2002

Finding a Voice: The Legal Ethics Committee

Carol M. Langford

David M.M. Bell

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation


Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol30/iss3/11

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
FINDING A VOICE:
THE LEGAL ETHICS COMMITTEE

Carol M. Langford* and David M. M. Bell**

I. INTRODUCTION

Legal ethics committees perform an increasingly important role in both unified and voluntary bar association states.

Over the past thirty-five years, ethics rules have undergone a transformation from hortatory professional norms to enforceable disciplinary standards. At the same time, state disciplinary/oversight agencies have become more professionalized, with full-time investigators, counsel, and judges replacing volunteer lawyers. A result is that lawyers are increasingly perceived and treated by disciplinary agencies as managed subjects rather than as self-regulating peers.

* Ms. Langford teaches professional responsibility law as an adjunct professor at Hastings College of the Law and at the University of San Francisco School of Law in San Francisco, California. She is former Chair of the State Bar of California Committee on Professional Responsibility and Conduct ("COPRAC"), and is current Chair of the State Bar of California Law Practice Management and Technology Section Executive Committee. She has written two books on professional responsibility: LEGAL ETHICS IN THE PRACTICE OF LAW (1995) and THE MORAL COMPASS OF THE AMERICAN LAWYER (1999).

** Mr. Bell teaches professional responsibility law as an adjunct professor at the Golden Gate University School of Law in San Francisco, California. Mr. Bell is former Director of Professional Competence and former Director of Professional Responsibility at the State Bar of California. In these positions, Mr. Bell was the executive responsible for development of the California Rules of Professional Conduct during the 1990s. Mr. Bell also oversaw the State Bar's Ethics Hotline, Law Office Management Assistance, and Lawyers' Personal Assistance Programs, and was staff counsel to COPRAC.

Carol Langford and David Bell practice attorney conduct law at Langford & Bell LLP in Walnut Creek, California.


2. See id. at 1241-42, 1255-56.

3. The concept of "managed subjects" is taken from Nancy Amoury Combs's excellent comment entitled Understanding Kaye Scholer: The Autonomous Citizen, the Managed Subject and the Role of the Lawyer, 82 CAL. L. REV. 663 (1994). In examining the Office of Thrift Supervision's enforcement action against Kaye, Scholer, Fierman, Hays & Handler, Ms. Combs
The perception and treatment of lawyers as managed subjects conflicts with traditional notions of autonomy and self-regulation operating within the legal profession. Volunteer-staffed, peer-driven discipline systems are virtually extinct in the United States. As volunteer participation is squeezed out, an increased sense of disenfranchisement and loss of autonomy is felt by practicing lawyers. Tension exists between the professionalized agency's goals and interests, and the membership's goals and interests, in crafting, interpreting, and enforcing disciplinary rules and procedures.

Our experience with membership disenchantment in California has taught us the importance of the Bar's perception of itself as a governing body. The State Bar of California ("State Bar") experienced a funding shortage in 1998 that forced it to lay off all but a skeleton staff for the better part of a year. Although the loss of funding resulted directly from the Governor's veto of the State Bar's funding bill (California is unique in requiring its State Bar to each year seek legislative and executive authorization to levy membership dues), it was recognized at the time that underlying the Governor's veto there existed a significant level of membership discontent with the State Bar. The various reasons for this discontent, some of which were political in nature, go beyond the scope of discussion here. However, we do believe that the tensions existing between the State Bar's goals and interests and the membership's goals and interests, in crafting, interpreting, and enforcing disciplinary rules and procedures, were in part responsible for this discontent. These tensions continue to exist today.

A. Volunteer Lawyer Ethics Committees

Volunteer lawyer ethics committees ameliorate this tension in a healthy way. These committees perform a critical balancing of agency, membership, and consumer interests that is necessary to promulgate

4. See Hazard, supra note 1, at 1242 ("The legalization process has resulted in the disintegration of the profession's sense of self and of the 'narrative' that helped to define and defend its social boundaries.").


FINDING A VOICE

effective, balanced rules. These committees also develop ethics opinions that interpret those rules and assist in membership compliance and disciplinary enforcement.

Ethics committees are a key avenue for practicing attorneys, as well as members of the public, to obtain meaningful participation in a professionalized disciplinary system. Ethics committees help legitimize the professionalized disciplinary system in the eyes of practicing lawyers, while returning to lawyers an important sense of input and autonomy. Public membership on an ethics committee helps legitimize the disciplinary system in the eyes of clients and the public.

Although an ethics committee can produce recommendations and work product that conflict with or complicate a professionalized disciplinary agency’s internally perceived goals or objectives, it is in the agency’s best interest to support the committee. An ethics committee gives a professionalized disciplinary agency a necessary window into current legal practice, where disciplinary staff no longer engages in private law practice. The ethics committee provides credibility with regulated lawyers, who may believe (rightly or wrongly) that their interests have been lost or dismissed in the promulgation, interpretation, and enforcement of disciplinary rules or procedures. An ethics committee facilitates the incorporation of local mores into state disciplinary rules and procedures, which in turn facilitates membership compliance and disciplinary enforcement.

State disciplinary systems should provide adequate financial and staff support to volunteer lawyer ethics committees. They should permit and encourage ethics committees to make meaningful contributions to the promulgation, interpretation, and enforcement of disciplinary rules. They should encourage both public membership and a broad spectrum of committee membership that is reflective of the regulated population of lawyers. By doing so, state disciplinary systems can strengthen their ties and credibility with regulated lawyers and the public. They can enhance the membership’s sense of autonomy and self-regulation. Most importantly, they can promote the cross-fertilization of ideas, interests, and objectives necessary to produce better considered disciplinary rules and interpretive ethics opinions.

7. See generally CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.6 (1986) (discussing ethics committees and opinions).
8. See id. § 2.6.6, at 65 (“Those opinions typically have answered questions on professional conduct posed to the ethics committee by lawyers.”).
9. See id. (“Ethics committee opinions sponsored the impression that a lawyer who disregarded their advice could be professionally disciplined.”). 
Part II of this Article sets the stage for the volunteer lawyer ethics committee inquiry by describing the development of the professional responsibility rules, as well as the development of professionalized state disciplinary systems. Part III discusses the tension raised by these developments for regulated lawyers. Part IV discusses the role of ethics committees in both causing and ameliorating tensions that exist between professionalized disciplinary systems and regulated lawyers. Part V concludes with recommendations in support of volunteer lawyer ethics committees.

