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THE MAJOR PROBLEMS OF THE LEGAL PROFESSION DURING THE SEVENTIES

by

Paul Carrington*

I. The Appointment of Three Highly Important Committees of ABA in 1964-1965

II. Minimum Standards for the Administration of Criminal Justice

III. The Code of Professional Responsibility
   A. The Code as a Model for Adoption
   B. Four Amendments to Canon 2 of the Code
      The Amendment of 1970
      The Amendment of 1974
      The Amendment of 1975
      The Amendment of 1976

IV. The New Antitrust Suit—United States v. American Bar Association
   A. The Suit as Filed was Ill-Timed
   B. The Suit as Filed was Intemperate
   C. The Suit as Filed was Ill-Conceived
   D. Another Suit in the Supreme Court

V. Availability of Legal Services
   Lawyer Referral Services
   Specialization
   Legal Assistants
   Prepaid Legal Cost Insurance
   Group Legal Services
   Legal Defenders
   Institutional Advertising
   Legal Aid
   Miscellaneous Other Devices for Promoting Availability

VI. Conclusion

I have been telling my classes on “The Legal Profession” at Southern Methodist University that there have been two periods of most significance in the history of the legal profession in America, each period really revolutionary in character. The first was the decade of the Seventies, the 1870’s; the second is another decade of the Seventies, the 1970’s.

In 1870 the Association of the Bar of the City of New York was organized for the purpose of promoting, educating, and developing its members. Repeated scandals involving state, county, and city officials, and the conduct of trial judges in New York City brought about the creation of the new City Bar.1 William M. Everts, who was counsel to Andrew Johnson during his impeachment trial and served as Attorney General of the United States, was

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665
elected the first president of the new City Bar. Leaders of the bar, Samuel J. Tilden especially, brought proceedings against judges and officials who were deemed recreant. The first years of the ensuing litigation resulted in checkered successes. Hung juries, partial successes, and serious disappointments were suffered repeatedly. Before the City Bar celebrated its twenty-fifth anniversary in 1895, however, the reform movement had been initiated and had accomplished much. Publicity about the organization of this new City Bar had much to do with the organization of bars in ten states during the 1870's, and twenty other states in the 1880's. In July 1878 these developments resulted in the issuance of a call for the organization of the American Bar Association by fourteen distinguished lawyers from that many states. Simon E. Baldwin, a professor at the Yale University Law School, William M. Everts of New York, and Benjamin H. Briscoe of Kentucky, later the first president of ABA, and others attended the first meeting at Saratoga Springs, New York, in August 1878. Seventy-four lawyers from twenty-one states signed the roll of membership during that meeting. Meetings of the new association were held annually in Saratoga Springs for the first twenty-five-year period. By 1902 the Association had become a national organization attracting distinguished personnel to positions of leadership in the profession and conducting meetings in various cities throughout the country. The organized bar became the voice of the legal profession and first learned to speak in the 1870's.

By 1970 the rapid rate of change affecting all aspects of American life had taken hold of the lawyers of America individually and their organized bar. They had become aware that their profession was in the midst of revolutionary changes.4

I. THE APPOINTMENT OF THREE HIGHLY IMPORTANT COMMITTEES OF ABA IN 1964-1965

During the past twelve years the legal profession has made a proud record in facing and attempting to resolve its problems of these changing times. The fact that the profession has done so well is due primarily to the foresight and leadership twelve years ago of Lewis F. Powell, who became president of ABA in 1964, and is now an Associate Justice of the Supreme Court. Plans had been formulated by Lewis F. Powell for meeting the crisis that was approaching the profession. His plans were unfolded at his induction as president of ABA when he said:

The following will receive top priority: (1) a comprehensive reevaluation of the ethical standards of our profession; (2) an acceleration and broadening of efforts—already having high priority—to assure the availability of legal services, in both civil and criminal cases, to all who need them; and (3) the launching and financing of the newly authorized Criminal Justice Project, which is charged with the task of formulating minimum standards for the administration of criminal justice—standards which will preserve a vigilant concern for protecting the rights of persons accused of crime, and at the same time assure that law enforcement is not

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2. 1 A.B.A. REP. 3 (1878).
3. Id. at 40. No Texan was a member of the Council of the new Association or a member of any of its committees. Id. at 33-39.
unduly hampered in protecting the rights of society against those who would prey upon it. 5

In August 1965, at the conclusion of his administration, President Powell delivered the annual address of the president, “The State of the Legal Profession,” and said:

The practice of law is not immune to the revolutionary social and technological changes that characterize our time. . . . Despite the high level of lawyers’ competency, their vital role in society and their many public contributions, the disquieting fact remains that the public’s opinion of lawyers is not reassuring. Opinion surveys show that in ‘general reputation’ lawyers rank below other major professions. Much of this vague uneasiness about lawyers has existed for centuries and is due to inevitable misconceptions about the role of lawyers in the adversary system. But much is also attributable to a failure to conform to ethical standards and to maintain adequate professional discipline. It may also reflect the present admitted gap in making legal services available to all who need them. . . . Upon assuming the Presidency last year I suggested that the top priorities for the year should include (i) an acceleration and broadening of efforts to assure the availability of legal services, in both civil and criminal cases, to all who need them; (ii) a comprehensive re-evaluation of the ethical standards of our profession; and (iii) the launching and financing of a project to formulate minimum standards for the administration of criminal justice. 6

With the requested assistance of the next two incoming presidents of ABA, President Powell appointed three committees: Availability of Legal Services, Evaluation of Ethical Standards, and the Project for Criminal Justice. Each of the new committees was assigned duties and undertook laborious tasks. Each worked over a period of years and by the beginning of the seventies had completed the assigned duties. Each made recommendations which were published and widely distributed after being acted upon by the House of Delegates; by 1970 their implementation throughout the country had begun.

II. MINIMUM STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE

The work completed under the guidance and direction of the last named committee appointed by President Powell has been considered by many to involve the accomplishment of the most important and far-reaching project ever undertaken by the organized bar of America. Chief Judge J. Edward Lumbard of the Second Circuit Court of Appeals headed the committee until overwork forced his resignation in 1968. He was succeeded by United States Court of Appeals Judge Warren E. Burger who resigned when confirmed as Chief Justice in 1969. Chief United States District Judge William J. Jameson of Montana, a former president of ABA, then became chairman of what by then was known as the Commission of Criminal Justice. The large number of other distinguished members of this Commission and its seventeen subcommittees are too numerous to list. For their services on this project Judge Lumbard and Judge Jameson were each awarded the American Bar Medal, the highest honor that ABA bestows. Each of the seventeen task forces that

were organized published a tentative report. These reports reflected thorough research and careful analysis on each recommendation. Each tentative report was distributed widely among lawyers, judges, and teachers of law. Every person requesting a copy was furnished one without charge. In the light of all the suggestions received for improvements or changes in each tentative report, the members of that task force produced a final report. All sixteen final reports received the approval of the House of Delegates of the American Bar Association. The vote in each instance was by overwhelming majority and in most instances was unanimous. These actions of the House of Delegates have been printed and widely distributed. ABA has undertaken to implement all of the recommendations in all of the areas and to urge all state bars to promote the changes in the rules or the state statutes necessary to put these minimum standards in effect. Great progress has been made. The Section of Criminal Justice of ABA is continuing its efforts to implement these standards. In his annual report to the ABA Convention in Atlanta in August 1976 President Walsh referred to such activity in all fifty states, "with thirty states having made significant progress in implementation." Complete implementation in all states is in prospect. When these standards have been implemented with such changes as the procedures and history of the state may dictate, many believe that fair criticism of criminal procedures, which in recent years has been so widespread, will be reduced to a minimum. Although the legal profession has been responsible for delays and inadequacies in criminal prosecution, the profession can no longer be blamed for lack of leadership or effort in finding answers for repetitive crime waves. One of the most persistent grounds asserted for moral or ethical inadequacy in the legal profession is in the process of being eliminated and to a very great extent has been eliminated.

