client funds. Disciplinary authorities rarely prosecute lawyers who make tough calls in situations where the disciplinary rules are uncertain; indeed, most close questions of interpretation never come to the disciplinary authorities' attention.

Second, courts address questions concerning attorneys' conduct when these questions are presented in litigation. For example, one party may seek to disqualify the opposing party's lawyer, claiming that the lawyer has an impermissible conflict of interest. Alternatively, a party

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14. For instance, a lawyer must decline a representation that "would be likely to involve the lawyer in representing differing interests" unless "a disinterested lawyer would believe that the lawyer can competently represent the interest of each [client] . . . ." Id. DR 5-105(A)-(C).
15. See, e.g., ROY SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED xiii (2002 ed.) (recognizing that bar association ethics committees' opinions are not binding on courts or disciplinary agencies).
16. See, e.g., WOLFRAM, supra note 2, § 2.2.2, at 24 ("American courts . . . have asserted the affirmative power to regulate the legal profession."); Carro, supra note 2, at 13; Bruce A. Green, Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?, 64 GEO. WASH. L. REV. 460, 462-63 (1996) [hereinafter Green, Whose Rules of Professional Conduct?].
17. See Carro, supra note 2, at 13.
18. See Underwood, supra note 2, at 131 (noting that "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").
may move to suppress evidence that the opposing party’s lawyer allegedly obtained by improper means. The types of professional conduct that courts customarily address are limited in range. Moreover, courts often can avoid resolving a question of professional conduct or can resolve it without interpreting the disciplinary rules. If courts can avoid interpreting a rule, they typically do so, because most courts do not consider it an important part of their function to give lawyers advice about the meaning and application of disciplinary rules. Of the four questions described earlier, none is definitely answered by the case law.

Lawyers seeking to answer questions of professional conduct on their own may also turn to secondary sources. Treatises and articles often contain their individual authors’ views about what the disciplinary rules mean and how they apply to particular situations. For example, a New York lawyer may turn to Simon’s New York Code of Professional Responsibility Annotated, which not only collects existing New York authorities, but also includes Professor Simon’s personal commentary on the disciplinary rules. Other secondary sources reflect lawyers’ collective views. Recently, the American Law Institute (“ALI”) completed the Restatement (Third) of the Law Governing Lawyers, a decade-long project that reflects its members’ views about what the law governing lawyers is and, in areas of uncertainty, should be. The ABA and some specialized bar associations have developed standards of recommended conduct for lawyers engaged in specific types of practice. A lawyer is more likely to find a specific question clearly answered somewhere in the writings of individual authors than in the Restatement, which is a collection of black-letter rules and therefore tends to be as general and ambiguous as the disciplinary codes, but the individual writings tend to be less authoritative, because they do not necessarily reflect a professional consensus on how the rules apply.

Where do lawyers go for help when they do not have time to undertake the research necessary to resolve for themselves a tough question about the proper course of professional conduct or when, even

20. See, e.g., Caro, supra note 2, at 16; Underwood, supra note 2, at 129.
after referring to judicial decisions and secondary literature, they remain in doubt? Typically, they consult another lawyer, who can bring his experience and judgment, as well as greater objectivity, to bear in assisting the lawyer who has a professional dilemma. Lawyers who work in a law firm or other type of law office can often draw on the assistance of an “in-house ethics expert”—a lawyer in the office who has developed special expertise in dealing with issues of professional conduct.25 Some lawyers can obtain advice from their malpractice insurer.26 Lawyers may seek assistance from mentors or professional acquaintances. Or they may retain a practitioner or law professor who concentrates in the area of professional responsibility.27

B. Bar Association Ethics Committees as Another Source of Guidance

There is another significant source of guidance, and it is the one that is the focus of this Article: bar association ethics committees.28 Many bar associations appoint committees for the purpose of giving advice to lawyers who have questions about the propriety of their professional conduct. The ABA’s ethics committee is the most nationally prominent one.29 In New York State, there are several.30 Indeed, New York State has the distinction not only of being home to the oldest bar association in the United States—the Association of the Bar of the City of New York—but also of being home to the first bar association to authorize a committee to give advice to lawyers about their professional conduct—the New York County Lawyers’ Association, which did so in 1912.31

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25. See Elizabeth Chambliss & David B. Wilkins, Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting, 30 Hofstra L. Rev. 691, 706-07 (2002).

26. Most notably, the Attorney Liability Assurance Society, Inc. (“ALAS”) answers questions from lawyers at the law firms it insures about how to avoid the risk of civil liability and professional sanction. See ALAS, About ALAS, at http://www.alas.com/about.shtml (last visited Feb. 21, 2002).

27. See, e.g., SIMON, supra note 15, at iii; Monroe Freedman, Misguided Acclaim for a Misplaced Advocate, RECORDER, Sept. 8, 1992, at 10 (stating in the byline that Professor Freedman often testifies as an expert witness on lawyers’ ethics).

28. As noted later, in some states the same function is served by a committee appointed by the state supreme court, rather than the bar association. See Chanin, supra note 1, at 161; infra notes 65-67 and accompanying text.

29. The ABA’s ethics committee is the ABA Standing Committee on Ethics and Professional Responsibility. See ABA, Legal Ethics, at http://www.abanet.org/scripts/PrintView.asp (last visited Feb. 22, 2002).

30. See SIMON, supra note 15, at xiv-xv (listing the names and addresses of five of the most active professional ethics committees of New York bar associations).

31. See Chanin, supra note 1, at 162.
Ethics committees around the country are organized and operated in different ways, but, in general, they have a single function—to give advice to lawyers—which they do in either or both of the following two ways. First, they give advice directly and privately to individual lawyers who ask specific questions about how the disciplinary rules apply to their proposed conduct. Committees typically receive questions in writing and provide a letter in reply. Some also field questions over the telephone, including, in some cases, via an “ethics hotline.” Either a member of the committee or a member of the bar association’s staff provides guidance, to the extent possible.