B. Methodology

A brief note regarding methodology is in order. In 1993-1994, the State Bar conducted a national survey of state lawyer regulatory systems, including (1) unified and voluntary structures and activities, (2) disciplinary structures and activities, (3) rule adoption structures, and (4) ethics opinion issuance structures. Although it should not be surprising, given the historic state-based regulation of lawyers in the United States, the variety of regulatory structures and activities existing from state to state is truly impressive. No two states appear to regulate and discipline lawyers in exactly the same manner.

In this Article, we conduct an analysis of "professionalized disciplinary systems." We do not believe that the wide variety of regulatory structures undercuts the validity of our analysis. Although each state parses out and performs regulatory functions differently, there is consensus that across the country, state lawyer disciplinary systems have become more professionalized, with better funding, more full-time professional staff, and greater independence from organized bar control. Regardless of their differences, which are considerable, it is asserted that these newly professionalized systems (and their professional staff) will tend to develop similar disciplinary goals and interests that can be analyzed legitimately on a macro level.

We also believe that our macro-analysis of the role of the volunteer lawyer ethics committee in a professionalized disciplinary system is valid. The 1993-1994 State Bar of California survey again reveals that rule adoption structures, as well as ethics opinion issuance structures,
vary dramatically from state to state. Regardless of the particular structures employed, however, we assert that all regulated lawyers have a shared self-interest in retaining meaningful input into these structures as state disciplinary systems become more professionalized.

Volunteer lawyer ethics committees are a traditional exercise in professionalism and autonomy—they exist to provide meaningful membership input into rule adoption and ethics opinion issuance structures. They possess heightened levels of expertise, which makes their input especially useful, and arguably critical, to modern, professionalized disciplinary systems. We attempt to explore the issues raised by these committees for modern disciplinary systems, as well as the role that these committees can and should play. Readers can then apply the insights gained to an analysis of their own state’s lawyer disciplinary system.

II. LAWYER REGULATION AND DISCIPLINE: A SHORT HISTORY

The past thirty-five years have witnessed two key developments in the regulation of lawyers. First, the professional responsibility rules have evolved from hortatory norms to enforceable disciplinary standards. Second, state systems overseeing the regulation and discipline of lawyers have become professionalized.

These two developments were intertwined and helped fuel each other. Both were the result of increasing pressure on the legal profession from without, to police itself (or submit to outside policing), and from within, to maintain autonomy and self-regulation. The American Bar Association ("ABA") took a lead role regarding each development.

A brief history of these developments follows, which we believe is useful in showing how lawyers have come today to be perceived more as managed subjects than as autonomous peers in their relationship with state disciplinary agencies.

14. See id. at 12.
15. See Hazard, supra note 1, at 1241.
16. See id.
17. See Moulton, supra note 11, at 88 n.57 (stating that part of the reason for creating "law-like" standards was fear of outside regulation).
18. See infra notes 65-83 and accompanying text (discussing the involvement of the American Bar Association's ("ABA") Clark Committee in the professionalization of state disciplinary systems).
A. "Legalizing" Legal Ethics

During the United States' first century, there was no officially adopted, written code of professional conduct for American lawyers. The first reported state code of ethics was adopted by the Alabama State Bar Association in 1887. The Alabama Code was not an enforceable set of disciplinary rules, but was rather an aspirational set of professional values.

In 1908, the ABA adopted the ABA Canons of Professional Ethics ("Canons"), which were developed by the ABA following review of the Alabama Code. The Canons, as amended, remained in effect for the next sixty-two years. Like the Alabama Code, which preceded them, the 1908 ABA Canons were not intended as disciplinary standards, but rather as "moral and fraternal admonitions." The 1908 ABA Canons represented the first official attempt to set a uniform standard for lawyer conduct in this country, but commentators assert that the Canons consisted of "little more than ideals," and that they had "limited influence on lawyers and state regulators" as disciplinary standards. While the Canons were universally accepted by the states (with the ABA asserting in 1958 that they were to act as

---

19. See WOLFRAM, supra note 7, § 2.6.2, at 53.
20. See Moulton, supra note 11, at 85; see also Fred C. Zacharias, Federalizing Legal Ethics, 73 TEX. L. REV. 335, 338 (1994).
21. See Moulton, supra note 11, at 85; see also THOMAS L. SHAFFER with MARY M. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION 6 (1991) (noting that the Alabama Code was not adopted into law until twenty years after it was drafted); Walter Burgwyn Jones, Canons of Professional Ethics, Their Genesis and History, 7 NOTRE DAME LAW. 483, 489 (1932) (noting that one Alabama state senator stated, "we are adopting what we consider a sound code of morals for the practice of law"). The Alabama Code was substantially adopted in eleven other states after 1887. See id. at 494, 496.
22. CANONS OF PROF'L ETHICS 1 (rev. ed. 1949) (1908) [hereinafter CANONS].
23. See Jones, supra note 21, at 496 (noting that the 1908 ABA Committee Report pays tribute to the Alabama Code by stating: "The foundation of the draft for canons of ethics, herewith submitted, is the code adopted by the Alabama State Bar Association in 1887, and which, with but slight modifications, has been adopted in eleven other states.").
25. Geoffrey C. Hazard, Jr., Lawyers and Client Fraud: They Still Don't Get It, 6 GEO. J. LEGAL ETHICS 701, 705 (1993) (stating that the 1908 Canons were "a professional credo but not a set of legal obligations"). Note that the Preamble to the 1908 ABA Canons clarifies that they were adopted "as a general guide." CANONS, supra note 22, at 2.
26. Zacharias, supra note 20, at 338; see also Hazard, supra note 1, at 1250 (stating that the 1908 Canons had "no direct legal effect"); Hazard, supra note 25, at 703 (stating that "[u]ntil the promulgation of the bar-sponsored Code of Professional Responsibility in 1970, the courts were the primary source of the law governing lawyers").
27. See Moulton, supra note 11, at 86; see also WOLFRAM, supra note 7, § 2.6.1, at 50.
“guides for the basis of discipline”), the vagueness, generality and precatory nature of the Canons rendered them ineffective as disciplinary standards.

