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The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility?

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INTRODUCTION

The practice of law in America has been regulated since early colonial days. Both legislatures and courts, from without, and the legal profession, from within, have adopted regulations governing the practice of law. The more visible regulations are in the form of statutes, court decisions, court rules, and codes of professional ethics. Although regulations have provided guidance to the practicing bar for many years, a substantial number of existing norms are not well known to the general public. Included in the latter group are the ethics opinions issued by bar associations.

The purpose of this Article is to measure the impact of ethics opinions on courts that decide matters relating to the legal profession. In this Article, the history of the regulation of the practice of law as a profession will be surveyed, the evolution of the ethics opinions of the bar associations will be traced, and a quantitative, as well as a qualitative, analysis of their impact upon the courts will be attempted.

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I. THE REGULATION OF THE LEGAL PROFESSION: A HISTORICAL PERSPECTIVE

A. *Early Attempts*

There were few lawyers in the early colonial period. Those who practiced were not only impoverished, but subjected to severely restrictive legislation, almost leading to their complete banishment.¹ These circumstances began to improve at the end of the seventeenth century, when in Virginia, Massachusetts, New York, and Maryland, an organized bar emerged.² The bar produced an array of better educated, true professionals who not only maintained a regular and extensive practice but who also established legal fees as their regular course of income.³ The evolution of the legal profession did not preclude the continual promulgation of rules to regulate practitioners — particularly in the area of fees.⁴ Nevertheless, at the time of the American Revolution, no uniformity existed for the enactment of rules, even in an area as important as the requirements for admission to the bar. For example, in Massachusetts, each county court admitted attorneys for all the courts in its jurisdiction. In Rhode Island, Delaware, and Connecticut, local courts handled bar admissions, although admission to one bar allowed attorneys to practice in all.⁵ At times, regulations went beyond matters related to the practice of law itself. For example, in New York, each attorney was required to provide satisfactory proof that he had conducted himself as a good and zealous friend to the American cause.⁶

Between 1765 and 1840, the legal profession attained an unprecedented prominence in the leadership of the country. As one commentator expressed: "It was a time when lawyers spoke and acted with that conscious authority which is characteristic of truly creative founders and promoters of public institutions and policies."⁷ However, it was only after 1875 that practitioners began to develop the concept of the legal

1. In Massachusetts, by a statute adopted in 1641, attorneys were allowed to plead causes other than their own, but all fees were disallowed. In Virginia, not only were all attorneys virtually eliminated in 1645, but heavy fines were imposed upon those remaining in practice in 1657. FRANCIS R. AUMAN, *THE CHANGING AMERICAN LEGAL SYSTEM* 19-26 (1940).

2. *Id.*

3. Alan F. Day, *Lawyers in Colonial Maryland, 1660-1715*, 17 *AM. J. LEGAL HIST.* 145-49 (1973).

4. Throughout 1678 and 1679, authorities in Charles County, Maryland ordered attorneys to collect 100 pounds of tobacco per case. This ruling remained in effect until 1690 when lawyers were permitted to charge up to 300 pounds. *Id.* at 163.

5. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 276 (1973).

6. 2 ANTON H. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 7 (1965).

7. *Id.* at 285.

profession as a "branch of the administration of justice" instead of "a mere money-making trade."⁸

B. The Organized Bar

Even after the American Revolution, the organized bar, as we think of it today, with internal organization and cohesion, was nonexistent. It was only in the late nineteenth century that local bar associations began to emerge.⁹ In 1870, a number of prominent lawyers founded the Association of the Bar of the City of New York. In 1874, the Chicago Bar Association was created. Immediately thereafter, eight city and state bar associations were formed, all having as one of their main goals the improvement of the conditions of the bar.¹⁰ A proliferation of bar organizations followed. By 1890, there were twenty state or territorial bar associations. By 1916, forty-eight associations existed. In 1925, every state and territory had associations of lawyers, although their formats varied.¹¹ The most important event in the history of the bar occurred in 1878, when the American Bar Association (ABA) was created in Saratoga, New York. The ABA's goals included the resurgence of the professional spirit of the bar combined with a sense of public duty, the improvement of legal education, formulation of standards for admission to the bar, and the achievement of legal reform.¹²

At the celebration of its centennial in 1978, the ABA counted a membership of 235,000 lawyers. Today, the ABA has a membership of 360,000. The Association continues its devotion to service to the profession and to the improvement of the administration of justice, but maintains as its primary goals the pursuit of professional integrity and professional development.¹³

II. THE ETHICAL NORMS OF THE LEGAL PROFESSION

A. The Early Treatises

From the outset, the legal profession expressed great concern for the ethical behavior of its members, seeking guidance for ethical principles from organized bodies. Two works in particular had a significant impact

8. HENRY S. DRINKER, *LEGAL ETHICS* 20 (1953).

9. JAMES W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 285-86 (1950).

10. *Id.* at 286.

11. *Id.* at 287.

12. *Id.*

13. ABA CENTENNIAL: *A CENTURY OF SERVICE* 5 (1979).

on the early development of professional ethical principles: David Hoffman's *Fifty Resolutions in Regard to Professional Deportment* (1822), and George Sharswood's *A Compend of Lectures on the Aims and Duties of the Profession of the Law* (1854). Both Hoffman and Sharswood were nineteenth century law teachers.¹⁴

Hoffman's work was reprinted in his *Course of Legal Study* in 1836. This work was a collection of moral maxims which established very high standards for the practicing lawyer, for example:

XI. If, after duly examining a case, I am persuaded that my client's claim or defense (as the case may be), cannot, or rather ought not to be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonorable use of legal means in order to gain a portion of that, the whole of which I have reason to believe would be denied to him both by law and justice.¹⁵

In Maxim XII, a pledge was made not to plead the Statute of Limitations.¹⁶ Sharswood followed the same format, although his moral maxims were presented in the form of essays. Sharswood later developed an original contribution in his treatise *Legal Ethics* (1884).

For many years, these two treatises constituted the creed of the legal profession. Other less significant works on ethics which coexisted with or supplemented these two included Timothy Walker's *A Course of Legal Study* (1837), George W. Warvelle's *Essays in Legal Ethics* (1902), and Gleason L. Archer's *Ethical Obligations of the Lawyer* (1910).

B. The Codes of Ethics

1. *The Alabama Code of Ethics.*—As the legal profession attained maturity and the practice of law became more complex, the need arose for ethical norms of a more definite character than the merely encouraging works of Sharswood and Hoffman. In 1887, the state of Alabama promulgated its *Alabama Code of Ethics* based upon the aforementioned treatises.¹⁷ The Alabama Code was composed of: (a) a preamble; (b) a quotation from Sharswood titled "High Moral Principle Only Safe Guide;" (c) "A Summary of the Duties of Attorneys," which constituted an oath of the profession; and (d) a relation of the "Duty of Attorneys to Courts and Judicial Officers." This last section comprised a series

14. ROBERT H. ARONSON ET AL., *PROFESSIONAL RESPONSIBILITY* 29 (1985).

15. DRINKER, *supra* note 8, at 339-40.

16. *Id.* at 340.

17. *Id.* at 352-63.

of fifty-six statements establishing the basic duties of lawyers in matters ranging from criticism of judges and trial conduct to the preservation of clients' confidences and contingent fees. The quotation from Sharswood starts with the following sentence: "There is, perhaps, no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law."¹⁸

2. *The ABA Canons of Professional Ethics*.—In 1908, inspired by the Alabama Code, the American Bar Association adopted the original *Canons of Professional Ethics*, which initially included thirty-two canons, but which was subsequently amended and expanded to forty-seven.¹⁹ The guidelines imparted by the committee studying the adoption of the code suggested that: "good behavior should not be a vague, meaningless or shadowy term devoid of practical application save in flagrant cases."²⁰ Based on this guideline, the ethical standards were better defined and measured, and recommendations were made that "a lawyer failing to conform thereto should not be permitted to practice or to retain membership in professional organizations."²¹

The Canons were numbered, each beginning with a one-sentence title followed by a lengthy explanation. For example:

When Counsel for an Indigent Prisoner—A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.²²

Among other provisions, the purchase of interests in the subject matter of litigation which the attorney conducted was prohibited, the furnishing of information to newspapers by an attorney on pending or anticipated litigation was condemned, and the solicitation of professional employment by circular, advertisement or personal communication or interview not warranted by personal relations was banned. The Canons also contained a series of rules of candor and fairness to be followed when appearing before the court and when dealing with other attorneys.²³ Provisions also addressed the division of fees, contingent fees, suing a client for a fee, as well as prohibitions on attorneys assisting in the unauthorized practice of law.²⁴ The Canons were in effect for more than sixty years

18. *Id.* at 352.

19. THOMAS D. MORGAN & RONALD D. ROTONDA, 1991 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 438-450 (1991).

20. ARONSON, *supra* note 14, at 29-30.

21. *Id.* at 30.

22. MORGAN & ROTONDA, *supra* note 19, at 439.

23. *Id.* at 443.

24. *Id.* at 441-42.

until they were superseded by a new code. However, its provisions are still occasionally cited in court decisions and in bar opinions. The most important contribution emanating from this code was that it allowed the courts and the bar to discipline attorneys for a violation of ethical norms.

3. *The Canons of Judicial Ethics*.—On July 9, 1924, the ABA adopted the Canons of Judicial Ethics.²⁵ The Canons of Judicial Ethics were similar to those adopted for the practicing bar, but their goal was the formulation of a series of principles for judicial behavior. The ABA later recognized that “the primary function of the judges is to pass on their own conduct.” In 1945, the Ethics Committee recommended to the Board of Governors that they authorize the appointment of an Advisory Committee of five judges to whom the Committee might turn for advice in cases involving judicial conduct.²⁶

Topics the Canons addressed included promptness, behavior in court, treatment of witnesses, the avoidance of impropriety, and abuse of discretion. The Canons condemned the acceptance of inconsistent obligations. Of special interest were the provisions in Canon 23 that pointed to the judiciary’s exceptional opportunity and duty to promote legislation.²⁷ In 1970, the Canons became the Code of Judicial Conduct. In 1984, a paragraph was added to the comment of Canon 2 condemning judges’ membership in institutions that practice “invidious discrimination.” Recently, in August of 1990, a new Code was adopted by the House of Delegates of the ABA.²⁸

4. *The Code of Professional Responsibility*.—In 1964, the ABA appointed a special committee charged with the responsibility of evaluating the standards of the profession because: (a) many aspects of the practice of law had changed drastically since the days of the old Canons; (b) those changes had made unreliable the present norms; and (c) there was increased recognition of the profession’s public responsibility.²⁹ Another concern that moved the ABA towards reconsideration of ethical norms was the question of enforcement. The ABA maintained that while the Code should not deal directly with disciplinary action, the close relationship between “the contents of the Canons and the observance and enforcement thereof” should be recognized.³⁰

The Special Committee on Evaluation of Ethical Standards worked for five years before any identifiable results were achieved. It was not

25. ABA Comm. on Professional Ethics and Grievances, ix (1957).

26. DRINKER, *supra* note 8, at 274.

27. *Id.* at 275-78.

28. MORGAN & ROTONDA, *supra* note 19, at 374-410.

29. ARONSON, *supra* note 14, at 30.

30. *Id.*

until 1969 that the Code of Professional Responsibility was adopted as a result of these studies.³¹

The new Code completely departed from the old Canons not only in format, with its more logical structure, but also in its enforceability.³² The previous thirty-two canons were reduced to nine, and were presented as "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationship with the public, with the legal system, and with the legal profession."³³

The meaning of the canons was then spelled out in the "ethical considerations" (EC), described as "aspirational in character."³⁴ They expressed objectives towards which every lawyer should strive, and also enunciated principles that will guide lawyers when making moral decisions.³⁵

The most distinctive feature of the new Code was the incorporation of the "disciplinary rules" (DR) which were mandatory in nature, and defined the "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."³⁶ With the adoption of the new format, the desire to comprise the aspirational standards of excellence and the standards of minimal performance in one body was achieved.³⁷ Now lawyers could look to the disciplinary rules for avoidance of what was prohibited, and at the same time, to the Canons and ethical considerations for guidance in their quest for the betterment of the profession. Since the adoption of the Code, bar disciplinary procedures have been enforced when violations of the DRs occur, unlike the Canons and ECs which are referred to solely for purposes of clarification. There are, however, rare exceptions, for example, in the application of Canon 9 regarding the appearance of impropriety.

