ETHICAL STANDARDS OF THE BAR

The House of Delegates of the American Bar Association, at the annual meeting in New York, created a new Special Committee on Evaluation of Ethical Standards.

The new Committee is charged with studying and reporting upon the adequacy and effectiveness of the present Canons of Professional Ethics, including their observance and enforcement. It is authorized to make such recommendations for changes as may be deemed appropriate to encourage and maintain the highest level of ethical standards by our profession.

The first adoption of formal rules of ethics in this country occurred in Alabama in 1887, when the bar association of that state adopted its "Rules for Governing the Conduct of Attorneys".* It was not until

1905 that the need for action at the national level was recognized. The President of the American Bar Association, Henry St. George Tucker of Virginia, then called for:

"A broader inquiry whether the ethics of our profession rise to the high standard which its position of influence in the country demands."

A Committee was appointed to consider "the advisability and practicability of the adoption of a code of professional ethics by this Association". The Committee, with Mr. Tucker as Chairman, initiated a study which resulted three years later, in 1908, in the adoption of the original 32 Canons of Professional Ethics.

In 1928, Canons 33 through 45 were added. Canon 46 was adopted in 1933, and Canon 47 in 1937. In subsequent years the need for a general re-evaluation and perhaps revision of the Canons has often been suggested.*

**The ABF, upon request of the ABA Board, made a study of the need for revision in 1955-58 and by a divided vote concluded that a broad revision was needed.
But except for certain amendments, the Canons have remained essentially in their original form.

As early as 1934, Chief Justice Harlan Fiske Stone commented:

"In the new order which has been forced upon us, we cannot expect the bar to function as it did in other days and under other conditions. Before it can function at all, as the guardian of the public interest committed to its care, there must be appraisal and comprehension of the new conditions, and the changed relationship of the lawyer to his client, to his professional brethren and to the public. . . . Our Canons of Ethics for the most part are generalizations designed for an earlier age. . . ."

It cannot be doubted that many aspects of the practice of law have changed drastically

since 1908. An ABF study committee has said that these changes "make unreliable (many) of the assumptions upon which the original Canons were based.*

In the half century since 1908, there have been striking changes in the role of government, in federal and state relationships, and in social, business and economic conditions. These and other changes have caused major evolutions in the practice of law and in responsibilities of lawyers.

In 1908 the typical lawyer was a general practitioner, usually alone, who divided his time between the courts and a family type of office practice. There were few large law firms, few corporate legal departments,

*Report, Special Committee of ABF, June 30, 1958, p. 10.
and lawyers in government were limited in number. There was no income tax law; few relevant Federal statutes and regulations; virtually no administrative law; no great body of corporate law practice; and, with the automobile little more than a gleam in the eye of Henry Ford, the flood of tort litigation was yet to come.

As remarkably flexible and useful as the Canons of Ethics have proved to be, the time has come to reconsider them in light of these vast changes in the practice of law.

They also require re-examination in view of the increasing recognition of the public responsibilities of our profession.

The Canons have been described as an articulate expression of the "conscience of the profession in the 19th and 20th Centuries."* We must be sure that they now conform to the conscience of the bar in the mid and late 20th Century.

It is not suggested that all or even a substantial number of the Canons are obsolete. There is, of course, no thought of starting out to rewrite de novo the ethical standards of the legal profession. The broad principles, as reflected eloquently in the Canons, are immutable. No doubt a major portion of the present Canons will be found adequate. The greater need may be for additional Canons rather than widespread revision of existing ones.

Closely related to the contents of the Canons is their enforcement. There is growing dissatisfaction among lawyers with the adequacy of the discipline maintained by our profession.

The Missouri survey concluded that "a majority of lawyers are convinced that the public image of the profession is affected by the policing procedure of the Canons of Ethics and that policing (by the Bar) is not adequately enforced."* This survey also indicated that

some 27% of Missouri lawyers think that perhaps half of their fellow lawyers fail to live up to the Canons. Along the same lines, a study in New York City concluded that more than 20% of the city's lawyers "persistently breached Canons of Professional Ethics."*

Surveys of this kind do not purport to be scientific, and one may doubt whether persistent or deliberate violations approach the percentages which have been mentioned. But few lawyers in the active practice doubt that there are significant violations or that grievance procedure is far less effective than it should be.

A compilation of disciplinary action for the seven-year period ending with 1962 indicated an average of only 68 disbarments per year. The number suspended was not significantly greater. Dean Blythe Stason, with typical restraint, commented that in a country of some 285,000 lawyers "the number subjected to discipline is remarkable small".**

*Time magazine, January 10, 1964.
**Stason, Disbarments & Disciplinary Action, 49 ABA Journal 270 (March 1963).
In somewhat the same vein Professor Jerre Williams, addressing the Association of American Law Schools last winter, is quoted as saying: "The best way to attain better ethics in the law profession is to have a few good disbarments."*

It may well be true, as many think, that grievance committees and courts tend to be unduly lenient in grievance cases. There should indeed be stricter enforcement of ethical standards and a more vigilant concern for the public interest. While no one wants punitive action, it must be remembered that the bar has the privilege of disciplining itself - to a greater extent than other professions or callings. This imposes a higher responsibility and one which the bar must discharge with greater fidelity.

