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Ethics In Legal Practice In Nebraska: A Comparative Analysis

By William F. Swindler*

I. INTRODUCTION

Interest in the improvement of professional practice has been associated historically with Nebraska at least since Roscoe Pound shattered the complacency of the American Bar Association with his renowned address on "The Causes of Popular Dissatisfaction with the Administration of Justice," delivered before the national convention of the A.B.A. in 1906. The basic problem, as Pound saw it at that time, was essentially an ethical one; he began his address by observing:

Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world. The law seeks to harmonize these activities and to adjust the relations of every man with his fellows so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult. It is impossible that legal and ethical ideas should be in entire accord in such a society. The individual looks at cases one by one and measures them by his individual sense of right and wrong. The lawyer must look at cases in gross, and must measure them largely by an artificial standard. He must apply the ethics of the community, not his own. If discretion is given him, his view will be that of the class from which he comes. If his hands are tied by law, he must apply the ethics of the past as formulated in common law and legislation. In either event, judicial and individual ethical standards will diverge. And this divergence between the ethical and the legal, as each individual sees it, makes him say with Luther, "Good jurist, bad Christian."¹

When the American Bar Association adopted its Canons of Professional Ethics in August, 1908, the Nebraska State Bar Association was among the first state groups to adopt them as its

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¹ Cf. 29 Am. Bar Assn. Report 395, 399 (1906).

own;² and in an address on "The Ethical Side of the Case" delivered at the state convention that year by Charles G. Ryan, a Grand Island attorney, it was observed that "the maintenance of that code of ethics must ever remain a matter of individual character, colored more or less by environs and subject, somewhat, to local interpretations."³ At the same convention, Dean Pound, in a paper on "The Etiquette of Justice," expressed the hope that the codes of ethics then beginning to win general support throughout the country would become "living bodies of law" and would make it clear that "there are lawful things which it is not professional to do at all times," and would reject "every attempt to use adjective law to defeat justice after the merits have been fairly settled."⁴

Nationally, the concept of an enforceable code was a long time coming. The famous "Fifty Resolutions in Regard to Professional Deportment," framed by David Hoffman of the Baltimore bar in 1836, and the "Essay on Professional Ethics" composed by Judge George Sharswood of Philadelphia in 1854, were conspicuous—but lonely—landmarks of the nineteenth century. State bar associations themselves did not become general until after the 1870's, and many of these—including Nebraska's—had only a sporadic existence until the turn of the century. The first state association to adopt a code of ethics was Alabama's in 1887.⁵ Twenty years later the A.B.A. addressed itself to the problem and agreed upon the fundamental need for such a code (1) to promote public confidence in the integrity of the legal system, (2) to impress upon practitioners the responsibilities devolving upon them as officers of the courts, and (3) to create an instrument for effective policing of professional conduct when placed in the hands of the judiciary and made a condition for admission to practice.⁶

The first thirty-two Canons of Professional Ethics were adopted in 1908; thirteen supplemental canons were approved in 1928 at which time the Nebraska State Bar Association formally resolved

² 3 Neb. State Bar Assn. Proc. 12-23 (1909). The Nebraska code of that date omitted Canon 13 of the A.B.A. code, relating to contingent fees, and the second paragraph in Canon 15, which held that it was improper for a lawyer to assert in argument his personal belief in his client's innocence and the justice of his case. *id.*, 12, 16, 17.

³ *Id.*, 166, 157. Cf. the preamble to the A.B.A. code, which includes the statement: "No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life." 33 Am. Bar Assn. Report 575 (1908).

⁴ 3 Neb. State Bar Assn. Proc. 231, 251.

⁵ Cf. 31 Am. Bar Assn. Report 676 (1907).

⁶ *Id.* at 676.

that the amended canons, as well as the complementary Canons on Judicial Ethics adopted nationally in 1924, should replace those it had originally adopted in 1909.⁷ Two other canons were added, and earlier ones amended, in succeeding years,⁸ and these were duly incorporated into the Nebraska code.⁹

It has often been noted that the A.B.A. canons are essentially aimed at the conduct of trial lawyers; certainly the first group of thirty-two concerned themselves almost exclusively with this function of the attorney, and the subsequent canons have by no means extended themselves to a comparable degree of definition of office practice, despite the dominating position assumed by this phase in the changing professional practices of the past generation. In any event it may be helpful, in view of the division of the subject matter in the following parts of this paper, to analyze the current forty-seven canons by classifying them under eight major subdivisions, viz.:¹⁰

1. *Relations Between Attorney and Court*: These embrace the first five canons, relating to the duty of the lawyer in the courtroom (1),¹¹ the responsibilities of the bar in the selection of judges (2), the prohibition of efforts to exploit personal influence with a court (3), the behavior of counsel appointed for indigent prisoners (4), and the rights and duties of those serving as attorneys for criminal defendants (5).