Second, ethics committees publish opinions on questions that they believe to be of general significance to lawyers. The ethics opinions are not authoritative in the way that judicial decisions are. But they provide guidance to lawyers who are seeking to resolve questions of professional conduct on their own. The ethics opinions take their place alongside law review articles, treatises, the *Restatement*, and other secondary sources of learning about the meaning and application of disciplinary rules.

Consider, for example, the Committee on Professional Ethics of the New York State Bar Association. It is not necessarily representative, but it is the committee that I know best. The committee has approximately twenty-five members from around the state. Although several of us are law professors, the overwhelming majority are practitioners who work in different practice settings and engage in different types of practice. The committee draws on the services of two bar association staff members in Albany who field inquiries from lawyers around the state.

The state bar association receives over 1500 inquiries a year. Most do not involve challenging new questions that implicate vague or ambiguous code provisions, but rather, can be answered by referring to clear provisions of the code or to prior opinions of the committee or of

32. See *Wolfram*, supra note 2, § 2.6.6, at 66; Chania, supra note 1, at 163.

33. The State Bar of California has in place an “ethics hotline” that provides “a telephone research service to assist attorneys with questions relating to their ethical responsibilities.” The State Bar of Cal. Comm. on Prof’l Responsibility and Conduct, Ethics Opinions Index, at http://www.calbar.org/2pub/3eth/3ethindx.htm (last visited Mar. 15, 2002).

34. See, e.g., *Simon*, supra note 15, at xiii (stating that ethics committees issue “formal or informal written opinions to address complex or important questions”).

35. See, e.g., id. (asserting that bar association ethics committee opinions are not binding on courts or grievance committees, but that a lawyer’s compliance with an ethics opinion decreases the likelihood of discipline).

36. See, e.g., id.

37. The information herein was confirmed by telephone interview. See Telephone Interview by Matthew Minerva with Kathy Baxter, Counsel, New York State Bar Association (Feb. 25, 2002).
another bar association committee in the state. Some questions are more difficult. When they require a rapid response, they are referred to a member of the committee's "telephone subcommittee," who attempts to help the inquirer resolve the question.

If the inquiring attorney has a difficult question that need not be answered in a hurry, or if he is not satisfied with the initial response given by the bar association's staff member or by the subcommittee member with whom he spoke, he is invited to submit his inquiry to the committee in writing—whether by mail, e-mail or fax. The inquiry is then forwarded to the committee, which handles approximately sixty written inquiries a year. Each inquiry goes initially to a committee member to conduct research and draft a letter in response. Committee members may draw on the assistance of law student researchers who are supervised by a law professor on the committee. In recent years, Hofstra law students, overseen by Professor Simon, have served in that role.

The full committee meets monthly to review the draft letters prepared by committee members. In many, if not most, cases, the draft is approved the first time it is presented, subject to revisions or amendments that the drafter and committee chair are authorized to make. But this is not always the case. Sometimes, the committee raises questions that the original drafter had not fully considered. These questions may require additional research, or require a committee member to elicit additional facts from the lawyer who posed the question. Occasionally, a majority of the committee members is dissatisfied with the drafter's analysis or conclusion. The committee will ask the drafter to expand, revise, or completely rewrite the draft. When questions are particularly difficult, the process can extend over several meetings. Once a response is approved, it is included in a letter sent to the inquiring attorney by the chair of the committee. The letters are not public.

If a particular question is thought to be of general interest, it becomes a candidate for a formal, or published, opinion. The committee member will be asked to prepare a draft based on the private letter sent to the original inquirer. Because there is no longer a particular lawyer who is waiting for an answer, the committee can spend more time debating and conducting research. It can reframe the question in more general terms, both to avoid identifying the lawyer who sent the inquiry, and to make the advice more broadly applicable. On occasion, the committee also prepares sua sponte opinions—that is, opinions that do not respond to a real lawyer's inquiry to the committee but that are developed at the committee's initiative. The questions addressed in these
opinions have come from various sources, including from questions asked at continuing legal education programs at which committee members participated.

Sometimes, in the course of the process of preparing and discussing a proposed formal opinion, what initially seemed to be a clearly correct conclusion no longer seems so clear or so correct. Sometimes, it is so difficult to forge a consensus that the committee decides not to publish an opinion on the subject. Most of the time, however, after a number of revisions and sufficient discussion, a substantial majority approves the opinion. The committee, unlike the ABA’s counterpart, has a strong, but not absolute, tradition against issuing dissenting opinions.38

Once approved by the committee, the formal opinion is published by the bar association. Between July 2000 and July 2001, the committee published seventeen opinions.39 The opinions are available on the state bar association’s website as well as on the electronic services, LEXIS and Westlaw.40 They are summarized in Professor Simon’s treatise as well as in the ABA/BNA Lawyers’ Manual on Professional Conduct, which contains synopses of ethics opinions issued by bar associations nationwide.41 Among the recent opinions of the New York State Bar Association Committee are opinions addressing the four questions identified earlier.42

III. ARE THE ETHICS COMMITTEES BROKEN? SOME PRIOR ACADEMIC PERSPECTIVES

This brings me to the question that is the subject of this Article: Are the bar association ethics committees broken? Over the past twenty years, several legal academics have considered this question. One commentator, Richard Underwood, defended the committees’ work from his perspective as chair of the Kentucky Bar Association committee, but

40. The opinions are available online in the following databases: Westlaw, in database “NYETH”; LEXIS, in the database “NY State Bar Assoc Comm on Prof Ethics/State Ethics Comm-Decs”; New York State Bar Association, http://www.nysba.org (last visited Apr. 1, 2002), under the heading “Ethics.”
41. See Simon, supra note 15, at xv, 1361-1412 (compiling New York State Bar Association Committee on Professional Ethics opinions issued since November 2000).
42. See supra notes 8-11 and accompanying text.
his defense has stood virtually alone.\textsuperscript{43} Most commentators have concluded that the ethics committees are dysfunctional.\textsuperscript{44} They have identified three principal problems. Each problem is attributed to a different flaw in the design of the ethics committees and leads to different proposed solutions.