But the problem is too complex to be remedied simply by resolving to increase the number of disbarments and suspensions. The principle of a "fair trial" surely applies as much to a lawyer threatened with

*Time, January 10, 1964.
disbarment as to other defendants. It is also undoubtedly true that the practical problem of obtaining solid evidence of the violation makes the task of grievance committees extremely difficult. The problem of evidence is especially acute in some of the areas of greatest concern - e.g., solicitation, "preparation" of witnesses, and diligence in duty to one's client.

The new ABA Committee to re-examine the Canons of Ethics will not deal directly with disciplinary procedure. But there is an obvious relationship between the contents of the Canons and their observance and enforcement. The Committee will therefore carefully evaluate the extent to which departures from high ethical standards, and lapses in strict enforcement thereof, are related to the content of the Canons.

Appropriate revisions of or additions to the Canons - where found to be necessary - could contribute significantly to more effective grievance procedure as well as to increasing the level of voluntary compliance.
Although the form and content of the Canons are of the utmost importance, it must be remembered that the Canons are not an end in themselves. Quite obviously, their purpose is to encourage and help maintain a level of ethical conduct appropriate for a learned profession. In view of the nature and responsibilities of the legal profession, it is not too much to say that its ethical and moral standards must be higher than those of any other calling or profession - with the exception (in a vastly different content) of the ministry. As Ross L. Malone (former President of the American Bar Association) has said:

"It (legal profession) presupposes a better developed moral awareness, and in day to day practice presents more occasions requiring resort to conscience in arriving at a decision, than any other (profession)."*

Judge George Shamswood published his famous treatise on Professional Ethics in 1854. He spoke of the legal profession as follows:

"There is no profession in which moral character is so soon fixed as in that of the law; there is none in which it is subjected to severer scrutiny by the public. It is well that it is so. The things we hold dearest on earth—our fortunes, reputations, domestic peace, the future of those dearest to us, nay, liberty and life itself, we confide to the integrity of our legal counsellors and advocates. Their character must be not only without a stain, but without suspicion. From the very commencement of a lawyer's career, let him cultivate, above all things, truth, simplicity and candor; they are the cardinal virtues of a lawyer."

The instilling of this type of moral and ethical awareness in a profession which now numbers 285,000 members is a task of monumental proportions. The process must commence as early as possible. Indeed, there are some who think that the teaching of ethical principles at the law school level is useless because by that time the prior training and environment of the student have predetermined his character and attitudes.

But happily this degree of pessimism has been rejected by a great majority of our law schools. It

*Sharswood, Professional Ethics (1854) p. 168, 169.
is now generally considered that the teaching of legal ethics is a necessary step in the education of a lawyer.

Indeed, the importance of thorough courses on legal ethics can hardly be over-emphasized. Nor should they be confined solely to a study of the Canons of Ethics, as this approach is far too restrictive. The need is for broadly based courses dealing with both ethics and the professional responsibilities of a lawyer. Happily, this need is gaining increased recognition in our law schools and in the profession generally.*

The ethical standards of our profession can also be improved by stricter admission policies. The law schools themselves, in admitting students, must give increasingly careful attention to moral and character qualifications. The obvious difficulties in making

*See: *Legal Ethics and Professional Responsibility*, published by the American Bar Foundation (1963). This study indicated that 77% of the approved law schools now offer some formal training in professional responsibility (including ethics), and in most of these schools the course is required for graduation.
evaluations in this delicate area should not preclude a conscious effort to eliminate, at this point, applicants whose records suggest the absence of the character qualifications so essential to being a lawyer.

There is of course a second chance to eliminate undesirables, namely, upon application for admission to the bar. But by this time it is even more difficult to identify objective reasons for disqualification of one who has attended or graduated from law school.

I have perhaps said enough to indicate the vast complexities of maintaining the desired level of ethical conduct. This is especially true in America where responsibility for admission standards and disciplinary action is dispersed among 50 states. But the difficulties of the task merely mean that the bar at all levels, including the teaching, practicing and judicial branches of our profession, must be even more determined to accomplish improvement.
Before concluding, you may be interested in a word about the composition of the new ABA Committee. Its chairman is Edward L. Wright, distinguished former Chairman of the House of Delegates. Without undertaking to name the other 11 members, I can say they are broadly representative of the profession: They include two former judges (Mr. Justice Whittaker); two past Presidents of the ABA; two widely known members of the teaching branch; the present and one past chairman of the ABA Ethics Committee. Indeed, each member has a reputation beyond his own state.

It is contemplated that the Committee, in its deliberations, will rely on the accumulated experience of state bar ethics and grievance committees, as well as that of the ABA Committees and Sections. In view of its importance and scope, it is expected that the project will require at least two years.

Now, a final word: For centuries, lawyers have prided themselves on ethical standards which we
have thought were the highest - self proclaimed and self enforced. Although lawyers will agree that there is real justification for this pride, I suspect that with pride has come a certain amount of complacency.

It is thus appropriate - indeed, essential in my view - that we take a fresh, over-all look at the ethics of the bar, and especially at the extent to which the profession recognizes its unique responsibility to insist upon compliance with high standards. If we pursue this with diligence - and discipline - we may refresh and refurbish the honor of being a lawyer.