7. These initial tentative reports on each of the seventeen subjects were published in the following order:

- **1966:** Fair Trial and Free Press
- **1967:** Standards Relating to Post-Conviction Remedies
- **Standards Relating to Pleas of Guilty**
- **Standards Relating to Appellate Review of Sentences**
- **Standards Relating to Speedy Trial**
- **Standards Relating to Joinder and Severance**
- **Standards Relating to Sentencing Alternatives and Procedures**
- **1968:** Standards Relating to Pretrial Release
- **Standards Relating to Trial by Jury**
- **Standards Relating to Electronic Surveillance**
- **1969:** Standards Relating to Criminal Appeals
- **Standards Relating to Discovery and Procedure Before Trial**
- **1970:** Standards Relating to Probation
- **Standards Relating to the Prosecution Function and the Defense Function**
- **1971:** Standards Relating to The Judge's Role in Dealing with Trial Disruptions
  (This report was in the following year incorporated into the report below mentioned on "The Function of the Trial Judge")
- **1972:** Standards Relating to the Urban Police Function
- **Standards Relating to the Function of the Trial Judge**

A single volume containing all of the sixteen final reports has been published by ABA.

The new administration of the State Bar of Texas, which took office in July 1976, should appoint a new blue-ribbon commission to study and recommend to the state bar board of directors all appropriate amendments to Texas statutes and rules in order to ensure the assimilation of the new Minimum Standards of Criminal Justice with whatever modifications or omissions deemed proper in light of Texas experience. Additionally, all existing state bar sections and committees should be assigned the duty to work with this new commission under procedures established by the board of directors. Thus, the board will have the benefit of the simultaneous submission of each new recommendation of that new commission and each section and committee with present jurisdiction over the subject matter of each commission recommendation.

III. THE CODE OF PROFESSIONAL RESPONSIBILITY

The second committee named by President Lewis F. Powell, which was a blue-ribbon committee,9 was given the task of modernizing the ethical standards of the legal profession. The chairman of this committee received the ABA Award of Merit in recognition of the outstanding services of all members of this committee under his leadership. To find a better qualified or more truly representative group of eleven richly experienced men in our profession for this service would have been very difficult. One was a Justice of the Supreme Court retired, two were former presidents of the American Bar Association and two have since served as president, three were professors of law of national distinction, and each of the others had served notably in varying capacities in the organized bar. The task that they assumed in 1964 involved consideration of the Canons of Professional Ethics, which had been adopted first by ABA in 1908 and to which thirty-four amendments were made.10

The original Code of Ethics of ABA, as adopted in 1908, was based principally on an Alabama State Bar Association Code adopted in 1887, which was formed largely from the lectures of Judge George Sharswood of Alabama before the students of the University of Pennsylvania.11 By 1908 similar codes had been adopted in eight states. As a model for them, and especially for the states that had not adopted a code, the American Bar Association adopted a preamble and thirty-two canons which were hortatory in language. The purpose of the Code was stated in the preamble.12

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9. The chairman of this committee was Edward L. Wright. The members were: Professor A. James Casner, Glenn M. Coulter, E. Smythe Gambrell, Benton E. Gates, William H. Morrison, Dean John Ritchie, Sylvester C. Smith, Lawrence E. Walsh, John G. Weinmann, Sherman Welpton, and Charles E. Whitaker. Professor John F. Sutton, Jr., served as Reporter for the Committee.

10. H. DRINKER, LEGAL ETHICS 309-25 (1953). The original Code and all of its amendments, with the history of each amendment, are presented by the chairman of the Standing Committee of ABA on Professional Ethics, followed by a summary of all opinions to that date by the ABA Standing Committee on Ethics interpreting the Canons of the Code of Ethics.

11. G. SHARSWOOD, PROFESSIONAL ETHICS (1854).

12. This preamble, which remained unchanged until the Code of Ethics was superseded by the Code of Professional Responsibility that became effective January 1, 1970, provided in the first paragraph:

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent,
The origin of the 1908 version of Canon 27\textsuperscript{13} may be found in England during the later Middle Ages. With the division of the English bar into barristers and solicitors, traditionally the barristers in England did not compete with one another, did not solicit employment in any way, and, indeed, performed the expected services without any agreement as to the pay that they were to receive, leaving that decision to the client served or his solicitor.\textsuperscript{14} Mr. Drinker, in the introduction to his book on legal ethics, which served the practicing lawyers of America as their "bible" on that subject, after citing Dean Pound, referred to the young men in the pre-revolutionary days who went to England from Boston, New York, Philadelphia, and the South to study at the Inns of Court and who on their return became the leaders of the bar. They brought back with them these traditions which Mr. Drinker defines in distinguishing the legal profession from any business enterprise:

The primary characteristics which distinguish the legal profession from business are:

1. A duty of public service, of which the emolument is a by-product, and in which one may attain the highest eminence without making much money.
2. A relation as an 'officer of court' to the administration of justice involving thorough sincerity, integrity and reliability.
3. A relation to clients in the highest degree fiduciary.
4. A relation to colleagues at the bar characterized by candor, fairness, and unwillingness to resort to current business methods of advertising and encroachment on their practice, or dealing directly with their clients.\textsuperscript{15}

Through many decades the substance of Canon 27 has been one of the basic principles of the legal profession, as illustrated many times by opinions published by the ABA Committee on Legal Ethics.\textsuperscript{16} There had been no opinions in conflict with this principle of the profession when the new committee undertook the formulation of a new Code of Professional Responsibility.

On the subject of advertising and publicity and every other subject dealt with by the previous Code of Ethics, the Special Committee of ABA with a background of thorough research based its work on the basis of the existing principles of the profession. In the preface to the new Code as promulgated by the committee, reference was made to the heavy reliance placed upon the monumental work of Henry S. Drinker and the opinions of the committee of ABA on Professional Ethics. This author was privileged to sit with the special

\textsuperscript{13} The first paragraph of Canon 27, as adopted in 1908, related to public advertising. The second paragraph of Canon 27 related to permitted publication of biographical data in law lists for use by lawyers only, and the third and last paragraph related to use on their letterheads and shingles by admiralty, patent, and trademark lawyers of that designation of their specialty.

\textsuperscript{14} See also \textit{id. ch.} 8, at 210-15.

\textsuperscript{15} Opinions 26 and 27, 86-95, 149 and 150 are among other opinions summarized by Drinker. See \textit{id.} at 285, 288, 289, 290.
committee as the liaison representative of the Special Committee on Availability of Legal Services. During those many meetings no member of that committee urged the modification or abandonment of the principles embodied in the old Canon 27 except for the slight modification regarding lawyers limiting their practice or specializing as provided in the new Code of 1969 (DR 2-105(A)). Neither in the committee during its years of effort nor in the House of Delegates when it voted on adoption of the new Code did a single voice urge the deletion or modification of the profession’s traditional position on advertising and publicity. Instead, with unanimity the position was retained in the new Code which in the words of the preamble to the old Code provides that advertising should be “such as to merit the approval of all just men.”

After numerous meetings with professional groups about the country and many days of meetings, the committee unanimously proposed a code containing two sets of provisions: (1) Disciplinary Rules, which were mandatory in character and stated the minimum level of conduct below which no lawyer could fall without being subject to disciplinary action; and (2) Ethical Considerations, stated to be “aspirational in character” and to “represent the objectives toward which every member of the profession should strive.” The ethical considerations expressly were not mandatory and a violation of them expressly was not to become the basis of disciplinary action. 17

The purpose of the committee was to set forth all of the general principles of the profession with a new clarity by arranging the principles around one of nine new canons which were stated in a very brief and general statement. That brevity is illustrated by two of the canons which expressed two fundamentally important and new ideas not to be found in the predecessor Code of Ethics:

A lawyer shall assist the legal profession in fulfilling its duty to make legal counsel available. 18

A lawyer should represent a client competently. 19

The typical clarity with which general principles were presented in this new Code is best illustrated by the disciplinary rule defining “misconduct” to include the violation of any disciplinary rule in the Code. 20

Inasmuch as the wording of Canon 2 on “Availability” and Canon 6 on “Competency” contain much that is not to be found in the predecessor Code of Ethics, the assumption has been made that all rules placed under these two canons as disciplinary rules or ethical considerations were without precedent. The best illustration to the contrary is the inclusion under Canon 2 of disciplinary rules and ethical considerations relating to advertising and publicity. 21

17. See concluding paragraphs of the preamble and preliminary statement at the beginning of the new Code. ABA CODE OF PROFESSIONAL RESPONSIBILITY 1 (1975).
18. Id. Canon 2.
19. Id. Canon 6.
20. Id. Canon 1, Disciplinary Rule 1-102. [Disciplinary Rules are hereinafter referred to and cited as DR].
21. Id. DR 2-101 entitled “Publicity in General” and DR 2-102 entitled “Professional Notices, Letterheads, Offices and Law Lists.” The substance of these two rules is to be found in Canon 27 of the predecessor Code of Ethics. The Ethical Considerations [hereinafter referred to and cited as EC] under Canon 2, “aspirational in character” and non-mandatory, for the violation of which there may be no disciplinary action, are consistent with the Disciplinary Rules; EC 2-9 provides:
The Code of Professional Responsibility was first submitted for adoption to the House of Delegates of ABA at its annual convention in Dallas in August 1969. Adoption resulted from an overwhelming if not unanimous vote after the Availability Committee had proposed an amendment to the Code relating to group legal service provisions which was defeated by an overwhelming vote.