2. *Relations Between Attorney and Client*: These deal with conflicting interests and the question of their representation by the same lawyer (6), the policy in receiving parties who have been clients of another attorney (7), advising clients upon the merits of their cases (8), the limits of propriety in supporting a client's case (15), the attorney's responsibility in restraining clients from improper conduct (16),¹² the avoidance of testifying in court as a witness for one's client (19), and the general matter of treating clients' confidences (37).

⁷ 20 Neb. State Bar Assn. Proc. 22 (1929).

⁸ For the table of A.B.A. canons as adopted and amended, see Table I in the appendix to this paper.

⁹ Cf. note 28 *infra*.

¹⁰ The text of the canons is not given in this paper, as much for reasons of space as for the presumption of their familiarity to practitioners. Copies of the latest revision of the canons of professional and judicial ethics may be obtained from the American Bar Association, 1155 East 60th Street, Chicago 37, Ill.

¹¹ The number refers to the canon on that subject.

¹² Cf. also Canon 44.

3. *Relations With Opposing Parties, Witnesses, and Counsel:* These canons define the proper procedure in negotiating with the adverse party (9), the avoidance of personalities between advocates (17), and the treatment of witnesses before (39) and during (18) trial.

4. *Conduct During Trial:* Attorneys are exhorted to refrain from discussing pending cases in newspapers (20), to be punctual and expeditious in court (21), to deal fairly and with candor in all stages of a case (22), to observe professional courtesies with reference to the convenience of opposing counsel (24), to avoid various sycophancies in dealing with juries (23), to refrain from taking technical advantage of an opponent (25), and to maintain the same degree of professional integrity in advocacy before bodies other than courts (26).

5. *Fiduciary Principles:* The canons impose a particular degree of honor, in inveighing against personal advantage sought by counsel in the handling of trust property (11) and in the matter of accepting commissions, rebates and the like without the full knowledge and consent of the client (38).

6. *Fees, Expenses, Etc.:* Rules of propriety in the fixing of the amount of fees (12), the policy to be observed in the matter of contingent fees (13), the necessity of suing a client for professional remuneration (14), and the question of advancing money to a client for expenses (42) are canons aimed at formalizing the attorney's financial arrangements with those he serves.

7. *Partnerships: Relations With Other Practitioners:* The growth of law firms as distinguished from the old-time solo practitioner, particularly in larger communities, led to the 1928 canon relating to law partnerships (33), and to the question of proper division of fees (34),¹³ while the increasing practice of employing attorneys as house counsel or retaining them for the exclusive service of trade organizations required special treatment (35). There was also the question of advertising (27), modified by the permissibility of appearing in certain law lists (43) and giving notice of particular services offered by a lawyer to local colleagues (46). The general discouragement of specialized status (45) and the pro-

¹³ The canon does not mention "fee splitting" by that term, but for a proper understanding of the modification of this canon under the pressure against such a practice, cf. the phraseology of the canon as originally adopted, 53 Am. Bar Assn. Report 496 (1928), the lengthy committee discussion leading to the amendment of 1933, 58 Am. Bar Assn. Report 161-166 (1933); and cf. *id.*, 434-435. The present canon represents the final amendment of 1937.

fession's struggle against unauthorized practice (47) have also found their place in recent canons.¹⁴

8. *General Professional Responsibilities*: Although all of the foregoing classifications, and particularly the provisions on fiduciary principles, advertising, and the like, could properly be repeated under this heading, the canons which seem particularly to relate to this general subdivision deal with the prohibition against acquiring an interest in litigation (10), avoiding the stirring up of litigation (28), upholding the honor of the profession in general (29), declining to conduct a cause which seems manifestly intended to perpetrate a wrong (30), preventing clients from undertaking improper litigation (31), and avoiding any other acts of disloyalty to the administration of justice (32). Although a general discussion of legal principles in the newspapers is permitted, no free advice on specific issues may be offered (40). Any attempt to impose upon or deceive a court is to be reported by counsel promptly upon its discovery (41), and counsel may withdraw from a case only if he discovers that a client is bent upon an unjust and immoral purpose, or if for any other reason the attorney feels he cannot serve the interests of his client or the cause of justice by continuing in the case (44).