A. Do Ethics Committee Opinions Deal with Trivial Subjects?

The first major criticism is that the opinions published by ethics committees deal with trivial subjects. This charge was leveled by Cornell law professor Charles Wolfram in his treatise, \textit{Modern Legal Ethics}, published in 1986.\textsuperscript{45} In a section on bar association ethics committees and their opinions, he suggested that ethics opinions are rarely cited in academic scholarship or in judicial decisions, and that they do not play a large role in disciplinary decisions or in judicial rulings on such matters as disqualification.\textsuperscript{46} He attributed the insignificance of ethics opinions, in large part, to self-imposed jurisdictional limitations which, in his view, made it inevitable that bar committees will ignore the questions of greatest significance to the bar.\textsuperscript{47} First, the committees typically answered only questions about the inquiring lawyer’s own future conduct, not questions about the lawyer’s past conduct or about the conduct of another lawyer.\textsuperscript{48} This meant, he believed, that lawyers would raise only the kind of questions about themselves that might safely be described on their own letterhead.\textsuperscript{49} Second, ethics committees typically interpreted only the applicable disciplinary rules, and not other law that might separately bear on the propriety of the lawyer’s conduct or that might be intertwined with the question about the disciplinary rules.\textsuperscript{50} The obvious solution to these problems would be for the ethics committees to answer a broader range of questions.

\textsuperscript{43} See Underwood, supra note 2, at 140 (asserting that “ethics committees provide important services” in the reality of today’s world).
\textsuperscript{44} See, e.g., WOLFRAM, supra note 2, \S\ 2.6.6, at 66; Finman & Schneyer, supra note 2, at 140.
\textsuperscript{45} See WOLFRAM, supra note 2, \S\ 2.6.6, at 66-67.
\textsuperscript{46} \textit{See id.} at 67.
\textsuperscript{47} \textit{See id.} at 66-67.
\textsuperscript{48} \textit{See id.} at 66.
\textsuperscript{49} \textit{See id.} at 66-67.
\textsuperscript{50} \textit{See id.} at 67.
B. Are Ethics Committee Opinions of Poor Quality?

The second major criticism is that the ethics committees' opinions are of poor quality. This was the conclusion of Ted Finman and Ted Schneyer, who published the first serious scholarly inquiry into the work of bar association ethics committees in 1981.51 They focused on the work of the ethics committee they considered the most important—the ABA committee, which has been issuing opinions since 1924.52 Examining twenty-one formal opinions published by the ABA from 1970 to 1979, they considered whether the committee correctly interpreted the Model Code of Professional Responsibility and, on occasions when different results might reasonably be reached, whether it provided an adequate explanation.53 They concluded that the opinions were "seriously flawed."54 Fully a third of the opinions, in their view, were clearly decided the wrong way.55 Even those that were not clearly wrong, but merely debatable, often overlooked relevant authority, failed to identify alternative arguments, lacked adequate analysis, or were seriously ambiguous.56

For Professors Finman and Schneyer, the source of the problem was that the ABA committee's procedures were not adversarial.57 The committee received an analysis from a single committee member, and did not receive alternative analyses of the problems it considered.58 Finman and Schneyer proposed that the committee appoint advocates to argue opposite sides of each question before deciding it.59 This, in their view, would be better than an alternative procedural change; conducting hearings or adopting a notice-and-comment process, like that employed by administrative agencies, in order to obtain input from interested members of the bar.60

51. See Finman & Schneyer, supra note 2, at 70-72.
52. See id. at 71.
53. See id. at 72, 92.
54. Id. at 72.
55. See id. at 101.
56. See id. at 114. Writing a few years later, Professor Wolfram was similarly critical of the ABA opinions. Many, he noted, were "very dogmatic in their answers, without recognizing apparent areas of doubt or ambiguity"; often, they relied on "strong statement rather than flawless reasoning"; "[t]he strength of the committee's convictions [was] not always matched by [the] strength of [its] analysis." WOLFRAM, supra note 2, § 2.6.6, at 66.
57. See Finman & Schneyer, supra note 2, at 145, 156-63.
58. See id. at 160.
59. See id. at 163.
60. See id. at 166.
C. Ethics Committee Opinions Are Ignored

The third major criticism of bar association ethics committees is that their opinions can be, and are, ignored, either by courts, by disciplinary agencies, by lawyers, or by some combination of the three. Much of the literature on ethics committees is devoted to the question of whether courts follow them, which seems to be the litmus test for many commentators. On this question, there has been some disagreement. Some have concluded that courts care about ethics opinions, based on a tally of cases citing them.61 However, Professor Wolfram and, in a more recent writing, Lawrence Hellman, took the view that courts do not care about what ethics committees have to say.62 Professor Hellman also expressed concern that disciplinary agencies ignore the work of ethics committees.63

Professor Hellman's diagnosis was that the problem with bar association ethics committees is that they are not part of the legal regulatory process.64 He proposed that his own state, Oklahoma, follow the lead of New Jersey, where advice is not given to lawyers by bar associations but by an advisory committee on professional ethics whose members are appointed by the state supreme court.65 Opinions issued by the committee may be reviewed by the state supreme court, whose decisions are binding on lawyers, disciplinary agencies and lower courts.66 Unreviewed advisory opinions, although not binding on New Jersey courts, are treated deferentially.67 In Professor Hellman's view: "A system that generates a steady stream of published ethics opinions that carry some real authority would contribute to greater visibility of the rules, enhance general discourse about legal ethics, and promote better understanding about and compliance with the professional responsibilities of lawyers."68

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61. See, e.g., Carro, supra note 2, at 33 (concluding, as the result of quantitative and qualitative analysis of a study based on a computerized search of federal and state court decisions citing ethics opinions, that "ethics opinions are an important component of the ethics laws to the courts"); see also id. at 15-33.
62. See Wolfram, supra note 2, § 2.6.6, at 67; Hellman, A Better Way, supra note 2, at 987-89.
63. See Hellman, A Better Way, supra note 2, at 988.
64. See id. at 1000.
65. See id. at 1000-01.
66. See id. at 1002-03.
67. See id. at 1004.
68. Id. at 999-1000. In a forthcoming article, Peter Joy makes a similar proposal to replace bar association ethics committees. He proposes, first, that responsibility for giving advice be shifted to professionally-staffed disciplinary agencies under the auspices of the state supreme courts; that state supreme courts review published ethics opinions when requested to do so; and that state supreme
To sum up, over the past two decades, several academic commentators have examined bar association ethics committees and concluded that they are not working well. They have tended to focus their attention on the most visible product of the ethics committees—namely, the opinions they publish—and particularly the ABA opinions. Judging the ethics committees by their published opinions, critics have concluded that the committees are not serving a very important role, since their opinions address insignificant questions and give wrong or poorly reasoned answers, on which a lawyer cannot safely rely because disciplinary agencies and courts do not take them seriously. The ethics committees are defective in ways that require either changing how they conduct their work or replacing them altogether.