A. The Code as a Model for Adoption

With unusual promptness nearly all states adopted the new Code with only minor changes. Only three states failed to adopt the Code by August 1973, and each of them has since done so. Provisions of the statutes or rules of each jurisdiction within the United States. This committee submitted reports to the House of the thirty circuits of the state, shall be elected and that the board is authorized to make rules attorneys at law. The statutes in this chapter provide that a board of commissioners, one for each of the thirty circuits of the state, shall be elected and that the board is authorized to make rules for the practice of law, including express authorization to prescribe a code of ethics. When the State Bar of North Carolina became an integrated bar the statute amending this chapter provided that a council of the state bar should be elected and vested with authority subject to the foregoing changes suiting the local situation in each state, in all states of the union and in the District of Columbia, excepting only three states, California, Alabama, and North Carolina. The report expressed the view that the steps taken to procure adoption in each of those three states would meet later with success. Subsequent developments in each of these three states indicate that the prediction at that time by this committee was accurate.

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state and the District of Columbia now bear substantial resemblance to the ABA Code of Professional Responsibility.

Texas adopted the ABA Code of Professional Responsibility adopted by the House of Delegates in August 1969 and amended slightly in 197024 with very minor changes25 which had been proposed to the directors of the state bar by its committee. The report of the committee as published was approved by the board of directors of the state bar and submitted to the Supreme Court of Texas which approved submission to the members of the state bar for a referendum vote in October 1971.26 The Texas version of the Code was adopted by the affirmative votes of 10,269 Texas lawyers with 1,222 against.27 Although the ABA House of Delegates amended the Code of Professional Responsibility in 1974, 1975, and 1976, none of those amendments has yet been adopted in Texas.

B. Four Amendments to Canon 2 of the Code

The Amendment of 1970. The last three lines of DR 2-108(B) as adopted in 1969 were deleted by the House of Delegates in 1970 on recommendation of the Standing Committee of ABA on Ethics and Professional Responsibility.28 The three lines were not included in the ABA Code as adopted in Texas.

The Amendment of 1974. At the midwinter Houston, Texas, meeting of the ABA House of Delegates in February 1974 the Code of Professional Responsibility was amended to facilitate the operation of prepaid legal services or group legal services and to place specific limitations on groups rendering those services. DR 2-101 and DR 2-102 were amended slightly, while DR 2-103 was amended substantially.29 These amendments were adopted by the House of Delegates at Houston by a close vote and after an extended and heated and regulations pertaining to the practice of law and conduct of attorneys at law. Such rules and regulations are subject, however, to the approval of the Supreme Court of Alabama. The latest supplement to that volume of the Code of Alabama available for inspection by this writer contains the amendments or new laws adopted through 1973. Nothing in the pocket part amends these statutory provisions of 1958. Mr. Thomas M. Greaves, immediate past-president of the Alabama State Bar, stated in a telephone conversation with this author that Alabama adopted the ABA Code of Professional Responsibility in 1974, effective October I of that year, he added that some slight amendments have since been adopted in Alabama, but that in substance the ABA Code is in effect there.

Accordingly, as predicted by the ABA committee in February 1972, the Code of Professional Responsibility has been adopted now in every state of the Union substantially in the form that was adopted by the ABA:

24. See text accompanying note 28 infra.
26. Id. at 746.
27. Id. at 1052.
29. See volume of Reports to the House of Delegates at the Houston midwinter meeting in February 1974 as to proposals and as to the action taken by the House of Delegates. See also a summary report in 60 A.B.A.J. 448 (1974). The changes made at this meeting in the Code of Professional Responsibility were numerous, but the controversial change which had been the basis for extended argument and a close vote in the House of Delegates involved the provision in 2-103(D)(5)(A)(v) which read:

Any of the organization's members or beneficiaries is free to select counsel of his or her own choice, provided that if such independent selection is made by the client, then such organization, if it customarily provides legal services through counsel it presels, shall promptly reimburse the member or beneficiary in the fair and equitable amount said services would have cost such organization if rendered by counsel selected by said organization.
argument. Those individuals opposing the amendments contended that groups in which the attorneys rendering the services were chosen from "closed panels," panels chosen by the management of the group, should be given opportunities equal to the groups in which the services were rendered by attorneys chosen by the individuals being served, "open panels." 

In an article published in the July 1974 American Bar Association Journal, Deputy Assistant Attorney General of the United States Bruce B. Wilson urged that the Code as amended in 1974 involved discrimination between the two types of plans, thereby raising a problem under the antitrust laws of the United States. In the November 1974 issue of the American Bar Association Journal, Thomas E. Kauper, head of the Antitrust Division in the office of the United States Attorney General, and Joe Sims, Special Assistant to the Assistant Attorney General in the Antitrust Division, strongly urged their views that the Code as so amended contemplated antitrust violations. 

Later in 1974 ABA published a new edition of the Code of Professional Responsibility reflecting all amendments to that date. Included on the first page of that new edition was a special notice stating that ABA was aware that "certain amendments to the Code adopted in February 1974 may have raised complex questions of constitutional and statutory law" and that recommendations for the modification of such amendments were being studied for submission to the ABA House of Delegates at the earliest possible date.

The Amendment of 1975. Immediately after the Houston midwinter meeting, a special ad hoc committee was appointed consisting of leaders of both sides of the controversy on the open-panel issue debated in Houston. This committee reached a compromise satisfactory to both sides by giving equal treatment to both types of panels, but containing an important clause applicable to both. This compromise was reached in time for submission as an amendment to the Code at the February meeting of the House of Delegates in 1975. The House adopted it promptly.

In effect, this 1975 amendment to the Code superseded the 1974 amendment. By this 1975 amendment the House of Delegates adopted a minor amendment to DR 2-101(B)(6), a substantial revision of DR 2-103, a minor amendment to DR 2-104 and to "Definitions," together with a complete rewriting of the new Ethical Consideration 2-33 which was first added in 1974. Neither the 1974 nor the 1975 amendment modified the substance of Canon 27.

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31. Id. at 791.
32. Id. at 1491.
33. DR 2-103 as amended in 1975 provides in (D)(4)(e):
   Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.
34. ABA Midyear Meeting of 1975: Summary of Action by House of Delegates 4-8 (Feb. 1975).
35. Id.
which was carried forward into the 1969 Code in DR 2-101 and DR 2-102. The 1974 and the 1975 amendments related to group legal services and prepaid legal services and the choice of attorneys rendering those services and not to advertising or publicity. The Texas Bar should amend its Code by substantially adopting these 1975 amendments.

The Amendment of 1976. Before 1976 another controversy developed on amending the Code of Professional Responsibility with respect to restrictions on advertising and publicity by lawyers. Over a period of several months prior to the meeting of the House of Delegates in February 1976 there had been much discussion concerning the need to change the substance of Canon 27 of the old Code of Ethics, as repeated substantially in Canon 2 of the present Code.

In 1973 a subcommittee of the Senate Committee on the Judiciary of the United States was appointed and chaired by Senator Tunney of California with Senator Cook of Kentucky as the leading Republican senator of the committee. The chief interest of the committee was representation of citizens' interests by lawyers. After considerable publicity, hearings were commenced on September 19, 1973, on "Consumer Access to Representation and Minimum Fee Schedules."36 Consumers and those who had studied consumer problems, including attorneys who had helped solve those problems, were the first to be heard at the hearings of this subcommittee. Additional sets of hearing days were scheduled for discussing government regulation and subsidy of legal fees and "Reasonable Attorneys' Fee Awards."