To devise such a code was one thing; to enforce it was quite another. It was originally believed that the courts would adopt these canons as part of the procedure of admission of attorneys to their respective bars, but this did not come about at once. The idea of incorporation of the bar, which came into general discussion about the time of World War I,¹⁵ and the movement toward an integrated bar which took place in the late 1920's and 1930's, were subsequent propositions for making the codes into an effective regulatory force. One or more of these means have now come into rather general use as to the punishment of actual offenses against professional integrity;¹⁶ but the more important problem of educating the practitioner against unprofessional behavior in general—which was the ultimate objective of the codes—obviously required a different approach. This took the form of the advisory committee, or committee of inquiry as it was called in Nebraska, to investigate specific questions of professional conduct and to

¹⁴ Cf. Jackson, *The Unauthorized Practice of Law*, 12 Neb. Law Bull. 332 (1934).

¹⁵ Cf. 9 Neb. State Bar Assn. Proc. 124 (1916).

¹⁶ For the Nebraska procedure on discipline and disbarment, see Part III of the Revised Rules of the Supreme Court of the State of Nebraska, in force September 1, 1957.

prepare instructions or advisory opinions upon them. The New York County Lawyers' Association appears to have organized the first such committee in 1912, but a similar committee was operating in Nebraska by 1914.¹⁷ The American Bar Association formally authorized its Committee on Professional Ethics and Grievances to undertake advisory opinions in 1922.¹⁸

The work of the Nebraska committee of inquiry was effective, over the years, not only in settling specific grievances but in calling attention to the need for a more effective control over the practice of law in the state. Almost as soon as it began functioning, the committee called upon the state bar association to support "legislation that will provide an efficient means for eliminating from the bar of this state any unworthy members." So long as all attorneys were not members of the association, and so long as the state supreme court was largely limited in its disciplinary power to cases against members brought by the association, the system was manifestly ineffective.¹⁹ The committee later urged that the attorney general be required to consider all complaints and to determine whether disbarment action should be recommended to the supreme court.²⁰ Detailed procedure for the investigation of such cases was recommended in 1926,²¹ and the committee was gratified to report favorable action by the court two years later.²²

Encouraged by these advances, the state association turned its attention to the bar integration movement,²³ and in 1935 a bill was introduced into the legislature; but it "was immediately met with vigorous . . . opposition by some of our most able lawyers;"²⁴ so the next year the association proposed that the supreme court undertake to effect integration by promulgation of appropriate rules, rather than to wait for a change of legislative opinion.²⁵ Following a poll of Nebraska State Bar Association members, the supreme court promulgated the rules on September 20, 1937.²⁶ In the process,

¹⁷ 7 Neb. State Bar Assn. Proc. 46 (1914).

¹⁸ 47 Am. Bar Assn. Report 286 (1922).

¹⁹ Cf. 8 Neb. State Bar Assn. Proc. 82 (1915).

²⁰ 14 Neb. State Bar Assn. Proc. 33 (1923).

²¹ 17 Neb. State Bar Assn. Proc. 49, 51-53 (1926).

²² 19 Neb. State Bar Assn. Proc. 18 (1928).

²³ A detailed history of the background of this movement appears in 25 Neb. State Bar Assn. Proc. 45-52 (1934).

²⁴ 26 Neb. State Bar Assn. Proc. 34 (1935).

²⁵ 27 Neb. State Bar Assn. Proc. 55-56 (1936).

²⁶ 28 Neb. State Bar Assn. Proc. 323 (1937).

the court felt compelled to dispose of the question of its authority to proceed, particularly in view of the prior effort to carry out the objective through the legislative rather than the judicial branch. The state constitution, the court conceded, "does not, by any express grant, vest the power to define and regulate the practice of law in any of the three departments of government." In the absence of such specific grant, the court concluded, this power "must be exercised by the department to which it naturally belongs."²⁷ The court then proceeded to cite a number of cases, within its own and other jurisdictions, illustrating the inherent power of the judiciary over its own bar, and came to the following conclusion:

An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court.

The inherent power of this court which petitioners ask us to invoke has always existed. This power is not subject to delegation to committees and representatives, although these agencies may be utilized for investigation or fact-finding purposes and to make recommendations, but the final decision must rest with the court.