I have a different view of bar association ethics committees. I do not propose to fully answer the earlier critiques. However, I do propose to paint a more positive picture of the ethics committees and their work, beginning with an appreciation of the place of ethics committees in the legal ethics process, and concluding with reflections in response to some of the principal criticisms.

IV. A DEFENSE OF BAR ASSOCIATION ETHICS COMMITTEES: WHAT ROLE DO ETHICS COMMITTEES PLAY IN THE LEGAL ETHICS PROCESS?

Whether you think bar association ethics committees function well or poorly depends, for starters, on what you think their function is. If you were evaluating a vehicle, it would not be a fair criticism to say that it could not float or that it could not fly if it were a car rather than a boat or plane, because it's function in the transportation process would be to move over land. Likewise, it would be unfair to criticize bar association ethics committees for failing to accomplish objectives that are not their own.

A. The Objectives of Ethics Committees

Let us begin with two roles bar association ethics committees do not play. First, they are not rule makers. That is a role assigned to the courts.69 Bar associations contribute, but not primarily through the ethics

committees. Most bar associations have separate committees that draft and review proposed disciplinary rules.

Second, bar association ethics committees are not disciplinary agencies. That is a role played by disciplinary or grievance committees under judicial oversight. It is true that ethics opinions may influence the disciplinary process. In New York, for example, disciplinary authorities sometimes ask an ethics committee’s advice about the meaning and application of a disciplinary rule. More often, individual lawyers seek a committee’s advice with the expectation that, if they follow that advice, disciplinary agencies will not prosecute them. That expectation is a realistic one. Nevertheless, it is not the primary purpose of ethics committees to influence decision-making by disciplinary agencies.

What is their primary purpose? It is simply to give guidance to well-intentioned lawyers who are uncertain about how to practice in the context of the disciplinary rules. It is, therefore, a mistake to compare ethics committees to courts, rulemaking bodies, or disciplinary agencies, each of which exercises legal authority. A fairer comparison is to in-house ethics experts and privately retained outside ethics experts. It is

71. See, e.g., SIMON, supra note 15, at xiii.
72. See Joy, supra note 2, manuscript at 336.
73. Cf. Underwood, supra note 2, at 142 (opining that “ethics committees should serve only [one] purpose—to provide limited (disciplinary) protection of lawyers who come to the committee in good faith”). In my judgment, well-intentioned lawyers should act in conformity with the disciplinary rules regardless of whether failing to do so puts them at risk. Providing protection to lawyers who rely on ethics opinions should be at most an incidental function of ethics committees.
74. It is useful to place the ethics committees’ role in historical context. Before the ABA adopted the Canons of Professional Ethics in 1908, in most jurisdictions there was no attempt to codify professional norms. Professional expectations were transmitted informally—passed down from senior lawyer to junior lawyer as part of an oral tradition. For the most part, they were also enforced informally: when a lawyer in the professional community violated conventional expectations, other lawyers might take the lawyer aside to explain that law was not practiced in that way; if the lawyer continued to transgress, he would be ostracized. That remains one way in which professional norms continue to be transmitted and enforced, especially in small, homogenous professional communities. But, by the early twentieth century, with the rise of cities and the influx of immigrant populations, regulation by word of mouth was no longer enough.

The ABA and other bar associations sought to fill the void by making professional self-regulation formal. But, at least initially, their role was extralegal; they were not an arm of the state. For example, the Canons of Professional Ethics, which the ABA adopted in 1908, were not initially meant to be enforceable law, but were simply meant to give guidance to lawyers. Bar associations established ethics committees to serve a similar extralegal function by addressing questions that were not clearly answered by the Canons. The early ethics opinions were ordinarily based on the Canons, sometimes loosely, but they did not “interpret” the Canons in the way that a court might
true that, as Professor Joy’s forthcoming article describes, the bar associations’ role expanded throughout the early and mid-twentieth century, because courts gave them disciplinary authority and permitted them to employ the canons as enforceable law for lawyers. But, as the ABA itself has recognized, regulation of the legal profession is primarily the responsibility of the state courts. Over the past several decades, state courts have assumed this responsibility, and properly relegated bar associations to a supporting role. Ethics committees help fill regulatory gaps, but they do not exercise legal authority.

The role served by ethics committees as legal advisor to lawyers with professional dilemmas complements the role of individual experts. A comparison suggests that each have their own advantages.

Individual experts are preferable for certain types of questions. Ethics committees have to deal with facts at a more abstract level than an individual ethics advisor. No ethics committee can review many pages of documents to ascertain the facts or resolve questions that are extremely fact-intensive, where much turns on factual nuances. In such situations, they will typically give the inquirer a general framework and leave it to the inquirer to reach an ultimate resolution. Ethics committees cannot give written advice as quickly as an individual. When a question is especially difficult, ethics committees may take a long time to give an answer, precisely because the answer will be the product of ongoing, collective deliberation. Seeking advice from an individual lawyer, especially one in the same law firm, limits the extent to which embarrassing or highly confidential information is disseminated. Finally, the jurisdictional restrictions on the ethics committees’ work limit the kind of questions that ethics committees will answer and how fully they will answer. All of this means that an ethics committee cannot eliminate the need for an individual expert in every situation.

interpret a statute. If a lawyer asked a question on which the Canons were silent, an ethics committee could give guidance based on broad principals underlying the Canons or on conventional professional understandings that were not codified. In other words, the Canons were not initially “law” and ethics committees were not attempting to do the courts’ job of definitively interpreting the “law.” See generally WOLFRAM, supra note 2, §§ 2.6.2-2.6.6 (discussing the historical context of legal ethics from the early canons to ethics opinions and committees).