Almost immediately, critics complained that the Code was insufficient in dealing with some of the more basic issues of the practice of law, such as the role of the lawyer as an instrument of change and development of the law, as well as the behavior of lawyers in their daily activities. Nonetheless, the new Code was recognized as a more practical instrument than its predecessor, and at any rate, "the elevation of standards comes in the main from neither exhortation nor codification."³⁸ One of the strongest criticisms was that the Code directed its attention to litigators,

31. 94 ABA Rep. 389-92 (1964).

32. Charles Frankel, Book Review, 43 U. CHI. L. REV. 874, 877 (1976).

33. *Id.* at 877 (quotation omitted).

34. *Id.*

35. *Id.*

36. *Id.* (quotation omitted).

37. *Id.*

38. *Id.* at 886.

corporate lawyers, and large law firms while ignoring smaller law firms and solo practitioners.³⁹

5. *The Model Rules of Professional Conduct*.—For its supporters, the adoption of the new Code signaled the completion of their task. This view was not universal. Immediately following its adoption, some observers characterized the Code, while a definite improvement from the hortatory Canons, as nothing more than a stepping stone to the ultimate goals of drafting a final and complete restatement of the law of the profession.⁴⁰ A new Code was needed which could address the developing social role of the attorney. In 1977, the ABA appointed the Commission on Evaluation of Professional Standards, also known as the Kutak Commission, to develop that Code. After three unsuccessful attempts, the Commission submitted the final draft of the proposed *Model Rules of Professional Conduct*.⁴¹ The new proposed Rules were intended to be revolutionary and included proposals to make pro bono public work mandatory and to limit the attorney-client privilege respecting confidential information. However, much of the Committee's work went for naught, as the most dramatic changes were soundly defeated. Nearly all that was achieved was a change in format.⁴²

With the new format, however, the Model Rules preserved the distinction between the legal order, the minimum duties and obligations of the attorney on one hand, and the moral order and aspirations for the improvements of the profession on the other hand. The former is found in the Rules which are mandatory—simple enunciations of postulates. Alternatively, the nonbinding comments consist of explanations of the Rules, elements of the legislative history and aspirations of the ideal behavior of lawyers. This format is similar to the one adopted by the American Law Institute in the Restatements of the Law. The impact of the new Rules is seen in their adoption by more than half of the states and their inspiration for modifications in the ethics codes of some of the remaining states.

III. THE ETHICS OPINIONS OF THE BAR ASSOCIATIONS

The ethics opinions of the bar are issued at different levels: by the American Bar Association at the national level; by the state bar associations at the state level; and by county and city bar associations at the local level. In addition, specialized associations of lawyers, such as

39. Philip Schuman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 249-50 (1968).

40. ARONSON, *supra* note 14, at 31.

41. *Id.*

42. Jorge L. Carro, Book Review, 56 U. CIN. L. REV. 207, 209 (1987).

the Patent Law Association and the Federal Bar Association, also issue ethics opinions.

In some jurisdictions, including New Jersey, Ohio, Rhode Island, and Tennessee, special advisory ethics committees exist which are not directly affiliated with the bar. These committees, consisting of a body of lawyers appointed by the supreme court of the state, are empowered to issue advisory, nonbinding ethics opinions.⁴³ Although nonbinding, these opinions may have more persuasive value than those issued by the bar due to the close relationship between the issuing body and the highest court of the state. This is a recent phenomenon. The impact the actions of these special advisory committees may have on the self-assigned role of the bar associations for the interpretation of the ethical norms cannot be predicted at this early stage. However, it does not appear that the existence of these special advisory boards has created any type of interference with the work of the ethics committees of the bar. On the contrary, both types of advisory bodies appear to be engaged in a peaceful coexistence, as they quote from each other.⁴⁴

Furthermore, prestigious and experienced law professors also issue ethics opinions from time to time which are also sporadically quoted by the courts. However, because of their non-bar nature, neither the supreme court boards' opinions nor those of legal scholars are included in this study.

A. *The Ethics Opinions of the American Bar Association*

1. *The Origins and Development.*—After the enactment of the original Canons of Ethics in 1908, the ABA recognized the need for an organized body capable of interpreting these Canons. To fill this void, it amended the ABA's constitution and by-laws to create the ABA Standing Committee on Professional Ethics. The by-laws read as follows:

The Committee on Professional Ethics shall communicate to the Association such information as it may collect respecting the activity of state and local bar associations in respect to the ethics of the legal profession, *and it may from time to time make recommendations on the subject to the Association.*⁴⁵

43. See N.J. Sup. Ct. R. 1:19 (1982); *Supreme Court Rules for the Government of the Bar of Ohio*, R.V. (1985); *Rules of the R.I. Sup. Ct. Ethics Advisory Panel No. 1* (1990); and *Tennessee Sup. Ct. Rules No. 9, § 26*, (1980). See generally *Ohio State Bar Ass'n Reports*, and William W. Hunt, *An Overview of Formal Ethics Opinions in Tenn. 1980-1988*, 19 MEM. ST. U. L. REV. 275-325 (1989).

44. See Supreme Court of Ohio Bd. of Comm'r on Grievances and Discipline, Op. 8827 (1988) (quoting from opinions of the Arizona and Kentucky bars).

45. 39 ABA Rep. 559 (1914) (emphasis added).

In 1919, the Committee was renamed the Committee on Professional Ethics and Grievances⁴⁶ and, in 1922, its governing by-laws were rewritten to include additional provisions, such as the following:

Be authorized in its discretion *to express its opinion concerning proper professional conduct, and particularly concerning the application of the tenets of ethics thereto, when consulted by officers or committees of state or local bar associations. Such expression of opinion shall only be made after consideration thereof at a meeting of the Committee, and approval by at least a majority of the Committee.*⁴⁷

In 1958, the Committee on Professional Ethics and Grievances divided into the Committee on Professional Grievances (adjudicatory) and the Committee on Professional Ethics (advisory), which in 1971 was renamed Standing Committee on Ethics and Professional Responsibility.⁴⁸

The Ethics Committee adopted rules of procedure on July 21, 1971. One of their primary purposes was to advise members of the Bar, in the form of opinions, on the ethical propriety of their contemplated professional or judicial conduct:⁴⁹

The Committee may issue opinions of two kinds: *Formal Opinions* and *Informal Opinions*. *Formal Opinions* are those upon subjects determined by the Committee to be of widespread interest or unusual importance. Other opinions are *Informal Opinions*. The Committee shall assign to each opinion a non-duplicative identifying number, with distinction between Formal Opinions and Informal Opinions.⁵⁰

The opinions are issued upon written request to any ABA member and are based solely upon the facts presented. According to the limitations included in the Rules, opinions are not be issued on questions of law, on matters subject to litigation, or on questions involving previous conduct.⁵¹

2. *The Sources.*—
a. *Official*

46. ABA Comm. on Professional Ethics, 1 (1967).

47. *Id.* at 1-2. (emphasis added).

48. ABA Standing Committee on Ethics and Professional Responsibility. Composition and Jurisdiction; Rules of Procedure, *reprinted in* MORGAN & ROTONDA, *supra* note 19, at 457-59.

49. *Id.*

50. *Id.* (emphasis added).

51. *Id.*

As noted earlier, the American Bar Association's Formal Opinions were published in the *American Bar Association Journal*.⁵² Summaries of certain informal opinions were included in the *Journal*, but most informal opinions were compiled in a separate volume appropriately titled *Informal Opinions*, which was regularly supplemented.⁵³

In contrast, the opinions issued by the state and local bar associations are distributed in a variety of ways. Those deemed most important are printed and either circulated among the association's members or inserted into their official publications.⁵⁴ Certain digests, including Olavi Maru's *Digest of Bar Association Ethics Opinions*, publish condensed versions of both the state and local opinions together with the formal and informal opinions of the ABA.⁵⁵ Not all bar association opinions are reported, one reason being the lack of a standardized reporting system. However, seven thousand opinions were reported in Maru's 1972 *Digest*.⁵⁶

Even with the above sources, there remained a need for a more comprehensive and centralized compendium of ethics materials. In 1980, the American Bar Association joined efforts with the Bureau of National Affairs and published the *Lawyer's Manual of Professional Conduct*. This is a regularly updated three-volume, loose-leaf service that publishes cases, ethics opinions, legislative actions, and disciplinary proceedings.⁵⁷ In the manual, the ABA formal and informal opinions are reproduced verbatim, while the state and local bar opinions are pinpointed on a selective basis and condensed.⁵⁸ At the same time the ABA continues to publish a loose-leaf service titled *Recent Ethics Opinions*.

In 1981 an individual attorney's ability to access ethics materials was greatly increased by the Shepard's/McGraw's addition of *Shepard's Professional and Judicial Conduct Citations* to its series of citators.⁵⁹ This citator is published triennially in March, July, and November, and each issue is cumulative.⁶⁰ The service consists of a compilation of citations not only to the ABA formal and informal opinions, but also to the rules of procedure of the American Bar Association's Standing

52. OLAVI MARU, *DIGEST OF BAR ASSOCIATION ETHICS OPINIONS* 2 (1970). After their appearance in the A.B.A. *Journal*, the formal opinions were compiled in the official text which is the *ABA Opinions of the Committee on Professional Ethics Annotated*. Citations of the opinions refer to the compilation and not to the *Journal*. See *supra* note 46.

53. MARU, *supra* note 52, at 2.

54. In some states, selected opinions are published in condensed form in the state bar association journal.

55. See MARU, *supra* note 52.

56. *Id.*

57. *Laws. Man. on Prof. Conduct (ABA/BNA)* (1980).

58. *Id.*

59. *SHEPARD'S PROFESSIONAL & JUDICIAL CONDUCT CITATIONS (Shepard's)* (1981).

60. *Id.* at 5.

Committee on Ethics and Professional Responsibility.⁶¹ Also cited are the Model Code of Professional Responsibility, the Model Rules of Professional Conduct, and the Code of Judicial Conduct.⁶²

b. Unofficial

In addition to the official publications of the bar, several authors have contributed to the law of ethics by privately compiling and publishing ethics opinions. The first of these works was Henry S. Drinker's *Legal Ethics*, which was published in 1953 and reprinted upon demand in 1954.⁶³ Drinker, who was the Chairman of the ABA Committee of Professional Ethics and Grievances at the time of the publication, authored a treatise which relied heavily on court decisions as well as on ethics opinions. In fact, Drinker cited more than 900 cases, along with 287 published ABA formal opinions and more than 380 unpublished opinions.⁶⁴ Drinker also relied heavily upon the opinions of state and local bars, as evidenced by his citation to more than 3000 of their opinions.⁶⁵ Drinker's work was extremely popular in its time and its impact is still evident, as it is currently cited in court decisions and ethics opinions. In fact, some of the ethics opinions, reported as cited by the courts in this study, have not been directly quoted from the bar publications but from Drinker's work.

In 1966, Raymond L. Wise's *Legal Ethics*, the second seminal treatise on legal ethics opinions was published. The popularity of this work was evidenced by the appearance of a second edition in 1970, a reprint in 1972, and supplements in 1973 and 1979. Wise's work echoed the profession's growing respect for ethics opinions, for it was solely based upon hundreds of ethics opinions.⁶⁶

In addition to these two works, which were considered the Delphian oracles of professional responsibility,⁶⁷ a number of textbooks, treatises, compilations, etc., have been devoted to the subject of legal ethics. With

61. *Id.* at 2-3.

62. The cited opinions are those that have previously appeared in *United States Reports*, *Supreme Court Reporter*, *Lawyers' Edition*, *Federal Reporter*, *Federal Supplement*, *Federal Rules Decisions*, *Bankruptcy Reporter*, *United States Claims Court Reporter*, and all state reports included in West's National Reporter System. It also includes those formal and informal opinions of the ABA and of the state and local associations cited in numerous law reviews, including the *ABA Journal*, and A.L.R. annotations. In addition, they refer to ethics opinions that are cited by the bar in their own opinions.

63. DRINKER, *supra* note 8, at ii.

64. *Id.* at 304-08, 380-410.

65. *Id.* at 410-36.

66. RAYMOND L. WISE, *LEGAL ETHICS* (2d ed. 1970).

67. CARRO, *supra* note 42, at 209.

a few exceptions, these works consistently referred to the ethical opinions of the bar as persuasive authority, a view which is reflected in the court's characterization of opinions as "advice to members of the bar and the public."⁶⁸

c. Computerized

Most recently, Westlaw and Lexis have incorporated in their data banks the ABA formal and informal opinions. In addition, Westlaw has started to include some of the states' opinions.