By 1964, following mounting complaints about the Canons’ vagueness and ineffectiveness as disciplinary standards, and concerns regarding possible loss of self-regulation, the ABA began a rule study that led to the adoption of the *Model Code of Professional Responsibility* (“Model Code”) by the ABA House of Delegates in August, 1969. The Model Code is a hybrid aspirational-disciplinary ethics code. As its Preamble states: “The Model Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor.”

To accomplish the twin goals of professional guidance and discipline, the Model Code is broken into three parts: Canons, Ethical Considerations, and Disciplinary Rules. The Canons provide axiomatic norms stating general standards of lawyer conduct. The Ethical Considerations state aspirational objectives toward which lawyers should strive. The Disciplinary Rules, however, are mandatory in nature, stating minimum conduct below which no lawyer can fall without being subject to disciplinary action. The Disciplinary Rules are thus the first unified codification of black-letter standards intended to operate as disciplinary law over lawyers. They began what Professor Geoffrey C. Hazard, Jr. has called the “legalization” of the profession’s disciplinary standards.

Although initial reaction to the Model Code was favorable, with forty-nine states adopting it with little amendment, the significance of enforceable disciplinary standards lead to increased scrutiny and criticism of the Model Code by commentators and the states. There was disagreement over the substance of the Disciplinary Rules and concern

29. See Moulton, supra note 11, at 86.
30. See Zacharias, supra note 20, at 338-39; see also Moulton, supra note 11, at 88 n.57.
31. See Moulton, supra note 11, at 87.
33. See id. prelim. statement.
34. See id.
35. See id.
36. See id.
37. See Moulton, supra note 11, at 88.
38. See id; see also Hazard, supra note 1, at 1249.
39. California was the lone exception in substantially reworking the Model Code when it adopted its *California Rules of Professional Conduct* in 1975.
40. See Moulton, supra note 11, at 88; Zacharias, supra note 20, at 339.
that the Canons and Ethical Considerations were being used inappropriately to discipline lawyers.  

In 1977, after a series of amendments to the Disciplinary Rules failed to stem mounting criticism, the ABA appointed a new committee, the Kutak Commission, which developed the ABA Model Rules of Professional Conduct ("Model Rules") that were adopted in 1983. Structurally, the Model Rules did away with the Canons and Ethical Considerations found in the older Model Code. As a result, the Model Rules create an undiluted, unequivocal disciplinary code that is presented in traditional restatement form.

The Model Rules were controversial and debated heavily from the start. Unlike the Model Code, which was adopted by the ABA House of Delegates unanimously with no amendments, the Model Rules were amended prior to their adoption by a divided House of Delegates. The Model Rules were not adopted by the states in the same unquestioning manner as was the Model Code. Although thirty-nine states today have adopted some form of the Model Rules, every adopting state has made modifications to the Model Rules. As a result, the initial ABA goal of a national, uniform ethics code for lawyers has not been met, and in fact appears prejudiced by the ABA's adoption of the Model Rules.

Today, the Model Rules are under comprehensive amendment yet again. The ABA's Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") has presented its
recommended Model Rule amendments to the ABA House of Delegates for consideration and vote in August 2001.\textsuperscript{50}

The most recent amendment process has been arduous. The Ethics 2000 Commission is credited for its willingness to address (and accept outside input on) many difficult and controversial rule issues.\textsuperscript{51} There is significant interest around the country in the Commission's work from both inside and outside the legal profession, which is a tribute to the increased importance and impact of the professional responsibility rules. When the Commission's proposed rule amendments finally did reach the ABA House of Delegates, a spirited floor debate occurred.\textsuperscript{52}

It is clear that controversy and debate grew within and without the legal profession as the professional responsibility rules evolved from hortatory, aspirational guidelines into enforceable, black-letter disciplinary standards.\textsuperscript{53} Once it became apparent that the rules had real disciplinary consequences, scrutiny and dissent increased dramatically.\textsuperscript{54} The substantive content and the specific wording of the rules became extremely important, as the rules now resulted, and were intended to result, in professional discipline.\textsuperscript{55}

Additionally, state courts now began to apply disciplinary rules in the civil context, in order to set standards of care regarding lawyers' duties to clients.\textsuperscript{56} Disciplinary rule-based standards are applied regularly today in malpractice actions, disqualification actions, and attorney-client fee disputes.\textsuperscript{57} As such, both the Disciplinary Rules and the Model Rules have effectively "legalized" lawyer regulation, dramatically impacting both disciplinary and civil law relating to lawyer conduct in this country.\textsuperscript{58}

B. Professionalization of State Disciplinary Systems

Thirty years ago, the ABA Special Committee on Evaluation of Disciplinary Enforcement ("Clark Committee") conducted the first

\textsuperscript{52} See id.
\textsuperscript{53} See Moulton, supra note 11, at 88-89.
\textsuperscript{54} See id. at 89.
\textsuperscript{55} See id. at 89-90.
\textsuperscript{57} See Davis, supra note 51.
\textsuperscript{58} See Hazard, supra note 1, at 1249.
national examination of lawyer disciplinary procedures in the United States. The Clark Committee published its report, Problems and Recommendations in Disciplinary Enforcement ("Clark Report"), in 1970, just one year after the Model Code was adopted by the ABA.

The Clark Report, which was published following a three-year study, clarionned "the existence of a scandalous situation that requires the immediate attention of the profession." The Clark Committee found that disciplinary action was "practically nonexistent in many jurisdictions," that practices and procedures were "antiquated" and that many disciplinary agencies had "little power" to take effective disciplinary action against errant lawyers. The Clark Committee concluded, without reservation, that the state of then current disciplinary enforcement was "failing to rid the profession of a substantial number of malefactors."

The Clark Committee found, as a key problem, that state disciplinary systems were too decentralized. Local disciplinary grievance committees, run by state and local bar associations, frequently required members of the local legal community to discipline each other, resulting in friendly outcomes for local lawyers. Even local courts, when disciplinary cases were referred, showed reluctance to impose substantial discipline on hometown lawyers. The Clark Committee found the public's lack of confidence in lawyer disciplinary systems well-founded, where complaints against lawyers were regularly being processed and resolved by professional colleagues of the lawyers "who often are intimate friends of the accused." Further, decentralization resulted in uneven discipline, undermining the confidence of the public, as well as the legal community.