At the outset of these hearings, Senator Tunney expressed clearly that he was primarily interested in minimum fee schedules of bar associations,37 and Senator Cook in a preliminary statement stated that he was interested in urging lawyers to improve the legal system by creating a more active awareness of their responsibilities to assure the availability of legal counsel.38 Walter P. Armstrong, Jr., Chairman of the Committee of ABA on Legal Ethics and Professional Responsibility, testified about an opinion rendered by his ABA Committee in 1957 which declared that ABA could not dictate to state and local associations the policies or procedures that they should adopt on minimum fee schedules.39 He stated that among other considerations for fixing a legal fee is "the customary charges of the bar for similar services." He emphasized the language of the opinion that such considerations were intended merely as guides in ascertaining the real value of the service. Additionally, reference was made to a letter entered into the record from the President of ABA, Mr. Chesterfield Smith, to Senator Tunney which assured the subcommittee full cooperation from ABA. In advance of these subcommittee hearings Senators Tunney and Cook jointly published their opinion on the prospective accomplishments of the hearings: "While it is recognized that

37. *Id.* at 2.
38. *Id.* at 6.
39. *Id.* at 127-28.
many of these matters fall within the traditional jurisdiction of and are under study by the organized bar, Congress can provide a valuable function by serving as a forum to inform the public about them.\footnote{Id. at 1550. This is quoted in the ABA editorial, 59 A.B.A.J. 1175 (1973). It is deemed worthy of mention in this connection that in the conference sponsored jointly by the American Assembly and ABA in 1968 on "Law in a Changing America" only one of a dozen speakers alluded to solicitation and advertising. That speaker was Dean Murrey L. Schwartz of UCLA Law School who entitled his paper "Changing Patterns of Legal Services." LAW IN A CHANGING AMERICA 114-24 (G. Hazard ed. 1968). In referring to solicitation and advertising in this paper Dean Schwartz said: Highly relevant to the unauthorized practice controversy are the professional restrictions against solicitation and advertising by lawyers. To the extent that the competitive entities do solicit and do advertise for business, it is clear that lawyers, as lawyers, will be at a disadvantage in attempting to obtain and retain that business, for the rules of the profession restrict or suppress the use by lawyers of these kinds of devices. Indeed, a frequently voiced argument in support of the unauthorized practice restrictions is the unfairness to the Bar which results from the ability of the other agencies to advertise and solicit. Id. at 114.}

During the hearings some witnesses discussed generally the availability of lawyers and especially minimum fee schedules. Except for tangential references by the assistant attorneys general, however, there was no discussion of provisions of the Code of Professional Responsibility that greatly limited advertising and publicity by lawyers.\footnote{Hearings 164 (statement of Acting Assistant Attorney General Bruce Wilson, accompanied by Lewis Bernstein and Keith Clearwaters, also of the U.S. Dep't of Justice). See also id. 174, reprinting Address of Thomas E. Kauper, "The Antitrust Bogey Man," delivered before the New York State Bar Association (discussing "possible avenues of enforcement, directions and procedures for the months to come" without mentioning any possible issue about restraints on advertising by lawyers).}

The principal background for members of the House of Delegates in February 1976 for considering an amendment to the Code provisions on lawyer advertising was the Supreme Court decision in the minimum fee schedule case of Goldfarb v. Virginia State Bar.\footnote{421 U.S. 773 (1975).} In May 1974 the Fourth Circuit Court of Appeals held that the suit against the state bar and a local bar should be dismissed because neither defendant was engaged in interstate commerce. As to the state bar, an additional ground was the immunity of an agency of the state from Sherman Act proscriptions.\footnote{497 F.2d I (4th Cir. 1974).}

In October 1973, after considering the issues raised in the Goldfarb case, the ABA Board of Governors adopted a resolution recommending that state and local bars which had not already done so "give serious consideration to withdrawal or cancellation of all schedules of fees, whether or not designated as 'minimum' or 'suggested' fee schedules."\footnote{19 A.B.A. News, June 1974, at 4. Seventeen states had rescinded all fee schedules and twelve states never had one. Id. 61 A.B.A.J. 1005 (1975) (President's Page) ("Only nineteen states still retained minimum fee schedules at the time of the (Supreme) Court's decision.").} This action of the Board of Governors in 1973 was not followed by debate or a proposal for action by the House of Delegates.

The unanimous\footnote{421 U.S. at 773. The opinion was unanimous as to all judges that participated in the case. Mr. Justice Powell did not sit in the case or participate in its decision.} Goldfarb opinion of Chief Justice Burger, rendered in June 1975, contained language of significance to the problem of lawyer advertising:
In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.\textsuperscript{46}

The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.\textsuperscript{47}

In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act, we intend no diminution of the authority of the State to regulate its professions.\textsuperscript{48}

The Court opinion in \textit{Goldfarb} has been read by a larger percentage of the lawyers of America than any other recent Supreme Court decision. In addition, much attention has been given it in legal literature, including publications of ABA.\textsuperscript{49} Because of the opinion and its implications which refer to the possible antitrust aspects of the provisions of the Code relating to lawyer advertising, the incoming president of ABA assessed the impact of that opinion upon the legal profession on his first “President’s Page.”\textsuperscript{50} He called upon all members of the profession to re-examine those provisions of the Code that “lawyers traditionally have observed for centuries” and which “were developed not for the benefit of the lawyers but to prevent abuse of the public.” He urged that any possibility of anyone’s being misled or injured as a result of enforcement of the existing provisions of the Code be eliminated. Previously he had called for the Standing Committee of ABA on Ethics and Professional Responsibility to re-examine such provisions of the Code. However, in November 1975 President Walsh explained his reasoning by questioning both the importance and the claimed benefits that “advertising might play in improving delivery of legal services.”\textsuperscript{51} He especially urged that “advertising that over-emphasizes price may be misleading and contrary to the best interests of the prospective client.”

On December 6, 1975, a conference on lawyer advertising was held in Chicago to which all state bar presidents, executive directors, and many other leaders of the bar were invited. The ABA Standing Committee studying this problem called for this third conference on the subject in order to permit consideration of the views of consumer groups and other laymen as well as the views of the leaders of the organized bar. At this December conference a draft of amendments to the Code of Professional Responsibility prepared by the ABA Committee on Ethics and Professional Responsibility was presented. After full discussion of the views of those present, each individual was requested to send his comments on the draft to the committee by January 15, 1976, with the expectation that in the light of those comments the committee would present a draft and a recommendation to a meeting of the House of

\textsuperscript{46} \textit{Id.} at 787.
\textsuperscript{47} \textit{Id.} at 791.
\textsuperscript{48} \textit{Id.} at 793.
\textsuperscript{49} \textit{See Index to Legal Periodicals} from the beginning of 1975 to date. \textit{See also} Allen, \textit{Do Fee Schedules Violate Antitrust Law?}, 61 A.B.A.J. 565 (1975), in which all arguments presented in the \textit{Goldfarb} case were published in advance of the decision of that case.
\textsuperscript{50} 61 A.B.A.J. 1005 (1975).
\textsuperscript{51} \textit{Id.} at 1291 (President’s Page).
Delegates in Philadelphia in February 1976. Meanwhile, a large number of copies of the draft amendments were distributed to all members of the House of Delegates of ABA, a broad group of leaders of the organized bar, and a number of other organizations. The draft proposed a new DR 2-101 of the Code entitled "Publicity in General," a less important revision of DR 2-102, and two new ethical considerations to replace EC 2-8. The language of this proposed draft was published in the American Bar Association Journal of January 1976.52

When the House of Delegates met last February this committee presented only a simplified version of its proposed amendment to DR 2-102, advising that the problem would be studied further and that any recommendations for other amendments to the Code on advertising by members of the legal profession would be presented to the House later. When presented to the House this recommendation was amended by substituting a recommendation for an amendment of the same subparagraphs DR 2-102(A)(5) and (6).53 The House adopted the recommended amendment54 which changed the wording of DR 2-102 after the fourth subparagraph to read (adding the italicized words and deleting bracketed words):

(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides and in the city directory of the city in which his or the firm's office is located; but the listing in the alphabetical section may give only the name of the lawyer or law firm, the fact he is a lawyer, addresses, and telephone numbers, and the listing in the classified section must comply with the provisions of DR 2-102(A)(6). The listing shall not be in distinctive form or type. A law firm may have a listing in the firm name separate from that of its members and associates. The listing in the classified section shall not be under a heading or classification other than "Attorneys" or "Lawyers," except that additional headings or classifications descriptive of the types of practice referred to in DR 2-105 are permitted.