3. *Present Status of the Ethics Opinions of the ABA: The Department of Justice Antitrust Suit.*—In addition to the inherent rights of the states' highest court to regulate and guide the activities of the legal profession, lawyers have been able to police themselves through the disciplinary actions of their committees on grievances and the advisory efforts of their ethics committees. The disciplinary process usually involves both the court system and the Bar, since the attorney in question must be accorded his due process. However, the preventive efforts of the bar via the issuance of ethics opinions is a prerogative that the Bar has been exercising with full autonomy throughout its history. This concept of self-regulation has upset some and prompted questioning of the validity of self-regulation against governmental control.⁶⁹

In 1980, the Florida House of Representatives considered proposing an amendment to the state constitution which would take exclusive jurisdiction over the bar away from the state Supreme Court. Similar attempts have occurred in Virginia, Arizona, New Jersey and other states.⁷⁰ In *Bates v. State Bar of Arizona*,⁷¹ the United States Supreme Court established that when self-regulation conflicts with speech protected by the First Amendment, the protected speech must prevail. Furthermore, in *Goldfarb v. Virginia State Bar*,⁷² the Supreme Court suggested that if the regulatory goal of the state is mandated in state policy, it will always prevail over federal anti-competitive goals, giving the edge to the states over the Bar.

As previously explained, the advisory ethics opinions of the Bar are provided by special bar committees in response to inquiries posed by the membership.⁷³ Usually, they are the product of carefully researched

68. WISE, *supra* note 66, at 9. See also *International Graphics v. United States*, 5 Cl. Ct. 97, 99 (1984).

69. Joseph W. Little & Randolph J. Rush, *Resolving the Conflict Between Professional Ethics Opinions and Antitrust Laws*, 15 GA. L. REV. 341, 341-42 (1980).

70. *Id.* at 341 n.2.

71. 433 U.S. 350 (1977).

72. 421 U.S. 773 (1975).

73. See *supra* note 50 and accompanying text.

and deliberated efforts, and some believe that they carry "about the same weight as an attorney general's opinion of law; they are studied opinions, due weighty consideration, but are not binding on the courts."⁷⁴ Despite the absence of binding force, the ethics opinions are widely circulated and do "discourage disapproved behavior."⁷⁵ This restraining effect has given rise to questions concerning antitrust violations.⁷⁶

On June 25, 1976, the Justice Department filed a complaint under Section 1 of the Sherman Antitrust Act against the American Bar Association challenging the activities of the ABA regarding the regulation of advertising for attorneys.⁷⁷ The complaint alleged that the ABA had "violated Section 1 of the Sherman Act by adopting and policing unreasonable restrictions on competitive advertising by lawyers and that members of the A.B.A. have unlawfully combined and conspired with the defendant to abide by such restrictions."⁷⁸ Among the violations claimed were that the Bar's interpretation of the Code's provisions upon advertising was incorrect,⁷⁹ and that the ABA's Standing Committee on Ethics and Professional Responsibility's issuance of opinions interpreting and applying the provisions of the Code regarding advertising constituted a restriction on trade.⁸⁰

On August 30, 1978, however, the Justice Department filed a motion dismissing the antitrust suit against the ABA without prejudice.⁸¹ The main reason for the department's decision to dismiss came from the internal changes in the ABA during the time between the filing of the complaint and its dismissal. The Supreme Court's opinion in *Bates* catalyzed many of these changes.⁸² As a result, the Bar took several

74. Little & Rush, *supra* note 69, at 343.

75. *Id.*

76. *Id.*

77. *Justice Department Dismisses Antitrust Suit Against American Bar Association*, 64 A.B.A. J. 1538 (1978) [hereinafter *Justice Department*].

78. From the Justice Department's memorandum in support of its motion to dismiss, reproduced in *id.* at 1539.

79. *Id.*

80. *Id.* at 1539-40.

81. *Id.* at 1538.

82. In this case the court declared that broad restrictions on advertising imposed by the state of Arizona violated the First Amendment, therefore voiding all existing state rules and regulations. The Arizona statute on advertising was identical to the ABA provision. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); see *supra* note 71 and accompanying text.

steps directed towards relaxing its rules on advertising.⁸³

As a result of the antitrust suit the ABA announced that in regard to advertising, neither the Code nor the interpretive (ethics) opinions of the Ethics Committee bind any individual lawyer, and that it takes no steps to assure individual compliance with them.

4. *Composition, Jurisdiction and Procedure of the ABA Committee on Ethics and Professional Responsibility.*—The ABA Committee on Ethics and Professional Responsibility consists of eight members, all lawyers. The Committee issues opinions, approved by a simple majority of its members, on proper professional and judicial conduct. The opinions are issued either on its own initiative, or when required to do so by a member of the Bar or an officer or committee of a state or local bar association. However, an opinion may not be issued on a question that is pending before a court.⁸⁴

B. *The Ethics Opinions of the State and Local Bar Associations*

Long before the ABA issued its first ethics opinion in 1924, the New York County Lawyers' Association established its first ethics committee in 1908. In 1912, the committee was authorized to render ethics opinions.⁸⁵ This activity was not limited to the New York Bar, as many state and local bar associations followed their path; it was reported in 1980 that eighty percent of all state and twenty-three percent of all local bar associations issue ethics opinions.⁸⁶ The composition and procedures of these committees vary from state to state but the majority follow that of the ABA. One distinctive feature of these state and local bar committees is the active and influential role of bar counsels in drafting ethics opinions.

IV. IMPACT OF ETHICS OPINIONS OF THE BAR IN COURT DECISIONS

Regardless of the nonbinding status of the bar's ethics opinions, both federal and state courts have frequently referred to them when deciding cases relating to ethical issues of the profession. The courts have often followed these opinions, although at times they have distin-

83. After *Bates*, the ABA appointed a special committee to deal with the question of advertising. The Committee, in June 1978, recommended several changes directed to the relaxation of the rules; for example, allowing television advertising. See *Justice Department*, *supra* note 77, at 1540-41.

84. ABA Standing Committee on Ethics and Professional Responsibility. *Composition and Jurisdiction*, (1971), reprinted in MORGAN & ROTONDA, *supra* note 19, at 458.

85. Charles A. Boston, *Practical Activities in Legal Ethics*, 62 U. PA. L. REV. 103, 111 (1913).

86. ABA DIRECTORY OF BAR ACTIVITIES 14 (1980).

guished, and even criticized, them. The opinions have been applied by courts in many different contexts: conflicts of interest (the most popular area); advertising; fee disputes; civil claims; and even in questions of ineffective assistance of counsel. The organized bar, of course, relies heavily on these opinions in their adjudicatory decisions (disciplinary proceedings), as well as in their advisory role.

However, this apparent respect for ethics opinions has not been universally shared. Some strong voices, mostly emanating from the academic community, have expressed sharp criticism over their practical value. The criticism centers not only on questions of merit, but also on matters of procedure.

Although some isolated studies have been conducted relative to the ethics opinions of the bar, there is a need for a comprehensive study directed at measuring their impact on the courts, both from a quantitative as well as a qualitative point of view. These findings must be contrasted with the opinions of the critics.

The following section will be devoted to the presentation and analysis of the survey of the ethics opinions that we have conducted, and a review of the literature on the subject.

A. The Survey

Our study is based on a computerized survey of federal and state court decisions citing ethics opinions of the bar from 1924 to 1990. Based on the collected data a quantitative and qualitative analysis was attempted.⁸⁷

B. Quantitative Analysis

The findings showed that a total of 1194 opinions were cited in 639

87. This empirical study was conducted by using LEXIS. The COURTS files from the GENFED library and the individual files from the STATES library were used. All necessary precautions were taken in attempting to make the survey as comprehensive as possible. Originally, the search was made using a combination of search terms like "committee," "professional," and "ethics." It was found, however, that there was no uniformity in the committee names nor in the way they were cited by the courts. It was only when a more general search term, "ethics," was used that substantial progress was achieved. The return was great and more than 4000 cases had to be reviewed. Another problem was the discrepancies in the scope of the different files. As those files are still at a developing stage, some covered a greater number of years than others. For all these reasons, the author cannot claim absolute inclusiveness. It is possible that a substantial number of cases citing ethics opinions remain undiscovered. However, if that is the situation, it will only reinforce our conclusions. In spite of all this, this cumbersome task could not be accomplished without the use of computerized legal research.

cases by federal and state courts at different levels. Of the cited cases, 203 were decided before 1978 and 436 thereafter. It was on August 30, 1978, that the Department of Justice filed the motion to dismiss its antitrust suit against the ABA after the bar announced its ethics opinions were not binding.⁸⁸ For quantitative analysis purposes the data obtained from the survey will be divided in two major groups: federal courts and state courts.

1. *Federal Courts.*—The federal courts were responsible for citing 317 opinions in 171 cases. A breakdown by court follows.

a. *Supreme Court*

In fourteen cases decided by the United States Supreme Court, thirty ethics opinions were cited: six ABA Formal; three ABA Informal, six issued by state or state-like bars (District of Columbia, Georgia, Kentucky, Maine, Michigan and Virginia); nine by the New York County Bar Association; and six by city bars (Chicago and New York City). Of the cited cases, three referred to ABA Committee on Ethics and Professional Responsibility, Formal Op. 148 (1935), which deals with the issue of solicitation and legal services for the poor.⁸⁹ Two cases cited ABA Informal Op. 955 (1975), which deals with the duty of counsel to avoid frivolous appeals.⁹⁰ One case cited ABA Informal Op. 469 (1961), which refers to pre-paid legal services.⁹¹ In another case, a concurring opinion referenced two ABA formal opinions which related to radio and television broadcasting of court proceedings.⁹² Finally, in three cases the Court relied on one state and two local bar opinions.⁹³

88. The search covered the period of 1924 to 1990, but the first citation retrieved was 1946. The absence of citations between 1924 and 1946 may be attributed to the limitations on the publication of the opinions. Drinker's first printing of his text, which constituted the first attempt to publish the ethics opinions of the bar in an organized manner, appeared in 1953. See DRINKER, *supra* note 8.

89. The Court referred to this opinion in *NAACP v. Button*, 371 U.S. 415, 440 n.19 (1962), *In re Primus*, 436 U.S. 412, 437 (1978), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 463 n.20 (1978).

90. *Polk County v. Dodson*, 454 U.S. 312, 323 n.14 (1981) and *McCoy v. Court of App. of Wis.*, 486 U.S. 429, 436 n.8 (1988) (which also cited ABA Informal 956, similar to the aforementioned 955).

91. *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 224 (1967).

92. *Estes v. Texas*, 381 U.S. 532, 597 (1965) (Harlan, J., concurring) (referring to ABA Comm. on Professional Ethics and Grievances, Op. 67 (1932) & Op. 212 (1941)).

93. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 777 (1975) the Court cited Op. 98 of the Va. State Bar Comm., and in both *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) and *Ohralik v. Ohio State Bar Ass'n* 436 U.S. 447, 460 (1978), reference was made to Op. 47 of New York County Bar Ass'n (quoting DRINKER, *supra* note 8, at 211 n.5). The Virginia opinion referred to fee schedules and the New York opinion with solicitation.

b. Courts of appeals

The federal courts of appeals cited a total of eighty-four ethics opinions in forty-one cases from 1972 to 1990. Thirty-six of the cited opinions were ABA formal and twenty ABA informal. Twenty opinions were issued by state bar associations,⁹⁴ three by county bar and five by city bars.⁹⁵ Some circuits appeared more inclined to cite ethics opinions than others.⁹⁶

The cited opinions by the courts of appeals referred to a variety of ethical issues. Questions regarding fees were frequently resolved by the courts including: fee sharing,⁹⁷ attorneys' prohibition to charge non-legal fees as a broker,⁹⁸ minimum fee schedules,⁹⁹ contingent fees,¹⁰⁰ and fee negotiations.¹⁰¹ The Courts' reliance on ethics opinions when dealing with motions to disqualify was also evident, as eight cases were identified in this area.¹⁰²

94. Arizona (4), Connecticut (1), Delaware (1), District of Columbia (2), Florida (1), Illinois (1), Michigan (2), New York (3), North Carolina (1), Oregon (3), and Texas (1).

95. Los Angeles County (1), New York County (2) and New York City (5).

96. The Second Circuit led the group with nine citations (1979-88); DC followed with seven (1972-85); Ninth with five (1973-83); Seventh with five (1972-83); Fourth with four (1981-89); Fifth with three (1976-83); Third with two (1979-82); Tenth with two (1979-82) and Eleventh with two (1983-87). No opinions appeared to be cited by the First or the Eighth.