Decentralization was not the only problem, however. The Clark Committee found that "[l]ack of adequate financing [was] the most

59. See COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, ABA, REPORT xix (1991) [hereinafter MCKAY REPORT].
60. See generally SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, ABA, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970) [hereinafter CLARK REPORT].
61. Id. at 1.
62. Id.
63. Id. at 3.
64. See id.
65. See id. at 5.
66. See id.
67. Id.
68. See id. at 5-6.
universal and significant problem in disciplinary enforcement." Lack of financing resulted in reliance on volunteer attorneys, who could not "devote the same time and attention to processing complaints as the full-time professional." The Clark Committee asserted that lack of an adequate professional staff presented "an insurmountable obstacle to effective disciplinary enforcement."

To address these problems, the Clark Committee recommended that state disciplinary systems be centralized under the exclusive disciplinary jurisdiction of the states' highest courts. Given proper funding, the Clark Committee asserted that this approach would result in more substantial, fair and uniform disciplinary enforcement. It further asserted that centralization would facilitate the availability of professional staff and financial resources for effective enforcement.

In 1989, the ABA established the Commission on Evaluation of Disciplinary Enforcement ("McKay Commission"), charging it to study the functioning of lawyer disciplinary systems in the United States. The McKay Commission was also instructed to examine the recommendations of the Clark Committee and the results of the reforms that grew out of the Clark Committee's recommendations.

In 1991, the McKay Commission published its report. The McKay Commission found that much progress had been made since the Clark Report. The McKay Commission reported that, "almost without exception, disciplinary systems [were now] staffed by full-time professional disciplinary counsel having statewide jurisdiction."

The McKay Commission also found that disciplinary funding had increased significantly, that Clark Report recommendations were now

69. Id. at 19.
70. Id.
71. Id. at 48. The Clark Committee noted that, at the time of its study, there were few states that had professional staff of more than a single attorney. See id. at 57.
72. See id. at xiv. Although the issue of who should have ultimate authority over lawyers has been debated extensively in recent years, a full discussion of this issue is beyond the scope of this Article. However, the Clark Committee does provide an expanded argument as to why the courts, and not the legislative or executive branches, should set the standards of lawyer conduct and oversee lawyer discipline. See id. at 10-18.
73. See id. at xiv.
74. See id. at 29.
75. See MCKAY REPORT, supra note 59, at xix.
76. See id.
77. See id.
78. See id. at iii.
79. Id.; see also id. at 3.
80. See id. at 63.
implemented in most jurisdictions, and that a majority of states had adopted some version of the Model Rules. In addition, several prominent national organizations now exist to formulate standards, conduct research, compile statistics, and consult with state disciplinary officials.

However, all was not well. In spite of these increased disciplinary efforts, the public continued to be critical of lawyer regulation. The McKay Commission reported "recurring" efforts to transfer regulatory authority over lawyers from the judicial to the legislative or executive branches of government. The McKay Commission found that the public held a "growing mistrust of secret, self-regulated systems of lawyer discipline."

The McKay Commission felt this mistrust was caused by a number of factors, including increased numbers of lawyers, aggressive marketing of legal services by lawyers, increased expectations of consumers, and the continuing inability of disciplinary systems to satisfactorily address consumers complaints. The McKay Commission noted that where elected bar officials controlled all or parts of a state disciplinary system, an apparent conflict of interest was created "regardless of the actual fairness and impartiality of the system." The McKay Commission ultimately reported that the public viewed lawyer discipline as "too slow, too secret, too soft, and too self-regulated."

81. See id. at iii, 64. However, while most states had adopted "many" of the McKay Commission's recommendations, a "significant minority" still performed some disciplinary functions at the local level. See id. at 64.
82. See id. at iii.
83. See id. at xx. National organizations mentioned by the McKay Commission included the ABA Center for Professional Responsibility, the ABA Standing Committee on Professional Discipline, and the National Organization of Bar Counsel. See id.
84. See id. at iii.
85. See id.; see also id. at xxi.
86. Id. at iii.
87. See id. at iii, xx, xxiii. The Commission felt, however, that many clients had unreasonable expectations of success in their cases that, once thwarted, resulted in unfair criticism of their lawyers. The Commission stated that many negative perceptions of the profession were "out of proportion to reality." Id. at xxiii.
88. See id. at v, xxi, xxii, xxiv. The Commission reported that some jurisdictions dismiss up to ninety percent of all complaints. See id. at xx. While most states now disciplined serious misconduct effectively, the McKay Commission found that existing disciplinary systems were too narrowly focused on violations of professional responsibility rules, and did not address common client complaints concerning lawyer delay, lawyer overpricing or overbilling, lawyer negligence, or lawyer incompetence. See id. at xxiv, xx.
89. Id. at 19.
90. Id. at xxiv.
In response, the McKay Commission recommended that many of the Clark Report’s previous professionalization recommendations and reforms be continued and enhanced. In particular, it emphasized and strengthened the Clark Report’s recommendations that the judiciary exercise exclusive control over the lawyer disciplinary system, and that the disciplinary system be weaned of bar association participation in order to avoid any public appearance of conflict of interest or impropriety.

To further these goals, the McKay Commission recommended that all state disciplinary officials be appointed by the state high court and given sufficient independent authority to conduct discipline functions impartially. It also recommended that elected bar officials, and their appointees and employees, provide only those administrative and other services that would support operation of the system without impairing the independence of disciplinary officials. In the McKay Commission’s view, bar officials should have no investigative, prosecutorial, or adjudicative functions in the disciplinary process.

Today, as a result of the groundbreaking recommendations of the Clark Committee and McKay Commission (as well as the considerable efforts of state courts, bar associations, and volunteer attorneys), state disciplinary systems are significantly more professionalized, with increased funding and full-time professional staff. This appears to hold true, as a general rule, in both unified and voluntary bar association states.

While there is still considerable variation in state disciplinary systems, it is undeniable that attorney discipline in the United States has been reshaped dramatically over the past thirty-five years. Today, black-letter disciplinary rules are regularly being applied by professional staff to discipline regulated lawyers. This shift has happened in a remarkably short time, well within the careers of many lawyers practicing today.