75. See Joy, supra note 2, manuscript at 326-27.
76. See ABA COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, REPORT: LAWYER REGULATION FOR A NEW CENTURY 1, 2 (1992).
78. Sometimes, court rules, or other laws aside from disciplinary rules, bear on the propriety of a lawyer’s conduct, or the disciplinary rules themselves refer the lawyer to other laws. Ethics committees will not interpret the other laws to which the disciplinary rules refer. Sometimes, a question cannot be fully resolved without assessing a lawyer’s past conduct or the past conduct of
At the same time, with regard to the category of questions that they can answer, bar association ethics committees have two principal advantages over in-house or outside experts or other individual lawyers. First, they give advice for free. Many lawyers, particularly those who do not work in large law firms, do not have access to the free services of an individual lawyer who is especially knowledgeable about the disciplinary rules and the case law and legal literature discussing them. Second, ethics committees give opinions that are likely to carry greater weight with a disciplinary agency because they will generally have greater legitimacy than opinions from a retained expert or an in-house ethics advisor who renders advice privately, and often orally, based on his personal reflection and individual perspective. This is true for several reasons. Ethics committees are generally more objective, especially as compared to an in-house ethics advisor, who may be naturally predisposed to give the answer the other lawyer in the firm seeks. Ethics committees make decisions collectively, can draw on their members' collective experiences and perspectives, and can deliberate aloud, all of which is likely to lead to sounder conclusions. Because of the diversity of their membership, they can compensate for individual biases and idiosyncrasies. And when questions are tough, they can publish the results of their deliberations, legitimating their views by putting them to the test of public scrutiny and criticism.

V. HOW SHOULD ONE MEASURE THE VALUE OF ETHICS COMMITTEES?

Let me turn, now, to some of the specific criticisms directed at bar association ethics committees. It is not surprising that commentators tend to focus on the work of the ABA ethics committee, gauge the quality of its opinions, and measure their impact. The ABA is, of course, the largest and most nationally representative bar association and its ethics committee's primary contribution is the publication of opinions. In one sense, its committee's pronouncements about the meaning of the

another lawyer, as is true of questions involving a lawyer's duty to report another lawyer's misconduct. Ethics committees will generally not answer or opine on past conduct. See supra notes 47-50 and accompanying text (discussing the jurisdictional limits of bar association ethics committees).

79. Cf. Underwood, supra note 2, at 177 (noting "that there is still room for the paid ethics consultant to operate. . .[in the context of] disqualification motions, malpractice suits, and disciplinary and fee cases"). Professor Underwood appears to imply that, in giving guidance concerning a lawyer's future conduct, ethics committees are invariably preferable to paid ethics consultants.

80. See, e.g., Finman & Schneyer, supra note 2, at 71.
disciplinary rules would seem to be the most important ones. After all, the ABA has played the leading role in codifying professional standards and promoting them nationwide. The ABA’s work product does not, in itself, govern lawyers. But courts, in determining what disciplinary rules to adopt, have been greatly influenced, directly and indirectly, by the ABA Model Rules. This being so, it would seem to be important to ask what the ABA thinks its Model Rules mean.

In measuring the contribution made by ethics committees, however, it is a mistake to focus on the ABA and exclusively on published opinions. Most state and local bar associations provide a service that the ABA committee does not provide: They attempt to assist every lawyer who has a question about how to interpret or apply the jurisdiction’s disciplinary rules to his or her own future conduct. Most of the committees’ time is likely to be taken up providing private advice to individual lawyers, and that may be the more significant service these committees provide. For many, this consumes much more time than publishing opinions. To focus exclusively on the ABA and its published opinions is to miss the extraordinary service that ethics committees other than that of the ABA provide to state and local lawyers by answering their questions privately by telephone or in writing. Many times, the questions are intensely fact-specific and would be uninteresting to other lawyers. However, the questions are important to the lawyers who ask them.

Even if one focuses on published opinions, it is a mistake to view the ABA committee as typical. It is, in fact, unique, in that it limits its role to giving advice about model rules. In contrast, state and local bar associations give advice about rules that are not simply models, but that serve as the law for lawyers in the state. They do something that the ABA cannot do: They interpret real rules in the legal and practical context in which they are applied. Disciplinary rules do not exist in the abstract or in isolation from other law. They are part and parcel of a body of state law and opinions. They must be interpreted in light of binding decisions issued by the state courts and against the background

81. See McCaslin, supra note 2, at 966-67.
82. See Finman & Schneyer, supra note 2, at 83-84; McCaslin, supra note 2, at 966.
84. Although the ABA has lawyers within its Center for Professional Responsibility who are available to assist lawyers with questions of professional conduct, the ethics committee itself picks and chooses what interpretive questions it answers, and concentrates its efforts on answering questions that it believes to be broadly significant. See, e.g., McCaslin, supra note 2, at 973-74.
85. See ABA CONST. art. 31, § 31.7.
86. See, e.g., McCaslin, supra note 2, at 978.
of all the state law and court decisions. State disciplinary rules also exist in the context of state law practice and all of what might be termed "the lore of the profession"—the traditions and history of state law practice, received wisdom, and understandings passed down over time. A state or local committee can take account of the professional lore as well as the law. The ABA committee could not have answered the same questions in this way. It might say what model rules mean in the context of its idea of the average state law and the average state law practice, but it could not consider enforceable law in the context in which that law is applied, interpreted and enforced. This being so, for a lawyer or a court in any particular jurisdiction, it would make more sense to seek guidance in the opinions of the ethics committees of that jurisdiction than in the ABA opinions.