97. See *Dietrich Corp. v. King Resources Co.*, 596 F.2d 422, 426 (10th Cir. 1979) (citing ABA Formal Op. No. 316 (1967)); *National Treasury Employees Union v. United States Dep't of Treasury*, 656 F.2d 848, 851-52 (D.C. Cir. 1981) (citing ABA Formal Ops. 48 (1931), 180 (1938), 294 (1958), ABA Informal Op. 544 (1975)); *Digest of Bar Ass'n Ethics Ops.* 647, 1272, 1391, 1429, 2245, 3020, 3304, 3610, 3735 (O. Maru ed. 1970); 1970 Supp. to the *Digest of Bar Ass'n Ethics Ops.* 5048, 5061, 5190, 5935 (O. Maru ed. 1972); 1975 Supp. to the *Digest of Bar Ass'n Ethics Ops.* 7509, 9178 (O. Maru ed. 1977); *Stissi v. Interstate & Ocean Transp. Co.*, 814 F.2d 848, 852 (2d Cir. 1987) (citing ABA Formal Ops. 97 (1933) and 153 (1936)).

98. *Leonard v. BHJK Corp.*, 469 F.2d 108, 113 (D.C. Cir. 1972) (citing ABA Informal Ops. 709 (1964) and 775 (1965)).

99. *Mills v. United States*, 713 F.2d 1249, 1255 (7th Cir. 1983) (citing ABA Formal Op. 302 (1970)).

100. *In re Forfeiture Hearing as to Caplin & Drysdale Chartered*, 837 F.2d 637, 654 (4th Cir. 1988) (Murnaghan, J., concurring) (citing ABA Informal Op. 1521 (1986)).

101. See *Western Fire Ins. Co. v. National Union Fire Ins. Co.*, 477 F.2d 1026, 1028 (9th Cir. 1973) (citing ABA Formal Op. No. 198 (1939)), and *Moore v. National Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1103 (D.C. Cir. 1985) (citing Op. 80-94 of New York City Bar Ass'n (1981) and Op. 147 of the District of Columbia Bar (1985)).

102. See *General Motors Corp. v. City of N.Y.*, 501 F.2d 639, 649 (2d Cir. 1974) (citing ABA Formal Op. 37 (1931)); *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357, 1359 (2d Cir. 1975) (citing ABA Formal Ops. 330 (1972) and 339 (1975)); *Woods v. Covington County Bank*, 537 F.2d 804, 812-16 (5th Cir. 1976) (citing ABA Formal Ops. 26 (1930), 37 (1931), 135 (1935) and Informal Ops. 885 (1965) and 1166 (1970)); *W.T. Grant Co. v. Haines*, 531 F.2d 671, 674-76 (2d Cir. 1976) (citing ABA Formal Ops. 58 (1931), 102 (1933), Informal

When dealing with conflicts of interest involving government lawyers the courts have also paid attention to the ethical opinions of the bar, as evidenced on five occasions.¹⁰³ In one case involving conflicts between the insurer and the insured, the court referred to both ABA and state ethics opinions.¹⁰⁴ The other four cases—one involving conflicts of corporate attorneys, one with appearance of impropriety, and two related to conflicts in the prosecution—also referred to ethics opinions.¹⁰⁵

Furthermore, in a variety of issues relating to ethics, the courts referred to or relied on ethics opinions on questions as diversified as: attorneys as witnesses,¹⁰⁶ liens on clients' files,¹⁰⁷ attorneys' work

Ops. 908 (1966), 1034 (1968), 1140 (1970), 1269 (1973)), and New York State Bar Op. 358 (1974); *Armstrong v. McAlpin*, 606 F.2d 28, 29-32 (2d Cir. 1979) (citing ABA Formal Ops. 37 (1931) and 342 (1975), as well as Op. 889 (1976) of the Bar of the City of York); and *United States v. Heldt*, 668 F.2d 1238, 1275 (D.C. Cir. 1981) (citing Oregon State Bar Comm. on Legal Ethics Op. 386 (1978)).

103. *United States v. Ostrer*, 597 F.2d 337, 339-40 (2d Cir., 1979) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975); N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 506 (1979)); *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 258 (7th Cir. 1983) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975); Ill. State Bar Ass'n Professional Ethics Ops. 762 (1982) & 811 (1982)); *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1264 (5th Cir. 1983) (citing Tex. Ethics Comm. Op. 148 (1957)); *Paul E. Iacono Structural Eng'r, Inc. v. Humphrey*, 722 F.2d 435, 440 (9th Cir.), *cert. denied*, 464 U.S. 851 (1983) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)); *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, 1347-1350 (9th Cir. 1981) (citing ABA Comm. on Professional Ethics and Grievances, Formal Ops. 132 (1935) & 331 (1972); ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 1157 (1970), 1235 (1972) & 1282 (1973); Or. State Bar Ops. 45 (1957), 57 (1957), 135 (1964), 218 (1972) & 376 (1977)).

104. *See In re A.H. Robins Co., Inc.*, 880 F.2d 709, 751 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1476 (1981); Conn. Informal Op. 83-5 (1982); Del. Op. 1981-1 (1981); Mich. Op. CI-866 (1983)).

105. *See Evans v. Artek Systems Corp.*, 715 F.2d 788, 792 (2d Cir. 1983) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 516 (1962) and 1056 (1968)); *First Wis. Mortgage Trust v. First Wis. Corp.*, 584 F.2d 201, 220 (7th Cir. 1978) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 885 (1965)); *Jones v. Richards*, 776 F.2d 1244, 1247 (4th Cir. 1985) (citing N. C. State Bar Ethics Op. 595).

106. *See Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1446 (1980)); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 658 F.2d 1355, 1359 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 828 (1965)); *United States v. Birdman*, 602 F.2d 547, 552 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032, and *cert. denied*, 445 U.S. 906 (1980) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 50 (1931)).

107. *Pomerantz v. Schandler*, 704 F.2d 681, 683 (2d Cir. 1983) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 1461 (1980)).

product,¹⁰⁸ advancing living expenses to clients,¹⁰⁹ substituting a person for the defendant in a criminal procedure,¹¹⁰ attorneys' liens,¹¹¹ Interest On Lawyers Trust Accounts (IOLTA),¹¹² solicitation in class actions,¹¹³ and consideration of certain types of litigation as constitutionally protected.¹¹⁴

c. District courts

The district courts cited a total of 162 opinions in eighty-six cases from 1958 to 1990. Fifty-one of the cited opinions were ABA formal and twenty ABA informal. Fifty-two were issued by state bar associations,¹¹⁵ fifteen by county bars,¹¹⁶ and twenty-four by city bars.¹¹⁷

The opinions cited by the district courts addressed a variety of ethical issues. The district courts frequently applied bar opinions in the area of conflicts of interest,¹¹⁸ particularly when dealing with questions of

108. *Parrott v. Wilson*, 707 F.2d 1262, 1271 (11th Cir. 1983), *cert. denied*, 464 U.S. 936 (1983) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 337 (1974)); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1320 (1975); N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 328 (1974)).

109. *See In re Ruffalo*, 370 F.2d 447, 450 (6th Cir. 1966), *rev'd*, 390 U.S. 544 (1968) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 288 (1954)); *In re Dawson*, 609 F.2d 1139, 1143 (5th Cir. 1980) (citing Florida Bar Professional Ethics Comm. Op. 65-39 (1965)).

110. *United States v. Thoreen*, 653 F.2d 1332, 1340 (9th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 914 (1966)).

111. *Jenkins v. Weinshienk*, 670 F.2d 915, 920 (10th Cir. 1982) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1461 (1980)).

112. *Cone v. State Bar of Fla.*, 819 F.2d 1002, 1005 (11th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 348 (1982)).

113. *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927, 930-31 (7th Cir. 1972) (citing ABA Comm. on Professional Ethics and Grievances, Formal Ops. 7 (1925) and 111 (1934); N.Y. City Bar Ass'n Comm. on Professional Ethics, Op. 717 (1948); N.Y. County Bar Ass'n Comm. on Professional Ethics, Op. 47 (1914) and 228 (1924)).

114. *International Union v. National Right to Work Legal Defense & Educ. Found.*, 590 F.2d 1139, 1148 (D.C. Cir. 1978) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 148 (1935)).

115. Arizona (2), Connecticut (1), District of Columbia (8), Florida (2), Idaho (1), Illinois (2), Louisiana (3), Maryland (2), Massachusetts (2), Michigan (4), Mississippi (1), New Jersey (1), New York (10), Oklahoma (1), Oregon (2), Tennessee (1), Texas (6), Virginia (1), Washington (1), and Wisconsin (1).

116. New York (13) and Allegheny (2).

117. New York (21), San Diego (2), and San Francisco (1).

118. Forty-eight of the cases citing ethics opinions dealt with conflicts of interest issues.

disqualification,¹¹⁹ confidentiality,¹²⁰ and government lawyers.¹²¹ Other ethics opinions cited referred to fees, communication with adverse parties, recording of conversations, and advertising and solicitation.

d. Other federal courts

The federal courts' reliance on ethics opinions of the bar when dealing with ethics issues is not limited to the regular courts, as some federal courts with special jurisdiction have followed the same pattern. The United States Court of Claims (United States Claims Court after 1982) has cited six ethics opinions in four cases from 1977 to 1984. Three of these opinions were ABA formal opinions, one ABA informal opinion, one opinion issued by a state-like bar (District of Columbia), and one opinion was issued by a city bar (New York). The cases dealt with a variety of issues like conflicts, recording of conversations, and communication with witnesses.¹²² In a 1982 case, the United States Court of Customs and Patent Appeals cited ABA Formal Opinion No. 342 (1975) in dealing with the question of disqualification of a government lawyer.¹²³

The United States Court of International Trade, in a 1989 decision, cited ABA Formal Op. 342 (1985) in dealing with the specialization of government lawyers.¹²⁴ The United States Bankruptcy Courts have cited five ethics opinions in five cases from 1990 to 1991. Two of the cited opinions were ABA informal opinions, one opinion was issued by the New York State Bar, and two opinions were issued by the San Francisco Bar. The bankruptcy courts have referred to ethics opinions when dealing with problems of advance payment retainers.¹²⁵

The military courts apply the Model Code of Professional Responsibility to its lawyer members when dealing with ethical issues. These

119. See, e.g., *Realco Servs., Inc. v. Holt*, 479 F. Supp. 867, 871 (E.D. Pa. 1979) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 885 (1965)).

120. See *Moore v. Margiotta*, 581 F. Supp. 649, 652-53 (E.D.N.Y. 1984) (citing N.Y. State Bar Ass'n Op. No. 555 (1984)).

121. See, e.g., *In re Grand Jury Proceedings*, 700 F. Supp. 626, 630, *aff'd*, 875 F.2d 927 (1989) (D.P.R. 1988) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)).

122. *Kesselhaut v. United States*, 555 F.2d 791, 793-94 (Ct. Cl. 1977) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975); N.Y. City Bar Ass'n Comm. on Professional Ethics, Op. 889 (1976)).

123. *Ah Ju Steel Co., Ltd. v. Armco*, 680 F.2d 751, 754 (C.C.P.A. 1982) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)).

124. *National Bonded Warehouse Ass'n, Inc. v. United States*, 718 F. Supp. 967, 971 (Ct. Int'l Trade 1989).

125. *In re McDonald Bros. Constr., Inc.*, 114 B.R. 989, 1001-03 (Bankr. N.D. Ill. 1990).

courts have frequently referred to ethics opinions of the bar for clarification and explanation of the code provisions. Twenty-seven of these opinions have been cited in nineteen cases from 1955 to 1989.¹²⁶ Fifteen of these opinions were ABA formal opinions and nine were ABA informal. The rest of the opinions came from the bars of one state (Kentucky), one county (New York), and one city (New York). The cases in question mostly involved issues of conflicts of interest.¹²⁷

2. *State Courts.*—The state courts, at different levels, have cited a total of 881 ethics opinions in 468 cases from 1948 to 1991. Two hundred and eighty-three of the cited opinions were ABA formal and 103 were ABA informal. Three hundred and twenty-six were issued by state bar associations (including state-like bars, e.g. D.C.), sixty-five by county bars and 104 by city bars. (See Appendix.)