---

91. See id. at xxiii.
92. See id. at 1-6. The McKay Commission, like its predecessor, the Clark Committee, provides a spirited defense of the judiciary’s control over the regulation and discipline of lawyers.
93. See id. at 19-20.
94. See id. at iv, xi. This recommendation is provided in McKay Commission Report Recommendation No. 6. See id. at 21-22.; see also id. at 19 (Recommendation No. 5 (regarding the independence of disciplinary officials)).
95. See id. at 20 (Recommendation No. 5.1).
96. See id. (Recommendation No. 5.2).
97. See id. at 63.
98. See id.
III. TENSIONS FOR REGULATED LAWYERS: THE AUTONOMOUS PEER VERSUS THE MANAGED SUBJECT

A key consequence of these regulatory developments is that lawyers are increasingly perceived and treated by disciplinary systems as managed subjects rather than as self-regulating peers. This perception conflicts with traditional notions of autonomy operating within the legal profession. As volunteer participation is squeezed out of professionalized disciplinary systems, an increased sense of disenfranchisement and loss of autonomy is felt by practicing lawyers.99 Tensions exist between the professionalized disciplinary system’s goals and interests, and the membership’s goals and interests, in crafting, interpreting, and enforcing disciplinary rules and procedures.

A. The Lawyer as Autonomous Peer

The American legal profession envisions itself, with some measure of pride, as slow to change. It is a profession built upon tradition and precedent. One of the legal profession’s most cherished traditions is professional autonomy.100 Here, “autonomy” is used both in the group and individual sense, meaning self-regulation in the group sense, and independence in the individual sense.101

The American legal profession’s group tradition of self-regulation has sustained and rewarded it. The profession has defended self-regulation based upon (1) the learned nature of the practice of law (requiring that only those knowledgeable in law practice pass judgment), (2) the profession’s shared commitment to higher practice standards and ethical values, and (3) the need, in an adversarial system of justice, to maintain a judicial system that is not overborne by the legislative or executive branches of government.102 Internally, the profession uses the tradition of self-regulation to motivate its members to improve their competence, ethics, and professionalism.103 Externally, the profession uses the tradition to guard against outside control, especially control by the legislative or executive branches of government.104

99. See Hazard, supra note 1, at 1242.
100. See id. at 1240 (noting that like any other social institution the legal profession can be considered autonomous).
101. See id. (“Considered as autonomous, lawyers define their own identity, determine the nature of their work, and maintain the profession as an independent constituent in society.”).
102. See THE FUTURE OF THE CALIFORNIA BAR, supra note 10, at 103-04.
103. See id.
Related to this tradition of self-regulation is the profession’s tradition of personal independence, specifically independence of professional judgment on behalf of clients. A lawyer’s task is to provide clients with competent counsel and representation based upon the lawyer’s independent learning, experience, and judgment. Maintaining independence of professional judgment is considered essential to permit the lawyer to perform this task professionally and impartially, protecting the lawyer from outside, third-party influence, as well as from undue client influence.

Exercising independence of professional judgment fosters a strong sense of personal autonomy in lawyers. Lawyers regularly make tough judgment calls in representing clients. Lawyers are trained to make such judgment calls in a considered and impartial manner—attempting to do their best for clients within the bounds of the law and their professional duties. All lawyers recognize that this can be a difficult and lonely task, requiring a delicate and sometimes precarious balancing of competing interests and duties. It is a task that presents professional risk to the lawyer, but also one that promotes a sense of professional independence and character within the lawyer.

The exercise of independence of professional judgment helps a lawyer to reach difficult decisions by fostering professional autonomy. However, it also places the lawyer on the spot, by clarifying that the lawyer has used, or should have used, independent professional judgment in making decisions and providing counsel. Thus, the tradition of independence of professional judgment promotes not only the personal autonomy, but also the personal accountability of lawyers.

A consequence of this tradition is that lawyers are respectful of another lawyer’s judgment call, and tend to be deferential when asked to pass verdict upon it, in large part because they personally appreciate the practice complexities involved. Another consequence is that lawyers tend to anticipate and expect such respectful, deferential scrutiny from their own peers. Bad practice is never to be tolerated, but where a lawyer makes a difficult judgment call which turns out badly, some level of professional understanding and deference is expected.

The public has long believed that when it comes to lawyer discipline, a deferential, quid-pro-quo treatment exists, and that the legal profession has championed self-regulation in order to achieve and maintain such deferential treatment. A major impetus for the professionalization of state disciplinary systems has been the ongoing

105. See id. at 859-60.
public complaint that peer-driven, volunteer-lawyer disciplinary systems were far too lenient in visiting discipline on miscreant lawyers. In the public’s view, such leniency is a direct result of bar self-regulation, and the peer-review discipline system.

B. The Lawyer as Managed Subject

But now the regulatory pendulum has swung, and lawyer disciplinary systems are considerably more professionalized. What has happened to the legal profession’s traditions of group and individual autonomy? While disciplinary models vary considerably from state to state, it appears safe to say that regulated lawyers today are losing autonomy within to professionalized disciplinary systems, which tend to perceive and treat lawyers more as managed subjects rather than as autonomous, self-regulating peers.

From the outside, the legal profession may still appear to be completely self-regulating, with disciplinary systems and agencies operating under the aegis of state supreme courts. However, internally, regulation and discipline have changed. Regulators and the regulated are no longer cut from the same cloth. Disciplinary review and prosecution are now regularly undertaken by professional staff, instead of volunteer lawyers. Volunteer-driven disciplinary systems are a fading memory for lawyers and the organized bar.

Not surprisingly, with this change the goals and interests of regulators and the regulated have diverged, and tensions have increased. While both groups clearly seek an honorable profession that is legitimately respected by the public, the two groups have different interests in disciplinary rule drafting and enforcement.