(6) A listing in a reputable law list, [or] legal directory, a directory published by a state, county or local bar association, or the classified section of telephone company directories giving brief biographical and other informative data. A law list or any directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list or any directory is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law or law practice, to

53. Committee and Section Reports submitted for action by the House of Delegates at midyear meeting, Philadelphia, February 1976, item 100.
the extent permitted by the authority having jurisdiction under state law over the subject and in accordance with rules prescribed by that authority; [but only if authorized under DR 2-105(A)(4);] date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented; whether credit cards or other credit arrangements are accepted; office and other hours of availability; a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services; provided, all such published data shall be disseminated only to the extent and in such format and language uniformly applicable to all lawyers, as prescribed by the authority having jurisdiction by state law over the subject.55

Referring to the suggested draft of amendments presented to the meeting of December 6, 1975, Senator Tunney stated in a December 1975 letter to the ABA Committee on Ethics and Professional Responsibility: "Led by your committee the organized bar should take the initiative to relax the restrictions on advertising for all lawyers. If this occurs, federal and other governmental intervention should not be necessary."56 From this encouragement by the chairman of the Senate committee, which investigated alleged bar violations of antitrust laws over many months,7 the conclusion would seem quite likely that if the American Bar Association had adopted all of the amendments proposed in that December draft at its February 1976 meeting, the Antitrust Division of the Department of Justice would not have filed suit against the American Bar Association.

With the amendment to the Code adopted by the House of Delegates in February 1976, however, the record made by the ABA committee and the numerous hearings conducted in preparation for that February meeting clearly reveal that further amendments would continue to be under consideration by the standing committee of ABA and by the House of Delegates after the February meeting. Moreover, while only a first step, the American Bar Association had taken a strong step toward a final solution to the problem of advertising. Arguably, the resolution as adopted in February, if in turn adopted by any state with the intent of meeting the requirements of the federal antitrust laws as applied to provisions of that state’s code, would be found to be completely adequate.

Certainly on the minds of all of the members of the House of Delegates when acting in February 1976 were four lawsuits then pending against entities of the organized bar charging that limitations on publicity by lawyers violated

55. Id. at 5, 6 (emphasis added).
57. See Hearings.
first and fourteenth amendment rights as restrictions of freedom of speech. In these four suits efforts were made to obtain court judgments which would preclude enforcement of the provisions of the Code of Professional Responsibility relating to publicity as adopted by ABA in 1969, which restated the provisions of Canon 27 of the Code of Ethics of ABA.  

IV. The New Antitrust Suit—United States v. American Bar Association

Before the amendment of DR 1-102 by the House of Delegates in February 1976 attorneys in the Antitrust Division of the Department of Justice spoke on the subject of antitrust aspects of limitations on advertising in the Code.  

After the midwinter meeting, and without any further notice than the quoted remarks made by the members of the Antitrust Division, the Department of Justice filed suit on June 25, 1976, against the American Bar Association in the United States District Court for the District of Columbia. The complaint alleged that the provisions of the ABA Code of Professional Responsibility as amended constituted a violation of the antitrust laws and charged that the American Bar Association in promulgating and promoting the adoption of the rules of that Code in all of the states was involved in a conspiracy to violate those antitrust laws. On the same day that that suit was filed, Lawrence E. Walsh, President of ABA, sent a letter to all members of the House of Delegates and to the presidents and executive directors of all state and local bar associations represented in the house advising them of the suit and adding that ABA would resist this action for the following reasons:

(1) The regulation of the legal profession in the United States is committed to the 50 states. . . .

(2) The purpose of the Code of Professional Responsibility of [ABA] is to serve as a model for the states. . . .

58. These four suits are listed in the order in which they were filed. Hirshkop v. Virginia State Bar, Civil No. 74-0245-R (E.D. Va., filed May 23, 1974); Consumers Union of the United States v. ABA, Civil No. 75-0105-R (E.D. Va., filed Feb. 27, 1975); Person v. Association of the Bar, Civil No. 75-C-987 (E.D.N.Y., filed June 25, 1975); Cairo v. State Bar, Civil No. 74-C-606 (E.D. Wis., filed Oct. 12, 1975).

The Hirshkop case was tried on the merits before Judge Kellum in June 1976 and no decision has been announced. In the Consumers Union case a full oral argument was held on the merits before a three-judge court on May 18, 1976. There has been as yet no decision. In the Person case a hearing before a three-judge court was granted, 414 F. Supp. 133 (E.D.N.Y. 1976), and argument on the merits was completed before the three-judge court in the spring of 1976; there has been no decision. In the Cairo case an argument on a motion for a three-judge court was completed July 9, 1976, before Judge Swygert, and decision thereon is still pending. This explanation of the status of the four suits has been checked against a copy of the docket sheet of the clerk of the court as of approximately Oct. 1, 1976, and has been confirmed by a letter of the counsel to ABA dated Oct. 13, 1976.

59. See Smith, Making the Availability of Legal Services Better Known, 62 A.B.A.J. 855, 857 (1976) (quoting Mr. Sims): "Does it make sense, for example, to apply the ordinary and traditional rules in such areas as advertising to delivery vehicles which bear no resemblance to traditional legal services delivery systems?" Deputy Assistant General Bruce B. Wilson, speaking before the Idaho State Bar and the Alaska Bar Association in June 1975, is also quoted as stating that "after Goldfarb, an agreement to restrict . . . advertising could be held to be a violation of the antitrust laws." Id. Additionally, Mr. Smith quoted Mr. Sims' statement on the tentative draft of the amendment to the Code of Professional Responsibility then unveiled: "[The Code as so amended would] clearly preclude price advertising and since the concerted elimination of the price advertising by competitors limits price competition, a traditional analysis would find this flat ban a per se violation of the Antitrust Act." Id.

60. 62 A.B.A.J. 979 (1976) (a news report of the suit in which President Walsh calls the suit "bizarre" with a copy of the complaint as filed appearing on the next page).
The Code of Professional Responsibility of [ABA] is not self-enforcing.

Action by state authorities in the regulation of the profession is not subject to antitrust laws.

The American Bar Association Code has not been adopted in exact form by any state. The advertising provisions of the Code were added at its midwinter meeting in Philadelphia in February 1976. They have not been adopted by any other state and are more liberal than any state provision.

This suit seeks to destroy [ABA]'s right of independent advocacy and its right to petition for the enactment of its Code by the various states regulating the profession.

As to advertising it is the view of the Association that the action taken by the House of Delegates in February was a reasonable and responsible experimental first response to demands for greater liberality in professional advertising.

After the Supreme Court decided Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council in May 1976, the Committee established a subcommittee to work with the American Bar Foundation to determine whether in the practice of law there are areas comparable to those in the practice of pharmacy in which highly standardized routines require little professional judgment. This study is in the planning stage and was undertaken before the Department of Justice action was started.

Mr. Walsh analyzed the suit by referring to three Supreme Court decisions and emphasized that the Court had unanimously held that the Sherman Act had no application to actions influencing public officials of states. This point and others mentioned above were urged as defenses in the answer filed by ABA. This author is thoroughly in accord with the points made by Mr. Walsh in his letter and is of the opinion that the suit is ill-timed, intemperate, and ill-conceived.

A. The Suit as Filed Was Ill-Timed

Only a few days had expired after the action of the House of Delegates in February 1976 when this suit was filed. The record as outlined above clearly indicates that the American Bar Association had under consideration a broader amendment to the provisions of the Code relating to advertising by lawyers than was adopted at that meeting. Therefore, the effect of the meeting was merely the adoption of a first step toward the solution that the American Bar Association expected to reach on this subject. Many courts have held that the antitrust acts are to be interpreted under a "rule of reason." As it happened, the head of the Antitrust Division of the Justice

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61. This letter of President Walsh is substantially the same as his press release about the suit also dated June 25, 1976, which is presented in full. 62 A.B.A.J. 981 (1976).
63. The text of the complaint filed against ABA clearly demonstrates that an alleged violation of § 1 of the Sherman Act constitutes the basis of the suit. See 62 A.B.A.J. 980 (1976). Beginning with the famous case of Standard Oil Co. v. United States, 221 U.S. 1 (1911), the clearly established rule of decision of the Supreme Court has been that §§ 1 and 2 of the Sherman Act are to be construed by the "rule of reason." In the authoritative REPORT OF THE ATTORNEY
Department had reiterated that proposition in another context only a few weeks before the filing of this suit. To bring the suit while ABA, having

General’s National Committee to Study the Antitrust Laws (U.S. Gov’t Printing Office 1955), it is said in the first chapter, under the heading “The Central Core of Legal Antitrust Concepts,” that the modern view of the Sherman Act is the “Rule of Reason.” Id. at 5. This report also quotes from Chief Justice Hughes in Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933), in which he stated that the Sherman Antitrust Act “[l]ays a charter of freedom . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions. . . . The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness.” Id.