Like the federal courts, the state courts have also addressed a variety of ethical issues when citing ethics opinions. The great majority of the cited opinions dealt with conflicts of interest,¹²⁸ followed by an array of issues such as splitting fees,¹²⁹ authority of an ethics opinion,¹³⁰ an attorney's duty to report other attorneys' misconduct,¹³¹ definition of neglect,¹³² bartering clients,¹³³ communications with corporate employees,¹³⁴

126. These cases have been decided by a variety of military courts: U.S. Court of Military Appeals (5 cases), U.S. Army Court of Military Review (6), U.S. Navy-Marine Corps Court of Military Review (5), U.S. Air Force Board of Review (2), and U.S. Coast Guard Court of Military Review (1).

127. *E.g.* United States v. Nicholson, 15 M.J. 436, 438 (1983) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1474 (1982)).

128. *E.g.*, Turbin v. Superior Ct. of the State of Ariz., 797 P.2d 734, 737 (Ariz. Ct. App. 1990) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)).

129. Breckler v. Thaler, 151 Cal. Rptr. 50, 54 (Cal. Ct. App. 1978) (citing ABA Comm. on Professional Ethics and Grievances, Formal Ops. 153 (1936) & 204 (1940); ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 391 (1960), 848 (1965), 932 (1966), & 936 (1966)).

130. Esquire Care, Inc. v. Maguire, 532 So. 2d 740, 742 (Fla. Dist. Ct. App. 1988) (citing Fla. Bar Op. 86-5 (1986)).

131. *In re Himmel*, 533 N.E.2d 790, 793 (Ill. 1989) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1210 (1972)).

132. Attorney Grievance Comm'n v. Ficker, 572 A.2d 501, 504 (Md. 1990) (rejecting ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 1273 (1973), 1428 (1979), & 1467 (1981)).

133. Detroit Bank & Trust Co. v. Coopes, 287 N.W.2d 266, 269 (Mich. Ct. App. 1979) (citing N.Y. County Bar Ass'n Comm. on Professional Ethics, Op. 109 (1943)).

134. Niesig v. Team I, 558 N.E.2d 1030, 1033-36 (N.Y. 1990) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1410 (1978); Alabama State Bar Ass'n Ethics, Op. RO-83-81 (1983); Alaska Bar Ass'n Ethics, Op. 71-1 (1971); Colorado Bar Ass'n, Op. 69 (1985); Idaho State Bar Ass'n, Formal Op. 21 (1960); Professional Ethics Comm., Bar of the State of Me., Op. 94 (1989); Massachusetts Bar Ass'n, Formal Op. 82-7 (1982);

and clients' documents.¹³⁵

Some state courts appeared more inclined to cite ethics opinions than others. New York (144), New Jersey (116), and Oregon (44) led the states with a substantial number of ethics opinions cited during the survey period. It does not appear, however, that the courts of Nebraska, Vermont, or the Virgin Islands have ever cited ethics opinions. In citing ethics opinions, courts have shown preference for the ABA formals and informals, followed by those issued by their own state bars. Nonetheless, state courts eagerly cited opinions from other state and city bars. (See Appendix.)

The preceding quantitative analysis reveals a substantial number of cases reported by both federal and state courts, at various levels, that cited bar ethics opinions. Such citations have increased, instead of decreased, during the years following the ABA's announcement that its ethics opinions are not binding. Based on reported data, one must conclude that when courts are confronted with ethical issues they do not hesitate to rely on the bar ethics opinions for guidance.

C. *Qualitative Analysis*

In order to evaluate the impact that ethics opinions have on the decision making process of the courts, it is necessary to explore some methods of testing that are not purely quantitative; for example, measuring the degree of reliance the courts have displayed when referring to these opinions. In this section, by reviewing a selected group of court decisions, an attempt is made to measure this impact. The section is divided into: (1) ABA formal and informal opinions; and (2) state, county, and city Bar opinions.

1. *ABA Formal and Informal Opinions.*—It appeared in the great majority of cases surveyed that the courts have treated the ABA ethics opinions with great deference.

a. *United States Supreme Court cases*

In *McCoy v. Court of Appeals of Wisconsin*,¹³⁶ the United States Supreme Court dealt with the duty, or lack thereof, of a criminal defense

Los Angeles County Formal Ethics, Op. 410 (1983); Bar Ass'n of Nassau County, Op. 2-89 (1989); New York County Bar Ass'n Comm. on Professional Ethics, Op. 528 (1964); New York City Bar Ass'n Comm. on Professional Ethics, Op. 80-46 (1980)).

135. *Gries Sports Enter., Inc. v. Cleveland Browns Football Co., Inc.*, Nos. 49184, 49197 (Ohio Ct. App., Cuyahoga County, April 25, 1985) (LEXIS, States library, Ohio file) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977); Conn. Bar Ass'n, Informal Op. 82-4 (1981); Comm. on Ethics of the Md. State Bar Ass'n Informal Op. 84-8 (1983), Comm. on Professional and Judicial Ethics of the State Bar of Mich., Informal Op. CI-926 (1983)).

136. 486 U.S. 429 (1988).

lawyer to file a frivolous appeal. The Court, citing the ABA Committee on Ethics and Professional Responsibility, Informal Op. 955 (1955), decided that "an attorney, whether appointed or paid, is therefore under an ethical obligation to refuse to prosecute a frivolous appeal."¹³⁷ In doing so, the Court relied on the ABA Standards for Criminal Justice (1980) followed by ABA Informal Op. 955, which states that "like court-appointed lawyer, private counsel, 'ethically, should not clog the courts with frivolous motions or appeals.'"¹³⁸ Then, in a "*see also*" the Court referred to a court of appeals decision and to one of its own.¹³⁹ It might be inferred that the preferential position given to the ethics opinion in the Court's list of authorities reflects the deference the courts give to such opinions when dealing with matters of ethics. On the other hand, in *United Mine Workers v. Illinois State Bar Ass'n*,¹⁴⁰ the Court distinguished ABA Informal Op. 469 (1961) since it did not contemplate the situation at bar.

b. U.S. Courts of Appeals cases

The Eleventh Circuit upheld the correctness of a trust fund account maintained by an attorney and applied the standards of ABA Committee on Professional Ethics and Grievances, Formal Op. 348 (1982).¹⁴¹ The United States Court of Appeals for the District of Columbia declined to rule on the issue, but found ABA informal opinions applicable in deciding on the impropriety of an attorney charging double fees when working in a double capacity as a broker and a lawyer.¹⁴²

Questions of attorneys' fees provide an area where the courts interrelate with the bar. In *Stissi v. Interstate & Ocean Transport Co.*,¹⁴³ in dealing with a division of fees, the Second Circuit followed the interpretation of the Model Code of Professional Responsibility DR 2-107 (A) given by the ABA. On the other hand, the Fourth Circuit rebuked the ABA for stating in its Informal Op. 1521 (1986) that it was unethical for a lawyer not to offer prospective clients an alternative to contingent fee arrangements.¹⁴⁴

In a case involving clandestine recording of conversations with witnesses, the Eleventh Circuit recognized that, although this practice did not violate

137. *Id.* at 436.

138. *Id.* n.8.

139. *Id.*

140. 389 U.S. 217, 224 (1967).

141. *Cone v. State Bar of Fla.*, 819 F.2d 1002, 1005 (11th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987).

142. *Leonard v. BHJK Corp.*, 469 F.2d 108, 113 (D.C. Cir. 1972) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 709 (1964) and 775 (1965)).

143. 814 F.2d 848, 851-52 (2d Cir. 1987) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 97 (1933) and No. 153 (1936)).

144. *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 650-651 (4th Cir. 1988) (en banc) (Murnaghan, J., concurring), *aff'd*, 491 U.S. 617 (1989).

any law, the ABA in its Formal Op. 337 (1974) had ruled this practice unethical, and the court proceeded accordingly.¹⁴⁵

In dealing with cases involving government attorneys, the courts have frequently turned to the ABA opinions for guidance. In its search for a definition of what constitutes "substantial responsibility" of a former government lawyer in matters of disqualification, the Ninth Circuit adopted the definition given by the ABA in Formal Op. 342 (1975).¹⁴⁶

In a case entailing the duty of an attorney to release papers belonging to a client, the Second Circuit applied ABA Informal Op. 1461 (1980), which stated that the lawyer is required to release the papers on reasonable conditions.¹⁴⁷

c. U.S. District Court cases

District Courts have not been remiss in relying on ABA opinions. In cases involving government lawyers, the courts have referred to Formal Op. 342 (1975) as it has tempered the Model Code of Professional Responsibility DR 5-105(D) when applied to government officers.¹⁴⁸ Moreover, in *Caracciolo v. Ballard*,¹⁴⁹ this same opinion was applied in a case in which a former government attorney's use of information adverse to the government was at issue.¹⁵⁰

Frequently, the courts have applied Formal Op. 337 (1974), which considers the recording of conversations of witnesses without their consent unethical.¹⁵¹ Recently, courts have begun to use old opinions to interpret the new Model Rules, which were supposed to require less interpretation.¹⁵² In one particular instance, a court relied on Informal Op. 828 (1965) to censure an attorney who invited a witness to engage him as attorney to represent the witness during a deposition.¹⁵³ In citing Informal Op. 885

145. *Parrott v. Wilson*, 707 F.2d 1262, 1271 (11th Cir. 1983), *cert. denied*, 464 U.S. 936 (1983).

146. *Paul E. Iacono Structural Eng'r, Inc. v. Humphrey*, 722 F.2d 435, 440 (9th Cir. 1983), *cert. denied*, 464 U.S. 851 (1983).

147. *Pomerantz v. Schandler*, 704 F.2d 681, 683 (2d Cir. 1983).

148. *In re Grand Jury Proceedings*, 700 F. Supp. 626, 630 (D.P.R. 1988), *aff'd*, 875 F.2d 927 (1989).

149. 687 F. Supp. 159 (E.D. Pa. 1988).

150. *Id.* at 160. *See also* *United States v. Judge*, 625 F. Supp. 901, 902 (D. Haw. 1986), *aff'd*, 855 F.2d 863 (9th Cir. 1988), *cert. denied*, 488 U.S. 959 (1988).

151. *Haigh v. Matsushita Elec. Corp.*, 676 F. Supp. 1332, 1358 (E.D. Va. 1987). *See also* *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 108 F.R.D. 686, 690 (S.D.N.Y. 1985).

152. *Baker v. Leahy*, 633 F. Supp. 763, 765 (E.D. Pa. 1985) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)).

153. *Aspgren v. Montgomery Ward & Co., Inc.*, 47 Fair Empl. Prac. Cas. (BNA) 1438, 1442 (N.D. Ill. 1984), *clarified*, 47 Fair Empl. Prac. Cas. (BNA) 1443 (1984), *aff'd*, 852 F.2d 1008 (7th Cir. 1988).

(1965), one court forcefully stated that "courts have enforced these precepts."¹⁵⁴ Furthermore, when applying the Model Code of Professional Responsibility DR5-102(A), the court cited ABA Formal Op. 339 (1975) to hold that it "is not a per se rule which requires a literal application; rather, its application depends 'upon the attending facts.'"¹⁵⁵

d. Other federal court cases

Even the U.S. Court of Claims has cited ABA Informal Op. 480 (1961), in resolving a dispute regarding an attorney's use of a recording device for court proceedings.¹⁵⁶

e. State court cases

As has been the case with federal courts, the state courts at different levels have frequently cited ABA ethics opinions, recognizing their important role, when dealing with questions of ethics.

Cases in which state courts cited ABA opinions with more frequency than others are in the area of conflicts of interest. Conflict of interest issues frequently burden the courts, not only through disciplinary proceedings, but also in motions to disqualify. A group of cases dealing with this issue follows, selected at random from among the many decided by state courts all around the country.

An Alabama court followed ABA Formal Op. 330 (1972) clarifying the meaning of the term "associate" in Model Code of Professional Responsibility DR5-105(D).¹⁵⁷ In the same vein, another court referred to an ABA opinion for the definition of "matter."¹⁵⁸ One court relied on ABA Formal Op. 342 (1975) for the definition of "substantial responsibility" when delineating the duties of a lawyer in an imputed disqualification case.¹⁵⁹ Regarding the need of consent from both clients when there is a conflict, a reference to an ABA opinion was made in *Johnson v. Jones*.¹⁶⁰ However, an Arkansas court determined that some conflicts cannot be remedied with consent, basing its holding on both a previous case and ABA Formal

154. *INA Underwriters Ins. Co. v. Nalibotsky*, 594 F. Supp 1199, 1205 (E.D. Pa. 1984) (quoting *American Roller Co. v. Budinger*, 513 F.2d 982, 984 (3rd Cir. 1985)).