Whether one focuses on ABA opinions, state and local bar association ethics opinions, or both, it is a mistake to measure their value by the extent to which courts rely on them. When courts ignore ethics opinions, that does not necessarily mean that the courts believe that ethics committees have nothing to offer to one's understanding of the disciplinary rules. Often, a court ignores ethics opinions because it is not interested in the meaning of disciplinary rules. Disqualification decisions in the Second Circuit provide an obvious illustration. The courts of this circuit have made it clear that they will not invariably disqualify a lawyer when the lawyer has a conflict of interest that would be impermissible under the applicable disciplinary rules. Even though the lawyer might be subject to sanction, the court may permit the lawyer to continue the representation if, as a practical matter, no one will be harmed by the conflict of interest. The courts have developed their own jurisprudence on the question of when disqualification is necessary. Since they are not relying on disciplinary rules, they have no reason to look at ethics opinions interpreting disciplinary rules.

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87. Thus, when it answered the questions identified at the outset, see supra notes 8-11 and accompanying text, the New York State ethics committee could examine the particular lawyer's dilemma in the context of relevant state law and procedure. The municipal lawyer's question about how to deal with an unrepresented claimant on the other side of a lawsuit was examined in the context of the state law and procedure governing claims against a municipality, while the question of the attorney for an incapacitated client was examined in the context both of the state law governing durable powers of attorney and the state law governing legal guardianships.

88. See Green, Conflicts of Interest, supra note 19, at 74-75 (citing Armstrong v. McAlpin, 625 F.2d 433, 445-46 (2d Cir. 1980) (en banc); Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979); W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976)).

89. See id.
90. See id. at 72.
Moreover, influencing courts should not be a major aim of ethics committees. When a question comes before the court, it will have the benefit of briefing and argument on opposite sides of the question as well as a chance to conduct its own research and to draw on its own experience. Subsequent a bar association will file a brief as “friend of the court,” because it seeks to influence as well as assist the court. In most cases, however, bar associations do not weigh in on the meaning of disciplinary rules in question. They either assume that the court can get things right without the bar association’s help or conclude that they do not have a strong interest in which way the court interprets the particular rule. Courts do not need the help of the ethics committees nearly as much as lawyers do.

The ethics committees’ major contribution is to provide guidance to well-intentioned lawyers. This includes, particularly through hotlines and unpublished letters, giving advice on questions that can be easily resolved by referring to the rules and the case law. This also includes giving advice on the many questions of interpretation that the rules present and that courts have not answered. As noted, difficult questions of interpretation rarely come to the courts by way of the disciplinary process. Courts field questions in litigation, but many of those questions focus on the problems of litigators. And, courts address only a narrow class of litigators’ conduct—typically, conduct about which the opposing party has an incentive to complain. This leaves out conduct about which the lawyer’s own client might complain. The largest proportion of court decisions on questions of legal ethics involve litigators’ conflicts of interest. With respect to the questions that courts do not address, the largest body of writings is produced by bar association ethics committees.

Ethics committees also consciously influence the development of the law, not primarily by influencing court decisions, but by two other means. First, they influence how the legal profession understands the disciplinary rules in the interstices—that is, in the broad areas that courts never address. Some ethics opinions capture how lawyers already understand the rules, but others contribute toward the development of a

92. See id. at 498.
93. See McCaslin, supra note 2, at 967.
94. See Underwood, supra note 2, at 129-31 (describing the limited role the judiciary plays in the disciplinary process).
95. See Green, Conflicts of Interest, supra note 19, at 71.
consensus of opinion among lawyers within the jurisdiction concerning how the rules should be applied.

Second, ethics committees influence the development of the disciplinary rules themselves. In the course of giving advice and publishing opinions, ethics committees identify ambiguities in the disciplinary rules that ought to be clarified through later amendments. They identify candidates for new rules by unearthing problems as to which the disciplinary rules are essentially silent. And, they identify rules that should be amended because they do not seem to make sense as applied.

Finally, ethics committees contribute to an ongoing dialogue within the profession about how lawyers should behave. Since many of their opinions deal with aspects of professional conduct that are not the subject of judicial decisions, they bring otherwise hidden problems to light. Although ethics committees typically weigh in on one side of the question, their opinions are not the last word, precisely because they are not binding on courts. They encourage discussion of professional dilemmas that might otherwise be ignored.

Given the various contributions that ethics committees may make, at least one thing should be clear. Their success should not be measured by tallying the number of judicial decisions that cite their published opinions.

VI. ARE THE ETHICS COMMITTEES CONFINED TO ADDRESSING TRIVIAL QUESTIONS?

Among the universe of questions about lawyers' professional conduct, courts provide a definitive answer to a small number. Of the many questions unanswered by courts, some are unlikely to come before ethics committees, in part, for reasons already identified, including that

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96. For example, misdelivered documents, the subject of the new Model Rule 4.4(b), was an earlier subject of ethics opinions. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).


98. This function is served by other vehicles as well. For example, reports issued by bar association committees, such as the Committee on Professional Responsibility of the Association of the Bar of the City of New York, contribute to the professional dialogue about how lawyers should conduct themselves. Conferences on professional ethics, such as those conducted at Hofstra University School of Law, Fordham University School of Law, and other law schools, contribute to the professional dialogue as well. Individual law review articles serve the same purpose.

bar associations impose jurisdictional limits on the questions that their ethics committees may answer and that there are sometimes advantages to seeking advice from an individual lawyer. Professor Wolfram, writing in 1986, suggested that the ethics committees were relegated to insignificant questions, and cited a study that, as of 1968, approximately half of the ABA opinions dealt with advertising and solicitation.

Professor Wolfram may have been right about ethics opinions circa 1968, or even about those circa 1986. If so, the critique no longer seems to be a fair one. A review of recent ethics opinions will reveal many dealing with fundamental questions. If lawyers do not bring them important questions, many ethics committees can do what the ABA committee does: fashion the questions themselves. If the committees develop a reputation for providing thoughtful advice, lawyers will bring them questions that matter.