A treatise intended to bring the report of the Attorney General’s committee up to date with a discussion of the more recent Supreme Court decisions was published by ABA in 1975. Antitrust Law Section, ABA, Antitrust Law Developments (1975). The rule of reason was again called “the central core of legal antitrust concepts relating to restraints of trade,” id. at 1, and in support of this additional citations and the opinion of Mr. Justice Black in Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958), are quoted. Many cases may be cited as illustrating and sustaining the rule of reason, including the only other one cited by Mr. Justice Black in Northern Pac. Ry.: Board of Trade v. United States, 246 U.S. 231 (1918) (Brandeis, J.). Mr. Justice Brandeis stated:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. Id. at 238. That the violation of § 1 of the Sherman Act as alleged in the complaint against ABA is subject to the rule of reason as developed in many cases seems undeniable. See also Flittie, The Sherman Act § 1 Per Se—There Ought To Be a Better Way, 30 Sw. L.J. 532, 533 (1976), where there are listed presently recognized categories of per se violations of § 1:

1. Price fixing agreements
2. Agreements to limit supply or production
3. Horizontal territorial restrictions
4. Vertical territorial and customer restrictions where title has passed from the supplier
5. Group boycotts
6. Tying

It seems clear that the complaint asserts no set of facts to which any of these per se categories can be applicable. See specifically Professor Flittie’s discussions on indirect price fixing and agreements to limit supply or production, id. at 533-36. None of the other categories could conceivably be applicable to the authorities cited by Professor Flittie make it clear that neither of the two mentioned are. Certainly execution of an agreement not to advertise with respect to price or any quantity of service would naturally tend toward deviations in price or in quantities of service rendered rather than to uniformity.

64. Attached as an exhibit to the reports of the committees of the Corporation, Banking, and Business Law Section of ABA at Atlanta in August 1976 was a report of the Committee on Adoption of the Metric System in Commercial Transactions. A part of that report was a copy of the speech, “Antitrust Implications of Conversion to the Metric System” delivered by Thomas E. Kauper, head of the Antitrust Division of the Department of Justice, before the Second Annual Conference and Exposition of the American National Metric Council, Washington, April 5, 1976. Professor Kauper among other things said on that occasion:

The broad language of the Sherman Act has been given meaning over the years by numerous decisions of the Supreme Court. Early in the history of the act, the Supreme Court adopted the ‘rule of reason’ standard in determining whether a particular restraint violated the Sherman Act. Except in a few narrow but important areas—most notably with regard to price-fixing—this assures that a particular restraint will be reviewed in the context of unique industry problems with a sensitivity to the circumstances surrounding its adoption and implementation. . . . Although it may surprise you, notwithstanding the significant standardization, simplification and certification programs that have been in effect for many years, there are very few reported court decisions addressing in any detail the inter-action between standardization and the antitrust laws. Two broad propositions, however, may be stated:

First, very rarely will you find an antitrust enforcement agency arguing that industry standards are per se illegal. The potential benefits of industry standards are recognized and accepted by the
relaxed the rule against advertising in a highly responsible action, was considering further relaxation of the rules seems to be clearly unreasonable.

B. The Suit as Filed Was Intemperate

This suit was filed thirty-two days after the decision by the Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc., which held that a Virginia statute making it unlawful for pharmacists in that state to advertise prices for sale of drugs violated first amendment rights of the customers to free pricing information in advertising by druggists. Mr. Justice Blackmun, writing for seven members of the Court, stated:

We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising. Notwithstanding the caveat by Chief Justice Burger in Goldfarb, that the Court was not diminishing the right of states to regulate lawyers, and notwithstanding the more explicit recognition by Mr. Justice Blackmun of the historical and functional differences between the legal profession and those who disseminate commercial products, and the fact that the issues asserted were then sub judice, the Department of Justice brought the suit. The complaint sought to have "ABA's prohibitions on advertising be declared illegal, and that the ABA be required to cancel those provisions of its Code of Professional Responsibility, and other rules and statements, which have the purpose or effect of suppressing or restricting advertising by lawyers."

Thus, all

Department of Justice. However, and this is a second operating premise of our enforcement activities, precisely because they bring competitors together, private standards can be used to facilitate restrictive anticompetitive agreements. The basic legality of standards programs conducted by trade associations has never been questioned. Instead, the courts and the Federal Trade Commission have made it clear that, apart from illegal use, the programs are lawful and beneficial.

66. Id. at 1831 n.25, 48 L. Ed. 2d at 349 n.25. In his dissent Mr. Justice Rehnquist makes a more favorable argument.
67. See note 42 supra and accompanying text. In his opinion for the Court in Goldfarb Chief Justice Burger said:

We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that ‘forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.’ . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’ . . . In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.

42. 96 S. Ct. 792-93.
68. See note 58 supra and accompanying text.
restraints on advertising, not some of them, would be cancelled. The
restraints that advertisements not be deceitful, dishonest, or misleading are
attacked directly, and their cancellation along with all other restraints are
sought. This certainly seems to be an intemperate effort.

When the members of the House of Delegates were considering possible
amendments to the Code of Professional Responsibility in February 1976 they
had before them the existing Code containing rules of the legal profession on
advertising which had prevailed long beyond the memories of all living
lawyers. The delegates were considering a modification and a relaxation of
these rules to promote competition and not to restrict competition. Another
and broader relaxation of the rules was under consideration for the same
reason. The record as presented in this Article is too clear to permit anyone in
the Department of Justice to think otherwise. Some prior interpretations of
the antitrust laws in business transactions apparently were thought by Depart-
ment of Justice lawyers to constitute support for the contention that restraints
on advertising by lawyers involved in the words of Mr. Sims "a per se
violation." However, the background record of the profession and of the
present status of the problem, as outlined herein, were clearly such that the
assumed analogies could not be relied upon reasonably. Moreover, the con-
sspiracy allegations in the complaint are extravagant and overbroad in that
they complain about all provisions of the ABA Code of Professional Respon-
sibility which by their terms prohibit lawyers "from engaging in price adver-
tising and other advertising about the availabilty and cost of legal services."  
Some restraints on advertising the price of legal services are surely appro-
priate, as where advertisements are false or misleading. They also complain
that "members of ABA abide by said provisions of the [ABA] Code of
Professional Responsibility" which contains in Canon 2, Disciplinary Rules
101, 102, and 103 numerous provisions expressly permitting advertising of
facts most pertinent to selection of a lawyer and which specify exceptions
greatly relaxing the usual restraints that have been in the Code since its first
adoption in 1969.\textsuperscript{70} Literally, the complaint would nullify all provisions of the
Code restraining in any way advertising by lawyers.

C. The Suit as Filed Was Ill-Conceived

For the reasons so well stated by President Walsh in his letter,\textsuperscript{71} the suit was
not brought against any of the state bars but rather against the American Bar
Association which has been organized and operating for nearly one hundred
years for the benefit of the legal profession and the public. ABA is in a
position, as Mr. Walsh stated, of attempting to influence state bars, for the
state bars and not ABA impose regulations on the legal profession. Prior to
and since February 1976 the Code of Professional Responsibility of ABA has
not been enforceable by anyone; the codes adopted by the respective state
bars and only such codes are enforceable. In numerous cases the courts have

\textsuperscript{70}. These exceptions are in regard to legal aid or public defender offices, military assistance
offices, lawyer referral offices, group legal service organizations, prepaid legal service organiza-
tions, and other bona fide legal service organizations.

\textsuperscript{71}. See note 61 supra and accompanying text.
held that associations of representatives of competing corporations may adopt standards "the basic legality" of which "has never been questioned." Therefore, the suit against the American Bar Association should be dismissed.

D. Another Suit in the Supreme Court

On Thursday, August 5, 1976, Mr. Justice Rehnquist granted a stay of a decision by the Arizona Supreme Court censuring two Phoenix lawyers who operated a legal clinic. These lawyers had advertised in a Phoenix newspaper listing fees for some of their legal services. The Arizona Supreme Court ruled that the Arizona Code of Professional Responsibility forbids advertising by attorneys in media of general public circulation. Perhaps this case will be acted upon soon by the United States Supreme Court and the decision will throw light upon the validity of the Arizona Code and the provisions of the ABA model on which it was based. It is hoped that the decision and the opinion to be written in that case will aid in the proper disposition of the suit against the American Bar Association.