All lawyers recognize that some level of professional regulation and discipline is necessary to provide public confidence in the policing of the bar. However, they are not eager to be overregulated or disciplined, whether for public relations value or otherwise. They are interested in disciplinary regulations that recognize and balance practice realities with professional duties. They have strong self-interest in insuring that disciplinary practices and procedures are fair and provide due process. They have a strong self-interest in being heard, and having

106. See CLARK REPORT, supra note 60, at 5.
107. See id.
108. See Hazard, supra note 1, at 1241.
109. See Moulton, supra note 11, at 96-99.
110. See, e.g., Wilkins, supra note 104, at 816 (noting lawyers’ need to balance their duties as both advocates and officers of the court).
their concerns addressed, in the creation, interpretation, and enforcement of disciplinary standards.

A successful professional system, however, is built upon the efficient and successful resolution of matters before it. With regard to the regulation and discipline of lawyers, the incentive within a professional system is cost-effective regulation, including the promulgation of professional rules of conduct and disciplinary procedure that will produce effective control over lawyer conduct, while simultaneously providing for efficient disciplinary prosecution of lawyers.¹¹¹

Once created, a professional system or agency has incentive to justify and continue its own existence. A professional lawyer disciplinary system is judged not only on the speed, cost, and quality of discipline it dispenses, but also on the overall quantity of discipline it dispenses. As such, professional managers have a strong self-interest in promulgating rules and procedures that produce exemplary results for their system or agency.¹¹² Such results can include greater amounts of successful disciplinary prosecutions, efficient use of disciplinary resources, lower recidivism rates for disciplinary offenders, and less public complaints regarding the disciplinary system and/or lawyers.

These interests increase the propensity of professional disciplinary systems to treat lawyers as managed subjects. They decrease the propensity to encourage volunteer lawyer participation in rule promulgation, interpretation, and enforcement processes, which can work to undercut and impede the system’s prosecutorial and regulatory objectives. Regulators are no longer peers of the regulated population of lawyers, and there is less allegiance as a result. Regulators increasingly have the courts, legislatures, and the public to answer to.¹¹³

Lawyers, however, have not lost their traditional desire for autonomy, and where they are not permitted autonomy in newly professionalized disciplinary systems, they have great incentive to retain meaningful input. The full-time disciplinary professionals who

¹¹¹ For an excellent article discussing the regulation of lawyer conduct through both disciplinary and civil means, see generally Wilkins, supra note 104. Professor Wilkins examines the limits that exist on a disciplinary agency’s ability to police all types of lawyer misconduct effectively, especially the misconduct of lawyers practicing in large corporate firms. Mr. Wilkins identifies and discusses other mechanisms by which lawyers are regulated in practice, such as court sanctions, agency penalties, malpractice suits, and client oversight. See generally id.

¹¹² See Moulton, supra note 11, at 98-99 (noting that after “disciplinary staffs became more professional, disciplinary rates and expenditures per lawyer rose dramatically, and use of sanctions short of disbarment became more prevalent”).

¹¹³ See, e.g., Combs, supra note 3, at 669-71 (citing the Office of Thrift Supervision, a legislative creation, as having oversight authority over attorneys involved in the thrift industry).
increasingly regulate practice generally do not practice law or otherwise share in the day-to-day experiences or pressures of the lawyers they regulate and discipline. Because of this, lawyers need disciplinary professionals that are in touch with and realistic about everyday legal practice and mores, so that there is some level of empathy and accommodation.

Lawyers also have a strong self-interest in insuring that disciplinary professionals do not promulgate harsh or excessive disciplinary rules or procedures in order to further system goals and objectives at the expense of regulated lawyers. As such, they need meaningful input into the professionalized system, so that their perspective is not only recognized and appreciated by professional staff, but also reflected in disciplinary rules and procedures. If lawyers cannot remain truly autonomous, and are in fact becoming managed subjects, it is clear that they have great incentive in being fully active and participatory managed subjects.

IV. VOLUNTEER LEGAL ETHICS COMMITTEES IN STATE DISCIPLINARY SYSTEMS

We focus on the role of volunteer lawyer ethics committees in this section for a number of reasons. First, we have personal experience with lawyer ethics committees on both the volunteer and staff side. In 1994-1995, one of us was Chair of the State Bar of California Standing Committee on Professional Responsibility and Conduct at the same time the other was staff counsel to that committee. During our tenure, we sometimes had strong disagreements on particular rule amendments and ethics opinions. Our experience has provided us with unique

114. See id. at 691-92 (comparing the Office of Thrift Supervision to an autocratic government where “the law-makers are different from those to whom the laws are addressed” (quoting NORBERTO BOBBITO, DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER 137 (Peter Kennealy trans., 1989))).

115. One example of conflicts that promote system objectives without regard to regulated lawyers and gives rise to self-interest is found in the comparison of the Office of Thrift Supervision’s “obligation to volunteer material facts” versus “the lawyer’s duty of partisan presentation of evidence, the rule of confidentiality, and the ideal of rigidly separate roles that is implicit in adversarial theory.” Id. at 689.

116. During the mid-1990s, we worked on numerous rule amendments and advisory ethics opinions. We disagreed on a number of occasions on both the substance and wording of proposed rule amendments and proposed ethics opinions. The results were mixed. For example, Ms. Langford supported the promulgation of a professional conduct rule that would regulate the conduct of law firms, while Mr. Bell opposed such a rule (the rule was not promulgated). Ms. Langford favored an ethics opinion which advised that, in some instances, a lawyer could share a legal fee with another attorney who was not an associate or employee of the lawyer, without first obtaining the client’s written consent. Although Mr. Bell opposed this position, the ethics opinion was published. See Cal. State Bar Formal Op. No. 1994-138 (1994). Even where we agreed on a proposed rule or opinion
perspective regarding the goals and interests of volunteer lawyers and professional staff, as well as the tensions that exist between these two groups.\textsuperscript{117}

A second reason we focus on volunteer lawyer ethics committees is the dense nature of professional responsibility law. It takes concerted effort to become and remain knowledgeable in this substantive field, which is evolving rapidly. Here, ethics committees represent a valuable source of knowledge and experience. They possess specialized expertise and insight concerning the development and application of legal ethics rules, statutes and case law in the disciplinary, criminal, and civil arena. Their expertise makes them obvious players in any state disciplinary rule promulgation or interpretation exercise. Importantly, for our purposes, their expertise lies in the area of regulatory tension identified in Part II.