The primary duty of courts is the proper and efficient administration of justice. Attorneys are officers of the court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system of this state. It is their duty honestly and ably to aid the courts in securing an efficient administration of justice. The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government.²⁸

With the integration of the bar under rules set forth in this opinion, including the formal adoption of the A.B.A. Canons of Professional Ethics (Article X) and the provision for the investigation of complaints (Article XI), the association in 1938 set up a Committee Advisory to the District Complaint Committees, which was made a permanent part of the association by the court's amendment to Article VI (§ 9),²⁹ and which undertook the function of "rendering of opinions requested by members of the bar and by district

²⁷ *In re Integration of the Nebraska State Bar Association*, 133 Neb. 283, 285, 275 N. W. 265, 114 A. L. R. 151 (1937).

²⁸ 133 Neb. 283, 289. For similar judicial reasoning, cf. *Petition of the Florida State Bar Association*, 40 S.2d 902 (1949), citing precedents in Nebraska, Missouri and Oklahoma.

²⁹ 29 Neb. State Bar Assn. Proc. 244 (1938).

complaint committees on the propriety of certain practices which were the subject of inquiry but did not involve formal complaints."³⁰ Thus at length came into being the complete system of administration of professional practice in Nebraska toward which the association had been working since its adoption of the first code of ethics in 1909.

The present paper is a review of the general principles relating to professional ethics in Nebraska, particularly as reflected in judicial opinions and in certain statutes. These will be considered, so far as practicable, under the eight broad headings of classification or analysis of the A.B.A. Canons which have been set forth above. They will also be considered by comparison with advisory opinions of the national association on these same topics, and with certain advisory opinions published by comparable committees of other state bar associations.³¹ From this, it is hoped, a proper perspective of Nebraska professional practice may be obtained.

II. GENERAL PRINCIPLES OF PROFESSIONAL PRACTICE

A. STATUTORY BASES

Until 1895, each Nebraska court of record appears to have followed the tradition of maintaining its own bar and admitting attorneys to practice before it; by a new statute enacted in that year, however, exclusive power of admission to practice for the state as a whole was vested in the supreme court.³² This law was one of several reforms of the legal profession which were introduced in legislation during the last decade of the nineteenth century and the first decade of the twentieth. These statutes made more explicit the nature of and penalties for unauthorized practice of law,³³ admission to the state bar,³⁴ reciprocity in the admission of

³⁰ *Id.* at 245.

³¹ In addition to selected advisory opinions from Nebraska and the American Bar Association, published opinions from the following states have been used in this study: Illinois, Michigan, Missouri, New Jersey, New York, Oklahoma, and Oregon.

³² Neb. Laws c. 6, § 1 (1895).

³³ Neb. Rev. Stat. § 7-101 (Reissue 1954); for revisions of the statute during the period of professional reforms, cf. Neb. Laws c. 6, § 1 (1895); Neb. Laws c. 6, § 1 (1905). And see Neb. Rev. Stat. 7-111 (Reissue 1954).

³⁴ Neb. Rev. Stat. § 7-102 (Reissue 1954); Neb. Laws c. 6, § 2 (1895); c. 5, § 1 (1903); c. 2, § 1 (1907). The state supreme court has been held to have exclusive power to determine the qualifications of candidates for admission to the bar. *State ex rel. Hunter v. Kirk*, 133 Neb. 625, 276

nonresident attorneys,³⁵ and certain formalities of admission.³⁶ These revised definitions of practice, it was contended, had the effect of imposing upon the attorney, upon penalty of revocation of his license, the standards of honorable behavior exemplified in the nascent codes of ethics of the period.³⁷

Certain of the statutes, although enacted prior to the canons of the national or state associations, embodied certain principles of the Hoffman and Sharswood codes by defining the ethical responsibilities of attorneys appointed as counsel for infants³⁸ or for defendants in criminal actions.³⁹ The general matter of attorney-client relations, as well as attorney-court relations, covered by several "canonical" articles, were defined in an early statute on the duties of attorneys and counselors.⁴⁰ So, also, were the general powers of attorney,⁴¹ while the confidential nature of the client's communications, in terms of immunity from examination in court, was also covered by an early law.⁴²

The fiduciary concept in legal practice is reflected in part in the statute, first enacted in 1911, prohibiting attorneys' fees to estates handled by trust companies,⁴³ as well as in an 1881 law forbidding lawyers to act as surety on official bonds.⁴⁴ Embezzlement by a practitioner, in the nature of the case, called for a particularly stringent penalty under the criminal statutes.⁴⁵

N.W. 380 (1937). This may explain why this statute, which provides for admission without examination in the case of graduates of law schools which are members of the Association of American Law Schools, is superseded by the Rules of the Supreme Court stipulating examination for all candidates not already admitted in other jurisdictions. Cf. Rules, *op. cit.* supra, note 16, II Admission of Attorneys, § 1, 4.