Consider the questions identified at the outset. None seem trivial. Whether government lawyers should temper the zealousness of their advocacy in order to serve the interest of justice goes to the heart of what it means to be a government lawyer. Whether a union lawyer owes duties to at union member raises a fundamental question about the union lawyer's role. The question of a lawyer's relationship with an insurance company is of intense concern for any lawyer retained by an insurance company to represent a policyholder. Whether a lawyer may ask the court to appoint a guardian without the client's consent is a recurring one for elder law attorneys and others who represent incapacitated clients.

This is not to say that all ethics opinions are significant. Many still address seemingly trivial questions about how lawyers may market their services. For example, one recent New York State Bar Association opinion answers the question, "[u]nder DR 2-102(B), may an attorney use his or her surname together with the word 'group' as a law firm name where the attorney's firm has a number of associates?" Another answers the question, "[m]ay a lawyer place an advertisement in the Yellow Pages in which the lawyer uses the firm name 'A', or inserts the letter 'A' before the firm name, in order to ensure favorable placement?" These questions may not seem particularly earthshaking,
in part because the relevant disciplinary rules themselves seem relatively unimportant. Still, these questions are real. Answering them in a published opinion gives the ethics committee a chance to remind lawyers of restraints on how they may peddle their wares. But these questions need not be the steady diet of ethics committees, if ever they were.

VII. MUST ETHICS OPINIONS BE POORLY REASONED?

If Professors Finman and Schneyer were to examine the ABA opinions issued in the decade of the 1990s, it is unlikely that they would give them as harsh a grade as they gave the opinions from the 1970s. I do not propose to do that work, however, much less the work of examining hundreds of state and local ethics opinions. There is no doubt that state and local ethics opinions vary in quality, as do judicial decisions and most other legal writings that deal with legal ethics. Some ethics committees make it their practice simply to give their conclusion without providing any reasoning at all. It is easy to find opinions to criticize even among those that are extensively reasoned and researched, because issues of professional conduct are often hard and complex.

There is nothing inherent in the structure of ethics committees, however, that would compel them to issue poorly reasoned or wrongly decided opinions. Although some committees may be staffed by lawyers who are unfamiliar with the body of literature on legal ethics, there is no reason why they need to be. Virtually every state has legal ethics professors and practitioners with expertise in this area who would be willing to serve.106 Although some committees may not conduct research or attempt to identify arguments on opposite sides of the questions before them, nothing in the deliberative process requires them to ignore relevant authorities and analyses.

The enterprise of publishing ethics opinions has certain complexities that make criticism of ethics opinions almost inevitable, but these do not reflect flaws in the committees’ design. One complexity is the collective nature of the process. There is a virtue in having committee members with different perspectives attempt to forge a consensus on tough questions of professional conduct. The resulting

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106. For example, Professor Simon, who authored a treatise on the New York disciplinary rules, has served on the New York State Bar Association’s committee since 1995 and chaired the Nassau County Bar Association’s ethics committee; my colleague, Mary Daly, who also authored a book on the New York Code, chaired the ethics committee of the Association of the Bar of the City of New York; Harvard law professor Andrew Kaufman, the author of a legal ethics case book, has chaired the Massachusetts Bar Association’s Committee on Professional Ethics since 1982.
What then, should be the task of the ethics committee? Should the committee try to predict what a court would say the rule meant if the question ever came before the court? That is essentially what an individual expert would do, but it is a very difficult task, especially with regard to the type of questions that courts almost never address. Even if it can be done, that approach is at odds with the idea that the legal profession, through its bar associations, has an interest in moving professional norms in the right direction. If part of the idea is to influence professional understandings in the interstices, shouldn't the ethics committee give its own view about what the preferable interpretation of a disciplinary rule would be, as if the committee itself were the court? In sum, part of why ethics opinions do not always convincingly "interpret" the disciplinary rules is because ethics committees face so many levels of ambiguity—ambiguity about what the rules mean, about what principles of interpretation courts should employ in interpreting them, and about whether ethics committees should employ those same principles, assuming they can ascertain what they are.

In the end, ethics committees should strive to render opinions that are well-researched and well-reasoned, but I join Professor Underwood in the view that the value of well-reasoned opinions may be overrated.110 Ethics committees have less need for exhaustive analysis precisely because their opinions are not binding on courts and disciplinary agencies. Rather than comparing ethics committees to courts, compare them to the ALI, another collection of unpaid lawyers who offer their collective view of what the law is and should be. In the end, the members of the ALI simply issue black letter rules and comments, without any indication by the group of how difficult the question was and of why alternatives were rejected.111 Even the most sparsely reasoned ethics opinion gives as much explanation as the Restatement, and most give far more.

At the same time, and paradoxically, the very fact that the opinions are not definitive increases the incentive for ethics committees to issue opinions that are well-reasoned and persuasive. The state supreme courts have no reason to persuade; their word is law. Ethics committees are not regulators or lawmakers. They are, at best, nothing more than a collection of well-intentioned, reasonably knowledgeable lawyers who volunteer their time. Since they do not exercise the state's regulatory

110. See Underwood, supra note 2, at 149.
111. See generally RESTATEMENT, supra note 23.
opinion ordinarily has greater legitimacy than the opinion of any particular member. However, when the committee issues a single opinion embodying its collective view, the opinion is likely to seem fuzzy, because it will paper over the different analyses by which different members arrived at the same result. The problem will be exacerbated when the committee issues a series of related opinions over a period of time. As the composition of the committees change there may be a shifting consensus of opinion which the committee must balance against whatever loyalty it feels towards its prior jurisprudence. It is much easier for an individual author—a treatise writer, for example—to present a series of views that are coherent and sharply drawn. The tendency to issue opinions that do little more than state a conclusion is an understandable, although not ideal, way of dealing with the difficulty of collective decision making. It might be preferable if committees were more candid about how difficult and contentious particular questions may be. But it is understandable, and perhaps forgivable, that they are not. It is the tradition among courts as well as ethics committees to understate the difficulty of the legal questions that they are deciding, perhaps to avoid undermining the authority or credibility of their decisions.