The new administration of the State Bar of Texas should appoint a second and new blue-ribbon commission to study and recommend to the state bar board of directors, from time to time as their conclusions justify, all amendments to the Texas Code of Professional Responsibility deemed proper for Texas to adopt in the light of Texas' experience. For the above stated reasons the substance of the 1975 and 1976 amendments to the Code as adopted by ABA should be adopted in Texas. On May 11, 1976, the District of Columbia Bar approved a plan to publish a voluntary directory of District of Columbia lawyers which would be widely disseminated to the public. This plan ought to be considered for adoption in Texas in addition to adoption of the 1976 ABA amendment to the Code. Additionally, the Texas plan should include provision for the publication of local directories in each of the cities of Texas having a local bar association. With reference to this blue-ribbon commission as well as the first one suggested above, this author recommends that all existing state bar sections and committees be assigned a duty to study each recommendation of this new commission, and work with it under procedures established by the board of directors so that the board may consider their recommendations along with each recommendation of the new commission. The earliest feasible presentation to the lawyers of Texas of the best possible amendments to the present Texas Code of Professional Responsibility which they have adopted seems highly desirable.

V. Availability of Legal Services

The third of the three major committees appointed by President Lewis F. (1976)
Powell was not named until after the midyear meeting of the House of Delegates in New Orleans in February 1965. At that meeting a resolution was adopted reciting that the policy of ABA was that of encouragement and cooperation with the Office of Economic Opportunity in providing federal funds for legal services for indigents. The responsibility for implementing this resolution was placed in the Standing Committee on Legal Aid until a special committee might be created.

In June 1965 a national conference entitled "Law and Poverty—1965" was convened in Washington sponsored jointly by the Attorney General of the United States, the Director of the Office of Economic Opportunity, and the American Bar Association. Present at this conference were all of the members of the newly appointed committee, a number of distinguished lawyers, scholars, and students of the legal profession, including Elliott Evans Cheatham, professor emeritus of the Columbia University School of Law. When addressing the Annual Convention of the ABA at the end of his term, President Powell named the Availability Committee first, presumably because this inspiring conference which started the Availability Committee so enthusiastically was strongly in his mind.

At the first meeting of the new committee immediately following this national conference, Dr. Cheatham accepted the post of consultant to the committee. At that meeting the need for staff assistance was considered. Barlow F. Christensen moved from his position as staff assistant for the ABA Committee on Lawyer Referral Services to the staff of the American Bar Association as research assistant for this new committee. He attended all meetings of the committee, and developed and published numerous research papers which were revised and published in a treatise. The results of the work of this committee over its five years of existence, 1965-1970, may now be portrayed best by listing the reports filed with the House of Delegates and stating the action of the House of Delegates thereon and the developments following that report to date.

**Lawyer Referral Services.** For the new committee to act first on this subject was only natural since each of three of the seven members on the committee had served as chairman of the Standing Committee on Lawyer Referral Services. The recommendations of the committee involved substantial improvement and enlargement of the services of the ABA standing committee on this subject; all of these recommendations were put into effect promptly by the standing committee after approval by the House of Delegates. Lawyer referral services have grown substantially since that time, chiefly because of the great growth of legal services to the indigent. Texas, for example, has

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75. See note 6 supra and accompanying text.
76. See E. CHEATHAM, A LAWYER WHEN NEEDED (1963), a reprint of the author's Carpentier lectures delivered at Columbia University School of Law in the fall of 1963, a landmark exposition and an incentive for the new committee. For a footnoted and abridged version of this seminal work see Cheatham, A Lawyer When Needed: Legal Services for the Middle Classes, 63 COLUM. L. REV. 973 (1963).
77. B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS; SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES (1970).
installed a very effective statewide system of lawyer referral so that anyone desiring assistance in employing a lawyer may call the office of the state bar in Austin collect and receive a referral. Referral offices have served and are serving with increasing effectiveness in Texas cities.\footnote{79. The Lawyer Referral Services of the Dallas Bar Association, for example, first broke the barrier of ten thousand referrals during the calendar year 1973. Only three other bar associations in America had previously achieved that goal. Dallas Bar Weekly Bulletin, Dec. 31, 1973. See also Annual Report of the Lawyer Referral Service Committee of the State Bar of Texas, 39 Tex. B.J. 665 (1976).}

Specialization. There had been repeatedly unsuccessful efforts in the American Bar Association in preceding years to create interest and activity in this field. The report of the committee\footnote{80. 92 A.B.A. REP. 584 (1967).} urged the Board of Governors to implement the latest of these efforts. A resolution adopted in 1954 called for recognition and regulation of voluntary specialists. The report of 1967, which was approved by the House of Delegates,\footnote{Id. at 372.} urged the appointment of a new committee to proceed with specific recommendations for actions in the respective states under the guidance of the ABA leadership. This activity in the American Bar Association has developed into a standing committee which has promoted thorough research on the initial efforts toward specialization on an experimental basis by the state bars of California, Texas,\footnote{82. See Report of Texas Board of Legal Specialization, 39 Tex. B.J. 674 (1976).} New Mexico, and Florida, each of which have divergent plans. Meanwhile, the Texas experiment, like that of the California bar, is proceeding with most encouraging results.

Legal Assistants. Pursuant to the approval of the committee’s report\footnote{83. 93 A.B.A. REP. 529 (1968).} by the House of Delegates, a special committee to promote and enlarge this project was appointed. The committee’s work has proved most fruitful in promoting the broad development of the use of legal assistants and their training and certification.\footnote{Id. at 352.}

Prepaid Legal Cost Insurance. The report of the committee, recommending that the Board of Governors and the officers of the Association engage in limited experimentation on this subject,\footnote{Id. at 232.} was approved by the House of Delegates with a slight amendment.\footnote{Id. at 125.} This experimentation, initiated by a board committee with funds granted by the American Bar Endowment, involved the plans of two local bar associations, Los Angeles and Shreveport; the latter experiment especially proved quite successful. A chief result of the experiment is the very substantial project of the bar known as Prepaid Legal Services. Development of that project occasioned the amendments to the Code of Professional Responsibility developed in 1974 and broadened in 1975, as explained heretofore. A series of national institutes has been conducted by the Prepaid Legal Services Committee, which is now a standing committee of ABA. Great developments beyond the many experiments that have been undertaken seem in prospect. In Texas, with the cooperation of the
State Board of Insurance and the Texas Legislature, the State Bar Committee on Group and Prepaid Legal Services has opened the offices of the state bar for the submission of plans for operations, some of which are now functioning. 87

**Group Legal Services.** The initial committee report on this subject was superseded by a revision before being submitted to the House of Delegates 88 as a result of negotiations with other interested committees and sections of ABA. At the time of submission no action was taken by the House because the subject was still new and deserved further study. During the following year public hearings were held in the hope of obtaining a consensus favoring the report. Thereafter, further revised reports were filed 89 at the midyear 1969 meeting and at the annual meeting. 90 These reports specified with increasing clarity the regulation and public notice of all plans for group legal service.

However, the midyear report was referred back to the committee by the House. 91 This action by a majority of the House doubtlessly persuaded the Wright committee, which was then putting finishing touches on its projected Code of Professional Responsibility, not to deal substantially 92 with the subject of regulation of group legal services or to deal at all with the subject of disclosure of all such group plans. In this author's judgment the treatment of these two subjects in the projected Code was based on reasoning that the Code in all of its other provisions was too great a project and the benefits from adoption were too numerous to subject the Code to the hazard of rejection by the House of Delegates or in the several states if these unpopular provisions were included.