³⁵ Neb. Rev. Stat. § 7-103 (Reissue 1954); Neb. Laws c. 5, s. 2 (1903); and cf. Neb. Rev. Stat. § 7-109 (Reissue 1954).

³⁶ Neb. Rev. Stat. § 7-104 (Reissue 1954); Neb. Laws c. 5, § 1 (1899).

³⁷ Cf. *State ex rel. Atty. Gen. v. Burr*, 19 Neb. 593, 28 N.W. 261 (1886); *State ex rel. Neb. State Bar Assn. v. Wiesbusch*, 153 Neb. 583, 45 N.W. 2d 583 (1950); *State ex rel. Sorensen v. Goldman*, 127 Neb. 340, 255 N.W. 32 (1934).

³⁸ Neb. Rev. Stat. § 7-113 (Reissue 1954).

³⁹ Neb. Rev. Stat. § 29-1803, 1804 (Reissue 1956).

⁴⁰ Neb. Rev. Stat. § 7-105 (Reissue 1954).

⁴¹ Neb. Rev. Stat. § 7-107 (Reissue 1954); cf. also § 7-112.

⁴² Neb. Rev. Stat. § 25-1206 (Reissue 1956).

⁴³ Neb. Rev. Stat. § 8-206 (Reissue 1954).

⁴⁴ Neb. Rev. Stat. § 11-114 (Reissue 1954).

⁴⁵ Cf. Neb. Rev. Stat. § 28-538 (Reissue 1956).

In the definition of attorneys' rights to compensation for professional services, the statute provides for a lien upon any papers of his client which have come into his possession in the course of his employment, as well as upon any money in his hands belonging to his client, or in the hands of an adverse party in any proceeding in which the attorney was employed from the time of giving notice of the lien to that party.⁴⁶

Perhaps the most pertinent statute of all is that which subjects any lawyer guilty of deceit or collusion with intent to mislead a court or client to liability of disbarment and of treble damages to the injured party.⁴⁷

B. ADJUDICATION

It has always been recognized that a court may prosecute a party for practicing law without a license,⁴⁸ and in Nebraska it has further been generally held that practicing law without a license may extend by definition to any type of counseling where legal knowledge is the basic element of value in the advice given.⁴⁹ The court reserves the right, as an inherent element of its own integrity, of prohibiting one of its officers from using any improper means in the practice of the profession.⁵⁰ "The first duty of the attorney is to the court," it has frequently averred.⁵¹ In admitting one to practice it is intended that he will faithfully discharge this duty, avoiding any act which would tend to bring reproach upon the court or the bar.⁵² The standard of conduct is that expressed

⁴⁶ Neb. Rev. Stat. § 7-108 (Reissue 1954); and cf. Neb. Rev. Stat. § 25-1801 (1955 Supp.).

⁴⁷ Neb. Rev. Stat. § 7-106 (Reissue 1954).

⁴⁸ State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N.W. 95 (1936); State ex rel. Wright v. Hinckle, 137 Neb. 735, 291 N.W. 68 (1940).

⁴⁹ Spier v. Thomas, 131 Neb. 579, 269 N.W. 61 (1936); State ex rel. Hunter v. Kirk, 133 Neb. 625, 276 N.W. 380 (1937). Perhaps the most extreme statement of the law on this subject is found in State ex rel. Johnson v. Childe, 139 Neb. 91, 295 N.W. 381 (1941), wherein the court said: "We do not doubt that respondent possesses high qualifications But the fact that he can qualify as an expert in a particular field will not permit his engaging lawfully in the profession of law without a license to do so." id. at 95. The defendant was cited for appearing as a rate expert before the state railway commission.

⁵⁰ Cf. In re Breckenridge, 31 Neb. 489, 48 N.W. 142 (1891).

⁵¹ Nebraska State Bar Association v. Wiebusch, 153 Neb. 583, 45 N.W.2d 583 (1951); and cf. State ex rel. Neb. State Bar Assn. v. Niklaus, 149 Neb. 859, 33 N.W.2d 145 (1948).