Third, we focus on volunteer lawyer ethics committees because they present such a strong example of lawyers' autonomous conduct. Ethics committees are a true exercise in autonomy and professionalism, allowing volunteer lawyers (if permitted by their state's disciplinary system) to provide direct input into the very disciplinary rules that bind them, as well as into ethics opinions interpreting those rules. How these acts of autonomy are recognized (e.g., permitted, encouraged, financed, staffed, and cited) by a professionalized disciplinary system is of interest, because it reflects on how that system perceives such lawyers—whether it regards them more as autonomous peers or as managed subjects.\textsuperscript{118}

A. Issues and Tensions Raised by the Participation of Ethics Committees in Professionalized Disciplinary Systems

A public relations issue is raised for professionalized disciplinary systems when volunteer lawyer ethics committees are permitted position, there was no certainty of result. For example, both of us favored promulgation of a professional responsibility rule that would require a lawyer to place advance fee payments in a client trust account. (The proposed rule did not go forward following membership outcry.) Both of us opposed a trial publicity rule unless it was limited expressly to jury situations. See Cal. Rules of Prof'l Conduct R. 5-120 (2000) (applying the trial publicity rule more broadly to any "adjudicatory proceeding").

117. We believe our insights are valuable even with regard to professionalized systems that do not necessarily mirror California.

118. In California, for example, the ethics committee does receive significant funding and staffing. However, the California State Bar Court does not cite, refer to, or expressly rely upon ethics committee opinions in its written decisions. See Background for the California State Bar Court, at http://www.calbar.org/Discipline/BKG.htm (last visited Mar. 18, 2002) (describing the State Bar Court "as the administrative arm of the California Supreme Court in the adjudication of disciplinary and regulatory matters involving California attorneys").
meaningful input into the system. The professionalization of lawyer disciplinary systems occurred following public outcry that peer-driven discipline systems were overly deferential and lenient to lawyers.\textsuperscript{119} Thus, the goal of state professionalism efforts was to separate and differentiate \textit{judicial} regulation from \textit{bar} regulation of the legal profession, in order to restore public confidence in the integrity of lawyer discipline and the legal profession.\textsuperscript{120}

As a result, there is risk that \textit{any} meaningful participation of volunteer lawyers in a professionalized disciplinary system will cause increased public suspicion, criticism, and scrutiny. The public's expectations of professionalism have been raised following forty years of disciplinary reform.\textsuperscript{121} Thus, a professionalized disciplinary system must consider and decide the nature of its relationship with a volunteer lawyer ethics committee. Similar decisions, of course, must be made regarding other volunteer or organized bar committees that participate in the disciplinary system.

A second issue is that volunteer lawyer ethics committees can make recommendations that conflict with or complicate goals and objectives set by the professional disciplinary agency.\textsuperscript{122} These committees, when permitted meaningful input, operate in the precise tension area identified in Part II (the disciplinary rule promulgation and interpretation area), where the interests and objectives of regulated lawyers often collide with those of professional staff.

Volunteer lawyers bring a significantly different viewpoint to the table than professional staff.\textsuperscript{123} The result is that there is often longer discussion and debate, and greater open dissent, during the rule and ethics opinion promulgation exercise. There can be an open sense of competition between volunteer lawyers and staff. We know this from personal experience, and our discussions with colleagues in other states lead us to believe that this phenomenon happens elsewhere. A state disciplinary system must therefore decide on the proper degree of

\begin{itemize}
  \item \textsuperscript{119} See Wilkins, \textit{supra} note 104, at 802.
  \item \textsuperscript{120} The McKay Commission, in Recommendation No. 6.1(f), stated that in order to enhance the independence of disciplinary counsel, they should "be prohibited from providing advisory ethics opinions, either orally or in writing." \textit{Mckay Report}, \textit{supra} note 59, at 21 (Recommendation No. 6.1(f)).
  \item \textsuperscript{121} See Zacharias, \textit{supra} note 20, at 357.
  \item \textsuperscript{122} See \textit{McKay Report}, \textit{supra} note 59, at 21 ("Disciplinary counsel must be insulated from political pressure from the public, members of the bar, and adjudicative officials of the disciplinary agency including members of the Court in order to provide effective and fair enforcement of the rules of professional conduct.").
  \item \textsuperscript{123} See id. at 20 ("Bar associations still can have a fundamental role to play in professional discipline, although not in the processing of cases.").
\end{itemize}
participation, as well as the proper structure for participation, by a volunteer legal ethics committee.

A third issue for professionalized disciplinary systems is cost. Where a volunteer lawyer ethics committee is supported physically within or by a professionalized disciplinary system (e.g., staffed, financed), there is a resource allocation issue presented. Although disciplinary funding has increased significantly, modern disciplinary systems still live in a world of finite resources.  

Using system resources to support a volunteer ethics committee diverts resources from direct disciplinary enforcement. There are both direct and indirect costs to absorb. Direct committee costs include travel, meetings, staffing, and administrative support. Indirect costs flow from committee recommendations, which can slow or add to the rule and ethics opinion promulgation process, forcing professional staff to expend additional resources. Thus, a professionalized disciplinary system must decide how to best prioritize and allocate resources to meet its disciplinary responsibilities (which itself takes time and expends system resources).

B. Benefits of Ethics Committees to Professionalized Disciplinary Systems

With these thorny issues raised by the participation of a volunteer lawyer ethics committee, what reasons would a professionalized disciplinary system have to permit, or even encourage participation? A volunteer lawyer ethics committee personifies the autonomous interests

124. See id. at 49.
125. See id. at 52 (describing some of the necessary funding of a disciplinary system consisting of a travel budget, field work, and “proactive research”).
126. These costs are similar to those already experienced by the disciplinary system. See id.
127. There are a number of ways this can happen. Recommendations of the ethics committee can result in additional meetings, additional drafts of proposed amendments, and additional public comment periods. This is especially likely where volunteers and professional staff are in disagreement over a proposed rule amendment or ethics opinion. Volunteer committees can recommend the adoption of new rules or rule amendments that professional staff does not support, and also oppose rules recommended by staff. Professional staff expends additional resources preparing work product for meetings, defining and defending staff positions, and achieving staff objectives. Ethics opinions promulgated by the committee, even if advisory, can be used by regulated lawyers to show their good faith compliance. As such, professional staff has an interest in insuring that ethics opinions do not provide incorrect or improper advice, or suggest improper lawyer conduct. Additional resources are spent monitoring opinions and providing staff input. See id. at 66 (explaining the “significant delay in the processing of cases and . . . waste of staff time in administering hearings” that occur in the several states that still schedule committee hearings for determining whether or not formal charges should be filed).
of regulated lawyers, and its participation would appear to increase tensions and difficulties for a professionalized disciplinary system.