155. *Rubino v. City of Mount Vernon*, No. 82 Civ. 3101 (RWS) (S.D.N.Y. Apr. 25, 1984) (LEXIS, Genfed library, Distfile). See also *Freschi v. Grand Coal Venture*, 564 F. Supp. 414, 416-17 (S.D.N.Y. 1983) (see attached subs. history).

156. *Grimes v. United States*, 4 Cl. Ct. 205, 206 (1983).

157. *Terry v. Alabama*, 424 So. 2d 710, 713 (Ala. Crim. App. 1982).

158. *Comm. for Wash.'s Riverfront Parks v. Thompson*, 451 A.2d 1177, 1188 (D.C. 1982) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)).

159. *Colorado v. Anaya*, 732 P.2d 1241, 1242 (Colo. Ct. App. 1987), *rev'd en banc*, 764 P.2d 779 (Colo. 1988).

160. 652 P.2d 650, 653-54 (Idaho 1982).

Op. 192 (1939).¹⁶¹ When a husband and wife both practice law, the court, applying Formal Op. 340 (1975), held that there was not necessarily a conflict when practicing in different law firms.¹⁶² Moreover, when deciding on the impropriety of joint representation in adoption proceedings, an Ohio court followed a New York State Bar Association ethics opinion in contradiction to a previous court decision.¹⁶³ A similar situation occurred in Oklahoma.¹⁶⁴ Other areas are similarly represented by the use of ethics opinions. One court's decision rested entirely on when it was proper for an attorney to testify as a witness and remain in the case.¹⁶⁵ The same situation took place in *West v. Mississippi*.¹⁶⁶

In a decision involving the retention of attorney's liens, two Justices of the Arizona Supreme Court, after recognizing that the state bar "has refrained from taking a position" on the matter, referred to ABA Informal Op. 1461 (1980), and, together with opinions of other state bars, dissented from the majority opinion finding that the attorney's conduct was ethical.¹⁶⁷

In stating that a corporate attorney who acts as a legal advisor for a corporation must refrain from taking part in any controversies or factional differences among stockholders, a California court relied on an ABA ethics opinion as a basis for its decision.¹⁶⁸ A District of Columbia court cited ABA Informal Op. 1273 (1973) to define neglect in a competence situation.¹⁶⁹

At times, courts attempt in vain to find an ABA ethics opinion. One curious example was when a Florida court mentioned in a case that "[w]e have found no opinion of this Court or other jurisdiction, or of the ABA Committee on Ethics and Professional Responsibility which addresses the issue. . . ." ¹⁷⁰

161. *City of Little Rock v. Cash*, 644 S.W.2d 229, 235-36 (Ark. 1982) (quoting *In re A. & B.*, 209 A.2d 101, 102-03 (N.J. 1965)), *cert. denied*, 462 U.S. 1111 (1983).

162. *Jones v. Jones*, 369 S.E.2d 478, 479-80 (Ga. 1988).

163. *In re Adoption of Infant Girl Banda*, 559 N.E.2d 1373, 1382 (Ohio Ct. App. 1988) (citing N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 584 (1987)).

164. *Oklahoma ex rel. Okla. Bar Ass'n v. Stubblefield*, 766 P.2d 979, 982 (Okla. 1988) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 87-1523 (1987)).

165. *Andrea Dumon, Inc. v. Pittway Corp.*, 442 N.E.2d 574, 581 (Ill. App. Ct. 1982) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 339 (1975)).

166. 519 So. 2d 418, 423-24 (Miss. 1988) (en banc) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 339 (1975)).

167. *National Sales & Serv. Co., Inc. v. Superior Ct. of Maricopa County*, 667 P.2d 738, 743 (Ariz. 1983) (en banc) (Cameron & Gordon, J.J., dissenting).

168. *Hoiles v. Superior Ct. of Orange County*, 204 Cal. Rptr. 111, 115 (Cal. Ct. App. 1984) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 86 (1932)).

169. *In re Franklin*, 516 A.2d 171, 173 (D.C. 1986), *cert. denied*, 479 U.S. 1087 (1987).

170. *Florida Bar v. Jackson*, 494 So. 2d 206, 209 (Fla. 1986).

On the duty to report any unprivileged knowledge of a lawyer's violation of ethics, an Illinois court found "instructive" the position taken in ABA Informal Op. 1210 (1972).¹⁷¹ State court cases involving attorney's fees is another area in which ABA ethics opinions are commonly cited. An Illinois court relied on ABA Formal Op. 153 (1936) to determine "that a 'mere recommendation is not a sufficient basis for a forwarding fee.'" ¹⁷² In addition, an Indiana court applied the "reasonableness" and "clearly excessive" tests of the Code of Professional Responsibility and the Rules of Professional Conduct, as well as the ABA Informal Op. 86-1521 (1986), in dealing with a contingent fee case.¹⁷³

Occasionally a state court has distinguished an ethics opinion. An Illinois court, replying to a party's pretense to rely on an ABA opinion, rejected his contention because his authority was "misplaced."¹⁷⁴

Just to cite an example of an ethics decision dealing with a government lawyer, a Kentucky court, in deciding that Model Code of Professional Responsibility DR 5-195(D) does not apply to a government lawyer, said that "[w]e believe this question has been dealt with in a formal opinion, . . ." citing ABA Formal Op. 342 (1975).¹⁷⁵

Furthermore, addressing the validity of Interests on Lawyers Trust Account (IOLTA), a Massachusetts court decided that an attorney may ethically participate in those programs according to ABA Formal Op. 348 (1982).¹⁷⁶ Similarly, in Minnesota the state supreme court also relied on the same ABA opinion,¹⁷⁷ as did the state supreme court of New Hampshire.¹⁷⁸ Finally, a dissenter from the majority decision that an attorney had the duty to disclose the client's whereabouts expressed: "My position is supported by the ABA Committee on Professional Ethics. . . ."¹⁷⁹

2. *State, County and City Bar Opinions.*—Although the courts have relied primarily on ABA formal and informal opinions when dealing with

171. *In re Himmel*, 533 N.E.2d 790, 793 (Ill. 1988).

172. *Phillips v. Joyce*, 523 N.E.2d 933, 939 (Ill. App. Ct. 1988).

173. *Lutz v. Belli*, 516 N.E.2d 95, 103 (Ind. Ct. App. 1987) (Ratliff, C.J., concurring).

174. *Petrillo v. Syntex Lab.*, 499 N.E.2d 952, 964 (Ill. App. Ct. 1986) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 892 (1965)), *appeal denied*, 505 N.E.2d 361 (Ill. 1987), *cert. denied*, 483 U.S. 1007 (1987).

175. *Summit v. Mudd*, 679 S.W.2d 225, 226 (Ky. 1984).

176. *Petition by the Mass. Bar Ass'n and the Boston Bar Ass'n*, 478 N.E.2d 715, 718 (Mass. 1985).

177. *In re Petition of the Minn. State Bar Ass'n*, 332 N.W.2d 151, 158 (Minn. 1982).

178. *Petition of N.H. Bar Ass'n*, 453 A.2d 1258, 1261 (N.H. 1982).

179. *Pennsylvania v. Maguigan*, 470 A.2d 611, 633-34 (Pa. Super. Ct. 1983) (Montemurg, J., dissenting) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936)), *rev'd*, 511 A.2d 1327 (Pa. 1986).

questions of ethics, they also take into consideration the opinions issued by state, county, and city bar associations. When courts have addressed these types of opinions, the opinions were given the same deferential treatment as their counterparts from the ABA.

a. United States Supreme Court cases

Of the fourteen United States Supreme Court cases citing ethics opinions, six involved, in one way or another, state, county, and city opinions. In *Goldfarb v. Virginia State Bar*,¹⁸⁰ the Court, after analyzing two Virginia ethics opinions, concluded that the minimum fee schedules approved by the bar were mandatory, and as such, were within the reach of the Sherman Act. On the other hand, in *Evans v. Jeff D.*,¹⁸¹ the Court held that it was unethical for defense lawyers to request fee waivers in exchange for relief on the merits of plaintiffs, despite what the Fees Act might say. The Court in *Evans* quoted two New York City ethics opinions to reinforce its holding.¹⁸² In *Bates v. State Bar of Arizona*,¹⁸³ the Court referred to the Preamble of New York County Bar Ass'n Ethics Op. No. 47 to introduce a historical element in the reasoning of the case. In *Ohralik v. Ohio State Bar Ass'n*,¹⁸⁴ a solicitation case, the same situation was repeated. A New York City opinion was cited in *Local No. 391 v. Terry*¹⁸⁵ to trace the history of the prohibition of simultaneous representation. In *Mallard v. United States District Court*,¹⁸⁶ the Court adopted the principle establishing an attorney's obligation to accept court appointments, basing its reasoning on one county and two city ethics opinions.

b. U.S. courts of appeals cases

The federal courts of appeals have also followed the trend; of the eighty cases citing ethics opinions, twenty-eight included opinions by the

180. 421 U.S. 773 (1975); see *supra* note 93.

181. 475 U.S. 717, 728 (1986).

182. *Id.* The Court cites to Association of the Bar of the City of N.Y. Ops. 80-94 (1981) and 82-80 (1985). Also cited were D.C. Bar Ethics Op. 147 (1985), Ga. Bar Ethics Op. 39 (1984) (rejecting the reasoning of the N.Y. City Op. 80-94), and Grievance Comm'n of Board of Overseers of the Bar of Me. Op. 17 (1983).

183. 433 U.S. 350, 371 (1977) (citing DRINKER, *supra* note 8, at 210-11).

184. 436 U.S. 447, 460 (1978) (citing DRINKER, *supra* note 8, at 210-211).

185. 494 U.S. 558, 586 (1990) (Kennedy, O'Connor, & Scalia, J.J., dissenting) (citing Association of the Bar of the City of N.Y. Ethics Op. 662 (1944) (citing DRINKER, *supra* note 8, at 103).

186. 490 U.S. 296, 313 (1989) (Stevens, J., dissenting) (citing Chicago 33, N.Y. City 436 & 587; N.Y. County 338 & 371; Michigan 127) (citing DRINKER, *supra* note 8, at 62-63).

ethics committees of state, county, and city bar associations. The District of Columbia Circuit referred to this type of opinion in three separate cases. In *United States v. Heldt*,¹⁸⁷ the court referred to an Oregon ethics opinion, combined with statutory citations, to support its decision that it was improper for a prosecutor to participate in a case when he had a pecuniary interest in the outcome. In *Koller v. Richardson-Merrill, Inc.*,¹⁸⁸ the court cited an Oregon opinion to reinforce a quotation from an ABA opinion on the prohibition of recording conversations without consent of all parties involved. In *Moore v. National Ass'n of Securities Dealers*,¹⁸⁹ after conceding that it could not draw a uniform rule on fee negotiations from case law, the court recognized the conflict of interest problem and followed one state and one city ethics opinion. Furthermore, in *Cluett, Peabody & Co. v. CPC Acquisition Co.*,¹⁹⁰ which involved a question of billing practices, the court referred to a county bar opinion to support the crucial statement of the case: "Billing non-attorney time at an attorney's contractual rate, without identifying it as non-attorney time is fraudulent." Finally, in *In re A.H. Robins Co.*,¹⁹¹ a case involving conflicts of interest, the court followed an ABA informal opinion, reinforced by three state opinions, in order to hold that "it is universally declared that the type of counselor in the case at bar represented the insured and not the insurer."

c. *U.S. district court cases*

Of the 162 opinions cited in eighty-six district court cases, ninety-one opinions were issued by state, county, or city bars. In *United States v. Central Adjustment Bureau, Inc.*,¹⁹² the court considered whether it was unethical for an attorney to permit a collection agency to prepare and mail dunning letters using the attorney's stationery. In addressing this issue, the court mapped out a set of standards based solely on a string of ethics

187. 668 F.2d 1238, 1275 (D.C. Cir. 1981) (citing Or. State Bar Comm. on Legal Ethics Op. 386 (1978)), *cert. denied*, 456 U.S. 926 (1982).

188. 737 F.2d 1038, 1059-60 (D.C. Cir. 1984) (citing N.Y. Bar Ass'n Comm. on Professional Ethics Op. 328 (1974); ABA Comm. on Professional Ethics and Grievances, Formal Op. 337 (1974)), *cert. granted*, 469 U.S. 915 (1984), *and vacated*, 472 U.S. 424 (1985).