Another complexity is that there are no universally accepted principles for interpreting disciplinary rules. The rules are not statutes that, by common consensus, must be interpreted according to their drafters' intention. Courts adopt the rules and have ultimate authority to declare what the rules mean, regardless of what anyone may have intended when they were written. Many courts treat the rules more like statements of general principle than like statutes; they interpret the rules in "common law" fashion, based on their contemporaneous judgment about what standard of conduct is preferable in the situation before it. Courts have vast discretion and can bring a wide range of considerations to bear in deciding how to apply the rules. Deciding what a rule means in an area of ambiguity typically calls for a policy judgment. Like rule drafters, interpreters of ethics rules may take different views on questions of policy. All of this explains, in part, why courts, as well as ethics committees, sometimes interpret identically worded rules in different ways.

108. See id. at 487; cf. Underwood, supra note 2, at 149 (observing that "[t]he ethics rules can and should be applied as rules of reason").
109. See MARU, supra note 2, at 2.
authority, their influence is likely to be proportional to the quality of their opinions. They know that opinions that are poorly reasoned and unpersuasive are more likely to provoke disagreement from practicing lawyers and other entities and, ultimately, to be rejected or ignored.

VIII. ARE THE INTERNAL DECISION-MAKING PROCESSES DEFICIENT?

Ethics committees have been around for decades. 112 No doubt, they can improve how they do business, especially by taking advantage of technological advancements. But, are they in need of a major overhaul? Since I believe that bar association ethics committees can make substantial contributions to the legal profession as presently organized, my answer would be no. Further, I have doubts about whether substantial changes would be an improvement.

One possibility is to assign all or part of the function of bar association ethics committees to another entity in each state. For example, courts might offer to issue advisory opinions upon application from lawyers. Although judicial rulemaking may be a preferable process for making decisions about the scope of lawyers’ professional obligations, because it provides greater opportunity for diverse views to be considered, 113 judicial advisory opinions would in the very least be definitive. The principal problem is that most courts do not have time to take over the role of ethics experts and ethics committees. 114 No court has enough time to issue definitive opinions on every question that a lawyer may ask.

An alternative is to give the job to a judicial agency—either an advisory committee appointed by the court or a disciplinary agency under the court’s aegis. Insofar as advisory opinions are issued by a court-appointed committee of lawyers, rather than a bar association-appointed committee of lawyers, it is hard to see why the opinions would be of higher quality than those now issued by bar association ethics committees. If advice on tough questions were given by full-time staff members, the quality might be worse, since the conclusions would not be the product of collective decision-making by lawyers with vastly different perspectives. Even if their quality was low, advisory opinions

112. See Carro, supra note 2, at 9, 15 (stating that both the ABA and the New York County Lawyers’ Association established ethics committees in 1908 and that by 1980, eighty percent of state and twenty-three percent of local ethics committees issued ethics opinions).


issued by a single state entity under the auspices of the state judiciary could not easily be ignored.

It is far from clear, however, that making ethics opinions more authoritative is necessarily a good thing. In the area of legal ethics, there is a lot to be said for letting questions percolate for a while and inviting many interested parties to weigh in. In other areas of the law, by the time a tribunal issues a definitive opinion, a question may have been kicked around for a while by lower courts, commentators, and others. Ethics committees, in contrast, are often writing on a blank slate. Their opinions are the first word. Should they also be the last word? It seems better for opinions to be issued by bar associations, which have no legal authority, and best to have opinions issued by different bar associations within a state as well as nationally. When commentators or different committees disagree with an ethics committee’s opinion, that is all for the good, because the differing expressions of view provide a clearer picture of a question’s difficulty to rule makers and courts who have the ability definitively to resolve the question.

Proposals directed at preserving ethics committees but reforming how they do their work may also be unnecessary, if not harmful. One possibility is to remove limits on the questions of professional conduct that the committees will answer. At present, many committees avoid resolving legal questions other than those calling for interpreting the applicable rules of professional conduct, because that is where the court opinions provide the least guidance and where the committees have developed expertise.115 They avoid deciding questions pending in disciplinary proceedings and litigation, because they do not want to appear to usurp the role of disciplinary agencies and courts.116 They avoid questions involving past conduct or the conduct of someone other than the inquiring lawyer, because they are concerned about condemning a lawyer based on a one-sided version of the facts.117 Perhaps these explanations are not compelling, and the committees are too circumspect.118 But, if they have enough on their plate to keep them busy, enough important questions remain for them to answer, and there are other resources available to lawyers to deal with questions that the committees cannot fully answer, there seems to be no compelling reason to expand their range.

115. See Underwood, supra note 2, at 131.
116. See SIMON, supra note 15, at xiv; Underwood, supra note 2, at 143.
117. See Underwood, supra note 2, at 143.
118. For a more extensive defense of the committees’ jurisdictional limits, see id. at 143-44.
Another possibility is to change the committees’ internal deliberative processes, for example, by assigning lawyers to engage in adversarial argument on each question, or by inviting comment in some fashion from the practicing bar. These reforms would make the ethics committees slower and less productive. Ethics committees are staffed by unpaid lawyers seeking to engage in professional service. Their time is not endlessly elastic. The committees therefore need to strike a balance between the amount of time and deliberation that goes into an individual opinion and the number of opinions they issue. In the New York State Bar Association, some have argued that there is already too much collective deliberation, at least in the case of private letters that are sent to a single lawyer and then never made the subject of a published opinion. Making ethics committees more like courts or administrative agencies would not necessarily lead to better opinions, but would certainly reduce their number.

IX. CONCLUSION

It would be foolish to suggest that bar association ethics committees are perfect. Certainly, they are not. But, it also seems unfair to suggest that they are fundamentally flawed. In their present form, they are capable of making a variety of important contributions, and in many jurisdictions they do. They may need to be fine-tuned, but they are not broken.

119. See SIMON, supra note 15, at xiv; McCaslin, supra note 2, at 971 (noting that “since the positions are almost always voluntary, the choice is limited to those who want to participate”) (footnote omitted).
120. See generally Carol M. Langford & David M. M. Bell, Finding a Voice: The Legal Ethics Committee, 30 Hofstra L. Rev. 855 (2002).