The Evaluation Committee's proposed Code of Professional Responsibility was presented to the House at the 1969 annual meeting with a provision that recognized the existence of group legal services 93 but did not regulate them. 94 When Edward L. Wright, Chairman of the Committee on Evaluation of Ethical Standards, presented the proposed new Code, the only opposition heard in the House of Delegates referred to the treatment of group legal

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88. For the initial draft see 93 A.B.A. Rep. 519 (1968), and for a revision see id. at 526.
90. Id. at 697.
91. Id. at 138.
92. Id. at 728. The preface to the new Code of Professional Responsibility then presented to the House of Delegates provided:

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The preface to the new Code of Professional Responsibility then presented to the House of Delegates referred to the treatment of group legal

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93. See note 92 supra and a portion of the quoted proposed new Code.
94. See remaining provisions in the proposed DR 2-102(D)(5) as submitted in the proposed Code of Professional Responsibility.
services in DR 2-103(D)(5). The chairman of the Committee on Availability of Legal Services moved to amend the Code as presented by providing specific provisions for the regulation of group legal services and for the public filing of all plans under which such legal services would be rendered. The proposed amendment, which in substance added to DR 2-103(D)(5) additional subparagraphs, was defeated by an overwhelming vote. Nevertheless, in 1974 the amendments to the Code added express provisions substantially patterned upon the proposals of the Committee on Availability for regulating legal services under group legal service plans and requiring the filing of plans. These provisions of the 1974 amendments to the Code were retained in substance by the 1975 amendments. In brief, the record of the Availability Committee on this subject is one of initiating and developing provisions for regulation of those groups providing legal services which, though not adopted while that committee was in existence, now stand in the Code of Professional Responsibility.

Legal Defenders. The report filed initially was revised before submission to the House of Delegates and as presented was approved. This movement, well established at the time of the committee report, has since been growing substantially in its successful use across the country.

Institutional Advertising. The report of the committee approved by the House of Delegates called for substantial expenditures of funds by the organized bar for educating the public on the many services made available by the organized bar and by lawyers generally. Prior to House approval, and thereafter, some states developed programs on institutional advertising, but ABA has not undertaken this action yet, doubtlessly because of the lack of available funds.

Legal Aid. The report on this subject expressly covered all legal services for the poor whether rendered by the legal profession, the community, the government, or a combination of them. The report discussed (i) the problems of the hard-pressed urban community and the profession, (ii) the development of OEO with the cooperation of the organized bar, (iii) the proliferating government programs with legal services being rendered also by the Department of Justice, the Department of Health, Education, and Welfare, and the Department of Housing and Urban Administration, often in competition with OEO, and (iv) the need for the policy of unification of all government financed legal services. The report called for the formulation of a unified legal services program by the federal government and urged, as had been proposed in the meetings of this committee as early as a New Orleans

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95. For action on this proposed amendment taken by the House of Delegates see 94 A.B.A. REP. 389-92 (1969).
96. Id. at 719.
98. Id. at 127.
100. 95 A.B.A. REP. 751 (1970).
101. Id. at 545.
102. For the rich experience of the Texas State Bar see 33 TEX. B.J. 508 (1970).
meeting in 1966, the establishment by the federal government of a national legal services foundation, corporation, or commission to have exclusive charge of all government-supported legal service programs. As is well known by everyone having any interest in this subject, Congress has created a legal services corporation with the strong support of the American Bar Association in which all federally financed legal service programs for the poor are vested. That corporation has been organized and is functioning with greatly increased efficiency over its predecessor's programs. Also discussed was the experimentation by OEO with Judicare. The record of ABA's substantial support of OEO and financial support for legal services rendered directly by the profession was commended. The concluding paragraph, which is applicable to both aspects of ABA's support, is particularly worthy of emphasis in relation to the legal aid rendered directly by members of the profession:

We urge that the ABA continue to stress its dedication to the cause of Legal Aid. The ABA leadership, which of course includes every member of the House of Delegates, should constantly remind the profession of its obligation to insure that legal services are provided for the poor. The ABA should enlist participation in, and support for, all Legal Aid programs, by its membership and by state and local bars. The close relationship with the government's programs should be maintained, and efforts to promote state and local acceptance of these programs should be redoubled. The ABA's financial contribution to Legal Aid should be sharply increased as soon as funds can be made available. In short, every measure should be taken to maintain the position of leadership of the American Bar Association in the Legal Aid field. No other cause is more deserving of the best efforts of this Association.104

No action was requested of the House of Delegates, but the report was filed by the committee as a lasting standard to which advocates of legal aid might in the future repair.

Meanwhile, with the success of government funded programs of legal aid for the poor, the work of legal aid societies, local bar association committees, and individual members of the profession in furnishing services for the poor has received less and less attention from the ABA's Standing Committee on Legal Aid and generally from the members of the legal profession. Against the day that must surely come when such substantial financing of legal aid by government funding must be curtailed, the profession faces today the substantial problem of maintaining the effective legal aid organizations that flowered up to the time of the OEO establishment. Most state and local bar associations like ABA seem to be giving little attention to that day.105

Miscellaneous Other Devices for Promoting Availability. The Availability Committee's final report reflected the consideration given to a number of other proposals and suggestions for improving the availability of legal ser-

104. Id. at 714.
105. For example, the Dallas Bar Association Committee on Legal Aid which for years was most active has been superseded by a Legal Aid Foundation and is funded with federal funds. An exception to this generalization is the Association of the Bar of the City of New York which is undertaking in 1976 a strong effort to raise substantial funds for traditional legal aid in New York City and for many more volunteers to that service to the poor. See 31 RECORD OF THE CITY BAR 300 (1976).
VICES, none of which was investigated fully and none of which was the subject of any recommendation:

(1) Ombudsmen
(2) Citizens' advice bureaus
(3) Tax deductions
(4) Interstate practice
(5) Reimbursement for attorneys' fees as costs
(6) Neighborhood law offices
(7) Annual legal checkup
(8) Judicare
(9) Class actions
(10) Bank financing of legal services

In addition to the subjects on which the Availability Committee filed detailed reports and the ten other subjects just listed, there have been many other programs developed since 1970 for availability that certainly deserve mentioning in any article referring to the subject of availability as it has developed to this date:

(1) Survey of legal needs of the public
(2) Pro bono publico services by law firms and individual lawyers
(3) Conciliation, mediation, and arbitration
(4) Improvement of equipment and facilities permitting lawyers to accomplish more in less time
(5) Public interest law
(6) Lay magistrates, small claims courts, special masters
(7) Court administration
(8) Teaching students in the public schools about good citizenship and law

Even this list is not complete. In teaching students about the availability of legal services, some subjects are consolidated with others and this author presents developments to date relating to twenty-four programs from among all that are presently in use in developing availability.

This Article does not urge upon the Texas State Bar the appointment of a new commission to study in depth the subject of availability as recommended above on the subject of the standards of criminal justice or the subject of amendments to the Texas Code of Professional Responsibility. In view of the substantial steps already taken by the Texas State Bar on many programs, similar action currently does not appear needed in Texas on the subject of availability. This author recommends to the Texas State Bar, however, that

106. No report on ombudsmen was filed by the Availability Committee since the House of Delegates had endorsed that program on recommendation of the ABA Section on Administrative Law, 94 A.B.A. Rep. 119 (1969).
108. A national survey of the legal needs of the public was conducted jointly by a Special Committee of ABA to Survey Legal Needs in collaboration with the American Bar Foundation. See The Legal Needs of the Public: Preliminary Report of a National Survey by the Special Committee to Survey Legal Needs of the American Bar Association, in Collaboration with the American Bar Foundation (ABA 1974). A final report has been summarized by ABA in 1976, and a complete final report by the same authors has been expected in 1976.
109. See the report prepared jointly for the ABA Special Committee on Public Interest Practice and for the Ford Foundation on five years of experience, 1970-75, in S. Jaffe, Public Interest Law: Five Years Later (Ford Foundation 1976).
110. See report of ABA Special Committee on Youth Education for Citizenship, Information Reports to the House of Delegates, 1976 Annual Meeting, August 1976, item 213.
the pattern of the American Bar Association in this area be followed by organizing a consortium for joint planning by the various committees of the state bar now functioning or likely to function in the future in the areas of availability. Additionally, the chairman or other designated member of each committee should meet in such a joint effort to analyze the relationship between the work of each committee and the work of others in the field of availability.

VI. CONCLUSION

In the concluding paragraphs of sections II, III, and V of this Article recommendations for actions by the State Bar of Texas are stated. This Article has demonstrated that today, as was true in the past and will be true in the future, the legal profession has major problems. The more important problems of today, as this author evaluates them, have been referred to in this Article. Those who chance to read this Article may for themselves evaluate the importance of these present problems about which the officers and directors of the State Bar of Texas are encouraged to take actions now urgently needed.

The decade of the 1870's has been noted as the decade in which the organized bar found its voice. It is hoped that the decade of the 1970's will be noted in the future as one in which the organized bar, having discovered a clearer vision of its mission to serve the American people, took substantial steps toward attainment of its newly envisioned objectives.