189. 762 F.2d 1093, 1103 (D.C. Cir. 1985) (citing Ass'n of the Bar of the City of N.Y. Comm. on Professional & Judicial Ethics Op. 80-94 (1981); D.C. Bar Legal Ethics Comm. Op. 147 (1985)).

190. 863 F.2d 251, 254 (2d Cir. 1988) (citing L. A. County Bar Ass'n Ethics Comm. Formal Op. 391 (1981)).

191. 880 F.2d 709, 751 (4th Cir.) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1476 (1981); Conn. Informal Op. 83-15 (1982); Del. Op. 1981-1 (1981); Mich. Op. CI-866 (1983)), *cert. denied*, 493 U.S. 759 (1989).

192. 667 F. Supp. 370 (N.D. Tex. 1986).

opinions.¹⁹³ A New York district court, after stating that the business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice before it, felt compelled to act on a question of ethics where the case involved a communication with an adverse party's employees.¹⁹⁴ For the disposition of the matter, the court referred to a series of state and city opinions, which, combined with a few cases and an ABA opinion, allowed the court to establish a set of guidelines.¹⁹⁵ In deciding on the disposition of clients' documents in an attorney's files, another court applied two state ethics opinions.¹⁹⁶ In an attorney's lien case, a Mississippi court relied on one state and one city opinion to define which documents belonged to the attorney.¹⁹⁷ Finally, a Florida district court was faced with a government lawyer conflict in a class action. The court, recognizing that no applicable authority existed in the circuit, decided the case on the basis of a Florida ethics opinion and resisted plaintiff's counsel's effort to distinguish the ethics opinion.¹⁹⁸

d. State court cases

It should not be a surprise that state courts tend to favor not only local ethics opinions, but also those of other states when deciding cases affecting the legal profession. Of the 877 ethics opinions that state courts have cited in 460 cases, 491 came from state, county, and city bar asso-

193. *Id.* at 380-81 (citing Tex. Ethics Ops. 160 & 161 (1957); Phila. Ethics Op. 61-8 (1961); Ass'n of the Bar of the City of N.Y. Ethics Ops. 153 (1930) & 866 (1965); Alleghany County Ethics Ops. 1962-1 & 1963-2; Wis. Bar Ethics Op. 11 (1961); N.C. Ethics Op. 487 (1985); Wash. Ethics Op. 84 (1960); N.Y. County Bar Ass'n Ethics Op. 300 (1932); in addition to ABA Comm. on Professional Ethics and Grievances, Formal Op. 253 (1943)).

194. *Suggs v. Capital Cities ABC, Inc.*, 52 Fair Empl. Prac. Cas. (BNA) 1842, 1844 (S.D.N.Y. 1990).

195. *Id.* (citing D.C. Bar Comm. on Legal Ethics Op. 129 (1983); Ass'n of the Bar of the City of N.Y. Comm. on Professional Ethics Op. 80-46 (1980); Mass. Bar Ass'n Comm. on Professional Ethics Op. 82-7 (1982); Mich. Bar Ass'n Comm. on Professional & Judicial Ethics Informal Op. 535 (1980); Ill. State Bar Ass'n Comm. on Professional Responsibility, Op. 85-12 (1986); San Diego Bar Ass'n Ethics Comm. Op. 1984-5 (1984); L. A. County Bar Ass'n Formal Op. 410 (1983); Tenn. Bar Ass'n Op. 83-F-46 (1985); Tex. State Professional Ethics Comm. Op. 461 (1988); Md. Bar Ass'n Op. 83-4 (1982); Ohio Bar Ass'n Op. 81-5 (1981)).

196. *Resolution Trust Corp. v. H—*, P.C., 128 F.R.D. 647, 648-49 (N.D. Tex. 1989) (citing Professional Ethics Comm. State Bar of Tex., Ethics Op. 395 (1980); Iowa State Bar Ethics Comm. Op. 87-21 (1988)).

197. *Federal Land Bank v. Federal Intermediate Credit Bank*, 127 F.R.D. 473, 476-79 (S.D. Miss. 1989) (citing Miss. State Bar Advisory Ethics Op. 144 (1988); San Diego Bar Ass'n Ethics Op. 1977-3 (1978)).

198. *Norton v. Tallahassee Memorial Hosp.*, 511 F. Supp. 777, 780 (N.D. Fla. 1981) (quoting Professional Ethics Comm. of the Fla. Bar Op. 74-8 (1974)).

ciations. (See Appendix.) The reason for this favoritism may be that the local approach is closer to home than the positions taken by the national leadership, although these have not been totally ignored.

The New Jersey Supreme Court, in upholding sanctions against a lawyer facing disciplinary action, applied the principle that "[t]he fiduciary obligation of a lawyer applies to persons who, although not strictly clients, he has or should have reason to believe rely on him."¹⁹⁹ This principle was developed through a series of local ethics opinions. Distancing itself from the directives of three New York State Bar Association Ethics Committee opinions, a New York court refused to disqualify a part time Assistant County Attorney from representing defendants in criminal proceedings.²⁰⁰ According to the court, absent compelling reasons, a court should not interfere with the right of a criminal defendant to choose his own counsel. The three New York ethics opinions not followed pointed to the disqualification.²⁰¹ A Massachusetts court, in deciding upon a waiver of the attorney-client privilege, adopted the principle established by a state ethics opinion which maintains that the attorney-client privilege continues despite the fact that the confidential information has become notorious.²⁰² One Delaware court did not hesitate to go outside the state for guidance in deciding that former employees are not within the scope of the rule against ex-parte communications.²⁰³ Finally, relying exclusively on an opinion issued by its own state bar, an Ohio appeals court held that it would be unethical for an attorney to act both as an attorney and as a real estate broker in one transaction, and to charge one fee as an attorney and another as a broker.²⁰⁴

It is obvious from the preceding quantitative and qualitative analyses that for many years, courts have seriously considered the bar's ethics opinions when dealing with ethical matters. Courts have not only consistently referred

199. *In re Gavel*, 125 A.2d 696, 705 (N.J. 1956) (citing N.Y. County Bar Ass'n Ethics Op. 320 (1933); Ass'n of the Bar of the City of N.Y. Ops. 343 (1935) & 682 (1945). See also Mich. 150 (1952); Miss. 29 (quoting DRINKER, *supra* note 8, at 92).

200. *Moxham v. Hannigan*, 455 N.Y.S.2d 424 (N.Y. App. Div. 1982).

201. *Id.* at 427 (citing N.Y. State Bar Ass'n Ethics Comm. Ops. 367 (1974), 278 (1973) & 257 (1972)).

202. *Commonwealth v. Goldman*, 480 N.E.2d 1023, 1028-30 (Mass.) (citing Mass. Bar Ass'n Comm. on Professional Ethics, Op. 84-3 (1984)), *cert. denied*, 474 U.S. 906 (1985). The court also cited opinions 75-7 (1975), 76-12 (1976), and 77-1 (1977) of the same state bar committee. *Id.* Cal. Standing Comm. on Professional Responsibility & Conduct Op. 1980-52 (1980), Bar Ass'n of Greater Cleveland Professional Ethics Comm., Op. 150 (1983), and Vt. Bar Ass'n Comm. on Professional Responsibility Op. 83-6 (1983) were also cited. *Id.*

203. *DiOssi v. Edison*, 583 A.2d 1343, 1344 (Del. Super. Ct. 1990) (citing Colo. Ethics Op. 69 (Rev.) (1987); Fla. Bar Professional Ethics Comm., Op. 88-14 (1989); Alaska Ethics Op. 88-3 (1988); Ill. Ethics Op. 85-12 (1986)).

204. *Ollick v. Rice*, 476 N.E.2d 1062, 1069 (Ohio Ct. App. 1984) (citing Ohio State Bar Ass'n Comm. on Legal Ethics and Professional Conduct, Op. 9 (1950)).

to these opinions at all times, but also have treated them with deference. This reliance suggests that ethics opinions are an important component of the ethics laws to the courts.

D. Review of the Literature

In spite of the relevancy of ethics opinions, legal scholars have given them little or no attention. According to one of the few commentators who has considered this issue: "Few scholars have criticized individual [ABA Committee on Ethics and Professional Responsibility] opinions and no one has evaluated the Committee's work as a whole."²⁰⁵ In fact, with minor exceptions, those few who have undertaken the task of studying these opinions have taken a critical view.

The most ambitious, although isolated effort, that has emerged from legal scholars has been the article authored by Professors Finman and Schneyer in 1981. These authors expressed a very negative approach in criticizing the ABA ethics opinions in their article. Although they concluded that these opinions have played a significant role in governing lawyers through the interpretation of the ethical norms, they believed that the ABA needed to reform its opinions by correcting the recurrent flaws in the analyses and by improving their poor record in reaching correct decisions. The authors also cautioned the Bar that if no reforms were instituted, or if reforms proved unavailing, the entire enterprise should be abandoned.²⁰⁶

The aforementioned conclusion was reached after the authors analyzed a selected group of ABA ethics opinions. Throughout their study they viewed the opinions as interpretations of ethical norms.²⁰⁷ Despite the authors' concession that the opinions have great impact in the determination of the ethical conduct of lawyers,²⁰⁸ they reached the conclusion that "these opinions are seriously flawed, so much so that their overall influence may well be unfortunate."²⁰⁹ Professors Finman and Schneyer centered their criticism on what they believe is the deficient mechanism used by the ABA in preparing its opinions. First, because of the opinions' importance in regulating lawyers' conduct, they assert that ABA procedures should be adversarial, and not the product of mere reflections of individual members.²¹⁰ Second, they suggested that while alternative sources of guidance are available, such as scholarly works and consultation with colleagues, ethics op-

205. Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 72 (1981) (footnote omitted).

206. *Id.* at 167.

207. *Id.* at 69.

208. *Id.* at 70.

209. *Id.* at 72.

210. *Id.* at 73.

inions play a more significant role in guidance and offer such advantages as expediency, authority and total confidentiality.²¹¹ Third, the authors preferred the opinions identify “a tenable, rule-based rationale” and “relevant authorities,” as well as careful analysis of “problems of interpretive choice” and the achievement of “clarity.”²¹² They employed these standards when they tested the opinions, and thus, their severe criticism resulted. Finally, the authors complained of the lack of an adequate review process applicable to the ABA ethics opinions, because the opinions cannot be appealed, although they are occasionally reconsidered by the Committee itself.²¹³ Notwithstanding the negative approach used by Professors Finman and Schneyer, they predicted that the influence of the ethics opinions of the ABA was not likely to diminish in the future.²¹⁴

In 1986, in his hornbook on legal ethics, Professor Wolfram expressed additional charges against the ABA ethics opinions. Wolfram asserted: (1) the quality of these opinions has been “uneven,” reflecting the personal interests of the committee members; (2) these opinions are dogmatic, and fail to recognize apparent areas of doubt or ambiguity; and (3) they were more in the nature of “strong statement rather than flawless reasoning.”²¹⁵

Professors who teach courses in legal ethics have also neglected this topic. Although all of them have quoted ABA ethics opinions in their casebooks, the great majority of them have not included in their texts any explanation on what the ethics opinions of the bar are, their value, or their influence.²¹⁶

One notable exception in this group is Professor Geoffrey C. Hazard, Jr. In his text, Hazard explains the meaning of the ethics opinions of the bar at different levels. He also comments that although the courts’ decisions are the “only truly authoritative interpretation of the ethics rule,” ethics opinions provide guidance as well as a good defense to attorneys facing disciplinary charges.²¹⁷

211. *Id.* at 78-79.

212. *Id.* at 95.

213. *Id.* at 149-50.

214. *Id.* at 167.

215. CHARLES WOLFRAM, *MODERN LEGAL ETHICS* 66 (1986). Professor Wolfram’s hornbook provides the most comprehensive and in-depth analysis of the law of ethics ever published.

216. *E.g.*, ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* (1984); THOMAS D. MORGAN & RONALD D. ROTONDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (5th ed. 1991); L. ROY PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* (2d ed. 1987); MAYNARD E. PIRSIG & KENNETH F. KIRWIN, *CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (4th ed. 1984); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (1992); MORTIMER D. SCHWARTZ & RONALD C. WYDICK, *PROBLEMS IN LEGAL ETHICS* (1988); THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* (1985).

217. GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, *THE LAW AND ETHICS OF LAWYERING* 14-15 (1990).

The bar has predictably shown an increased awareness of the impact of their ethics opinions. Two recent events attest to this awareness. On February 8, 1991, at the National Organization of Bar Counsels annual meeting in Seattle, a review was made of some of the different bodies which issue ethics opinions. This recognized the increasing contribution of this service to the disciplinary process.²¹⁸ Concurrently, on June 26, 1991, the American Bar Association Task Force on Law Schools and the Profession: Narrowing the Gap issued a tentative draft of its *Statement of Fundamental Skills and Professional Values* in which the ethics opinions of the bar were identified as primary sources for the interpretation of the rules of professional conduct — second only to the interpretation given by the courts.²¹⁹

V. CONCLUSION

In spite of their nonbinding character, the bar's ethics opinions are frequently referred to by the courts. The courts treat these opinions with great deference, and, in fact, attribute to them a degree of attention similar to that usually found in the treatment of judicial opinions. In discussing the ethics opinions of the bar, courts follow, distinguish, criticize, parallel, and harmonize them just as courts do with judicial opinions. The most popular application of the ethics opinions is for clarification and interpretation of the ethical codes. However, their authority has occasionally been extended beyond this. Even when the ethics opinions were relied upon in conjunction with more binding authorities, such as case law, the courts assigned them a prominent, and not a secondary, role to add strength to the argument. Moreover, upon reviewing the quantitative and qualitative analyses and the opinions of legal scholars and the practicing bar, a consensus emerges on the relevance of ethics opinions for self-governance of attorneys.

218. National Organization of Bar Counsels, *Complaint Containment: The Advisory Legal Ethics Opinion Role in the Disciplinary System*, 1 (Feb. 8, 1991) (unpublished). The mission of these bodies was identified as: "to assist lawyers in the adherence to their professional codes or rules and to prevent the occurrence of misconduct through the use of Ethics Hotlines and written advisory opinions." For details on the program, see *Laws. Man. on Prof. Conduct* (ABA/BNA) Vol. VII, No. 2 at 36-37 (Feb. 27, 1991).

219. *Statement of Fundamental Lawyering Skills and Professional Values* 73-74 (Tent. Draft June 26, 1991). This report identifies as the primary sources of ethical rules: (a) the rules of professional conduct which have been formally adopted in the jurisdiction where the lawyer is practicing; (b) the interpretation of the applicable rules of professional conduct by the courts of the jurisdiction, the state or local bar associations, and other entities that are authorized to issue binding or persuasive interpretations of ethical rules; (c) model rules of ethics that have not been adopted in the jurisdiction; (d) constitutional, statutory, or common law principles related to the ethical obligations of the lawyer; (e) general aspects of ethical philosophy; and (f) the lawyer's sense of morality. *Id.* This report has been widely circulated as a public service of West Pub. Co. and is generating a wide variety of actions from both the bar and the academic community.

Therefore, it is fair to conclude that the contribution of the ethics opinions of the bar in the decision making process of the courts, and in resolving ethical issues, is an important one and not an exercise in futility as some may otherwise believe.

Nonetheless, some critics urge that there is a need for improvement in the procedure for managing ethics opinions, and in the quality and format of drafting as well. Suggested changes in procedure include: (1) making the process more adversarial, (2) creating a review process, and (3) improving the quality of the opinions. However, based on this research and my personal experience, injecting more antagonism in the advisory process and making the opinions reviewable will not only be counterproductive, but futile. There is much antagonism and delay in the judicial process already and more is not needed. Even still, there is ample room for improvements in the drafting of opinions. As is the case with judicial opinions, there are, and always will be, good and bad ethics opinions. This does not mean that efforts to improve opinions should not be attempted.

If, as it appears, ethics opinions of the bar are treated as an integral part of the law of ethics in lawyering, then the opinions must meet the highest standards of draftsmanship. Moreover, if the three major components of the legal community (legal educators, courts and bar) must deal with these opinions in one way or another, it is the responsibility of all parties to strive for their improvement. Legal educators should stress the importance of the ethics opinions not only by alerting the students to their existence and relevancy, but by exercising a more active role in constructive criticism of the opinions through legal scholarship. Courts should strive to achieve uniformity in utilizing ethics opinions, as some courts currently rely on them more than others. The courts should also contribute to the improvement of the quality of the opinions by taking a more critical view of the opinions when an occasion is presented.

The most important role is that of the bar. The drafters of ethics opinions—both the dedicated attorneys and the bar counsels—must be conscious of their professional responsibility and the transcendent value of their mission. They must be fully aware that every ethics opinion they draft, regardless of the jurisdiction (national, state, county or city) may eventually become an important part of the great repository of the law of ethics.

In addition, due to the transcendent role assigned to the opinions by the courts, the ethics committees should engage in thorough research of present and past ethics opinions of the bar together with analysis of pertinent present and past judicial decisions that have dealt with the opinions. The ethics committee should also consider the works of legal scholars. While ethics committees should not engage in social engineering or lawmaking, at the same time they should not ignore societal needs, clamors and perceptions.

Finally, the most important lesson of this study is that the ethics opinions of the bar provide more than a simple interpretation of ethical norms. The ethics opinions constitute the voice of one of the most influential segments of our society: the practicing bar. This voice, as proven here, does not fall on deaf ears. In matters of ethics, when the bar speaks, the courts listen.

Appendix
Bar Associations' Ethics Opinions Cited by State Courts

STATES*	CASES	ABAF	ABAI	STATE COUNTY		CITY	TOTAL
				BARS	BARS	BARS	
Alaska (1967-87)	(3)	3	0	0	0	0	3
Alas. (1964-90)	(9)	5	1	4 ¹	0	1 ²	11
Ariz. (1968-90)	(21)	4	4	32 ³	0	4 ⁴	44
Ark. (1968-90)	(4)	7	1	2 ⁵	1 ⁶	0	11
Cal. (1950-79)	(11)	9	5	0	1 ⁷	2 ⁸	17
Colo. (1971-89)	(9)	7	0	2 ⁹	0	0	9
Conn. (1964-87)	(5)	5	0	3 ¹⁰	1 ¹¹	0	9
Del. (1984-90)	(3)	1	0	7 ¹²	0	0	8
D.C. (1982-91)	(6)	1	1	6 ¹³	0	0	8
Fla. (1967-86)	(23)	5	4	27 ¹⁴	0	0	36
Ga. (1987)	(1)	1	0	0	0	0	1
Haw. (1969)	(1)	1	0	0	0	0	1
Idaho (1946-82)	(4)	0	2	2 ¹⁵	0	0	4
Ill. (1977-88)	(21)	18	2	10 ¹⁶	0	0	30
Ind. (1960-90)	(6)	4	2	2 ¹⁷	0	0	8
Iowa (1972-89)	(5)	2	3	0	0	0	5
Kan. (1958-82)	(14)	7	4	9 ¹⁸	1 ¹⁹	2 ²⁰	23

* Dates refer to period of time when opinions were cited. State-like bars, e.g. D.C. and Virgin Islands, are included here.

1. Alaska (4)
2. N.Y. (1)
3. Ariz. (29), La. (1), N.C. (1), Tex. (1)
4. N.Y. (3), Chicago (1)
5. Mich. (2)
6. N.Y. (1)
7. N.Y. (1)
8. N.Y. (2)
9. Colo. (2)
10. Conn. (3)
11. N.Y. (1)
12. Alaska (1), Colo. (1), Conn. (1), Del. (1), Fla. (1), Ill. (1), Tex. (1)
13. D.C. (5), Md. (1).
14. Fla. (25), Va. (2)
15. Idaho (2)
16. Ky. (1), Ill. (8), Va. (1)
17. Ind. (2)
18. Kan. (7), Ky. (1), Mich. (1)
19. N.Y. (1)
20. N.Y. (2)

Ky. (1951-89)	(4)	3	0	5 ²¹	0	1 ²²	9
La. (1968-91)	(7)	7	2	3 ²³	0	0	12
Me. (1989)	(1)	1	0	0	0	0	1
Md. (1965-91)	(15)	13	8	7 ²⁴	2 ²⁵	2 ²⁶	32
Mass. (1982-89)	(12)	16	3	17 ²⁷	1 ²⁸	1 ²⁹	38
Mich. (1972-89)	(11)	13	4	8 ³⁰	1 ³¹	0	26
Minn. (1951-88)	(7)	6	1	0	1 ³²	2 ³³	10
Miss. (1978-88)	(5)	3	0	2 ³⁴	0	0	5
Mo. (1958-81)	(2)	2	1	5 ³⁵	0	0	8
Mont. (-)	(0)	0	0	0	0	0	0
Neb. (1968-88)	(5)	4	0	2 ³⁶	0	0	6
Nev. (1971-89)	(2)	2	0	0	0	2 ³⁷	4
N.H. (1971-85)	(4)	1	4	2 ³⁸	0	5 ³⁹	12
N.J. (1940-86)	(37)	48	5	16 ⁴⁰	16 ⁴¹	32 ⁴²	117
N.M. (1983-89)	(2)	1	1	2 ⁴³	0	1 ⁴⁴	5
N.Y. (1948-90)	(73)	26	13	57 ⁴⁵	20 ⁴⁶	34 ⁴⁷	150
N.C. (1979-87)	(3)	2	2	2 ⁴⁸	0	0	6

21. Conn. (1), Fla. (1), Ky. (3)

22. N.Y. (1)

23. La. (2), Wis. (1)

24. Md. (7)

25. N.Y. (2)

26. N.Y. (2)

27. Cal. (1), Mass. (13), Mich. (1); Va. (1), Vt. (1)

28. N.Y. (1)

29. N.Y. (1)

30. Mich. (8)

31. N.Y. (1)

32. N.Y. (1)

33. N.Y. (2)

34. Miss. (2)

35. Ala. (1), Ariz (1), N.Y. (1), Tex. (1), Va. (1)

36. La. (2)

37. N.Y. (2)

38. Mich. (1), N.H. (1)

39. Chicago (1); N.Y. (4)

40. Mich. (7); Miss. (1), Mo. (4), N.J. (3), Wash. (1)

41. N.Y. (16)

42. N.Y. (32)

43. Mo. (1), Wis. (1)

44. N.Y. (1)

45. Ala. (1), Alaska (2), Cal. (1), Colo. (1), D.C. (1), Ga. (1), Idaho (1), Ill. (1),

Me. (1), Mass. (2), Mich. (4), N.Y. (40), Wash. (1)

46. La. (1), N.Y. (16), Nassau (3)

47. Brooklyn (1), Chicago (1), Milwaukee (1), N.Y. (31)

48. N.C. (2)

N.D. (1976-80)	(2)	1	1	0	0	0	2
Ohio (1964-89)	(9)	6	5	10 ⁴⁹	0	0	21
Okla. (1973-88)	(8)	2	1	7 ⁵⁰	3 ⁵¹	0	13
Ore. (1958-88)	(43)	11	4	42 ⁵²	5 ⁵³	8 ⁵⁴	70
Pa. (1969-84)	(13)	8	8	0	0	0	16
R.I. (1970-83)	(2)	2	0	0	0	0	2
S.C. (1976-88)	(3)	4	1	0	0	0	5
S.D. (1988)	(1)	0	1	0	0	0	1
Tenn. (1965-87)	(5)	2	1	1 ⁵⁵	2 ⁵⁶	1 ⁵⁷	7
Tex. (1967-90)	(15)	1	1	12 ⁵⁸	3 ⁵⁹	1 ⁶⁰	18
Utah (1983)	(1)	1	0	0	0	0	1
Vt. (-)	(0)	0	0	0	0	0	0
Va. (1986-89)	(2)	1	1	0	0	0	2
V.I. (-)	(0)	0	0	0	0	0	0
Wash. (1963-89)	(15)	13	3	8 ⁶¹	7 ⁶²	5 ⁶³	36
W. Va. (1970-90)	(4)	0	2	2 ⁶⁴	0	0	4
Wis. (1963-90)	(9)	3	1	6 ⁶⁵	0	0	10
Wyo. (-)	(0)	0	0	0	0	0	0
TOTAL	468	283	103	322	65	104	877

49. Conn. (1), Md. (1), Mich. (1), N.Y. (1), Ohio (6)

50. Mich. (1), Okla. (6)

51. N.Y. (3)

52. Or. (42)

53. N.Y. (5)

54. N.Y. (8)

55. Mich. (1)

56. N.Y. (2)

57. N.Y. (1)

58. Tex. (12)

59. N.Y. (3)

60. N.Y. (1)

61. Ariz. (1), Idaho (1), Mich. (1), Wash. (5)

62. La. (2), N.Y. (5)

63. N.Y. (5)

64. Va. (1), W. Va. (1)

65. Wis. (6).