We believe that it is in a professionalized disciplinary system's best interest to support the meaningful participation of a volunteer legal ethics committee. Recognizing again that state regulatory structures vary considerably, we believe that the participation of volunteer lawyers holding expertise in legal ethics is of great benefit to, and should be permitted and encouraged by, professional discipline systems. We believe that such participation, instead of increasing tensions, actually works in a healthy way to ameliorate tensions between a professionalized disciplinary system and its population of regulated lawyers. We also believe that a volunteer lawyer ethics committee can be useful to a professionalized disciplinary system in its relations with the public, the courts, and the legislative and executive branches of government.

The tensions and conflicts experienced by a professionalized disciplinary system in regulating and disciplining lawyers are deep-seated. On one hand, the organized bar and individual lawyers have a strong tradition of autonomy. On the other hand, the public expects a more professional, less lenient lawyer discipline system after thirty years of advertised reform.\footnote{128. See id. at 19 (stating that despite reforms enacted since 1970, "significant distrust of the fairness and impartiality of self-regulation" exists).}

This places a professionalized disciplinary system in a difficult position, and forces it to engage in a difficult balancing of interests. Its task is made more difficult where the organized bar holds management control within the disciplinary system, or is permitted significant access or input into the system. It is not surprising that these issues often take on a political bent. We believe that a volunteer lawyer ethics committee can ameliorate these tensions and conflicts, and help balance interests in a way that enhances the system’s credibility with both regulated lawyers and the public.

A volunteer lawyer ethics committee helps legitimize a professionalized disciplinary system in the eyes of regulated lawyers. It permits regulated lawyers to have a knowledgeable voice, and real input, into the disciplinary system, thereby providing them with a much-needed sense of autonomy. Managed subject/autonomous lawyer tensions can be reduced where a professionalized disciplinary system shows to the regulated membership that practicing lawyers, with expertise in legal ethics, have had significant input in crafting disciplinary standards.
An ethics committee can also be used effectively to help legitimize a professionalized disciplinary system in the eyes of the public, the courts, and the legislative and executive branches of government. Professional responsibility is a complex and rapidly developing area of the law. A broad-based, volunteer committee with expertise in professional responsibility law is an asset to a professionalized disciplinary system, because the committee can be used to support the argument that the professionalized disciplinary system is the proper institutional player to consider and develop new disciplinary rules and standards. Critical to this argument, however, is that the committee have public membership.

A diversified, expert committee helps show the public, and the other institutional players, that the professional discipline system is committed to a truly balanced, expert review of proposals, which provides much-needed credibility to it. It shows that the professionalized disciplinary system possesses the necessary expertise and perspective to do the job competently and fairly. It helps the professionalized disciplinary system maintain greater control, and greater power, in the rule promulgation and regulatory process.  

In the end, however, the major reason to encourage the participation of a volunteer ethics committee is the internal expertise and perspective it brings to a professionalized disciplinary system. A volunteer ethics committee gives a professional disciplinary agency a critical window into current legal practice, where disciplinary staff no longer engages in private law practice. It helps sensitize professional staff to practice realities and compliance difficulties, as well as to issues caused by the application of disciplinary standards in the civil context.

A volunteer lawyer ethics committee helps professional staff keep up with current developments in the law. It affords professional staff with a knowledgeable sounding board to discuss and examine current rule interpretation and enforcement issues, proposed rule amendments, and new professional responsibility and legal ethics concepts. Where public membership is encouraged, it provides both professional staff and volunteer lawyers with necessary client and public perspectives on the legal profession and lawyer discipline.

129. It should be emphasized that in seeking to create a diverse ethics committee which includes public membership, care should be taken to ensure that committee members have a high level of expertise in legal ethics, or else there is risk that the ethics committee’s value and credibility as an expert resource can be lost. It is important to remember that legal ethics has become a major substantive field of practice within the past fifteen years. Ethics committee members must be up to date on their substantive knowledge of this rapidly evolving field of law.
A volunteer lawyer ethics committee benefits a professionalized disciplinary system because it provides an effective mechanism for the system to engage in a cross-fertilization of ideas and perspectives. It permits both regulated lawyers and the public to become invested players in the professionalized disciplinary system, and ameliorates traditional tensions in a healthy way. Ultimately, we believe that it facilitates the promulgation of better-considered, better-balanced rules and ethics opinions, which is in everyone’s best-interest.

V. CONCLUSION

Professionalized disciplinary systems, which tend to perceive regulated lawyers as managed subjects rather than as autonomous peers, should support and encourage the meaningful participation of volunteer lawyer ethics committees. Such committees perform a critical balancing of agency, membership, and consumer interests necessary to promulgate well-considered, balanced rules and interpretive ethics opinions.

Professionalized disciplinary systems should provide adequate financial and staff support to volunteer lawyer ethics committees. They should permit and encourage ethics committees to make meaningful contributions to the promulgation, interpretation, and enforcement of disciplinary rules. They should publicize those contributions, so that the regulated membership, the public, and other institutional regulatory players can appreciate and benefit from what has occurred. They should provide committees with appropriate funds and administrative support necessary to conduct empirical studies and surveys, develop and publish educational materials, and perform continuing legal education and other educational outreach to regulated lawyers and the public. In this way, professionalized disciplinary systems can remain current and enhance expertise, maintain relevance with regulated lawyers, and maintain a prominent role as an institutional player in the promulgation of disciplinary rules.

Disciplinary systems should encourage a spectrum of committee membership that is reflective of the regulated population of lawyers, and should also encourage meaningful public membership. By doing so, professionalized disciplinary systems can strengthen their ties, as well as their credibility, with regulated lawyers and the public. They will enhance the membership’s sense of autonomy and self-regulation, and help reduce public skepticism regarding lawyer discipline.