⁵² State ex rel. Neb. State Bar Assn. v. Hungerford, 159 Neb. 468, 67 N.W.2d 759 (1954).

in the canons of the American Bar Association and such other canons as the court itself shall from time to time approve.⁵³

Courts have the inherent duty to impress upon members of the bar such ethical responsibilities as the keeping of clients' confidences,⁵⁴ preserving the respect due to the court by all parties coming before it,⁵⁵ and generally bringing lawyers to account for any and all instances of misconduct.⁵⁶ It has been pointed out on various occasions that in discharging this duty the courts are essentially discharging a responsibility to the public; and thus a disbarment proceeding against an attorney is regarded not primarily as punishment but as a protecting of the public interest by a determination of whether the attorney concerned is qualified to practice law.⁵⁷

Good moral character and circumspect professional conduct are proper subjects of inquiry for the court, and the lack of such character or conduct may be ground for suspension or disbarment.⁵⁸ "Ambulance chasing,"⁵⁹ false representations to a surety company,⁶⁰ conviction of a felony or misdemeanor involving moral turpitude,⁶¹ fraudulent conduct in the handling of a decedent's estate,⁶² have all been defined as evidence of bad character or unprofessional practices. Mere restitution of funds wrongfully taken or withheld will not exonerate the accused lawyer,⁶³ for the court will not permit

⁵³ *State ex rel. Neb. State Bar Assn. v. Palmer*, 160 Neb. 786, 71 N.W.2d 491 (1955); *State ex rel. Neb. State Bar Assn. v. Bates*, 162 Neb. 652, 77 N.W.2d 302 (1956).

⁵⁴ *In re Strelow's Estate*, 117 Neb. 168, 220 N.W. 251 (1928).

⁵⁵ *State ex rel. Hunter v. Hatteroth*, 134 Neb. 451, 279 N.W. 153 (1938).

⁵⁶ *State ex rel. Neb. State Bar Assn. v. Merten*, 142 Neb. 780, 7 N.W.2d 874 (1943).

⁵⁷ *State v. Priest*, 123 Neb. 241, 242 N.W. 433 (1932); *State ex rel. Hunter v. Crocker*, 132 Neb. 214, 271 N.W. 444 (1937); *State ex rel. Neb. State Bar Assn. v. Feehan*, 161 Neb. 9, 71 N.W.2d 518 (1955).

⁵⁸ *Bartos v. U. S. Dist. Ct. for Dist. of Neb., C. C. A. 8th*, 19 F.2d 722 (1927); *State v. Fisher*, 103 Neb. 736, 174 N.W. 320 (1919); *State ex rel. Hunter v. Marcounnit*, 143 Neb. 898, 280 N.W. 216 (1938).

⁵⁹ *State ex rel. Sorensen v. Goldman*, 127 Neb. 340, 255 N.W. 32 (1934); *State ex rel. Neb. State Bar Assn. v. Basye*, 138 Neb. 806, 295 N.W. 816 (1941).

⁶⁰ *Neb. State Bar Assn. v. Rein*, 141 Neb. 758, 4 N.W. 2d 829 (1942).

⁶¹ *Wright v. Sowards*, 134 Neb. 159, 278 N.W. 148 (1938).

⁶² *Neb. State Bar Assn. v. Gudmundson*, 145 Neb. 324, 16 N.W. 2d 474 (1944).

⁶³ *State ex rel. Neb. State Bar Assn. v. Hyde*, 138 Neb. 541, 293 N.W. 408 (1940).

so fundamental a question as the integrity of its officers to be compromised by a private settlement.⁶⁴

The courts stress that an attorney's relationship with a client is primarily one of trust and confidence, upon which the latter relies for the protection of his legal rights in the cause for which the attorney is retained; the fundamental responsibility of the lawyer, therefore, is to exercise the utmost good faith in all of his dealings with the client.⁶⁵ Private interests of counsel are not to be permitted to compete or conflict with those of the client.⁶⁶ Where an attorney and a client have an interest in the same transaction, the courts will demand clear and conclusive proof that no advantage was taken of the client, and that the entire interest of the attorney was clearly explained to the client; otherwise, the very juxtaposition of interests will incline the courts to find a breach of professional obligation.⁶⁷

Conversely, the courts are zealous to protect the interests of their officers and to see that they receive compensation and such other considerations as they may be entitled to claim.⁶⁸ A reasonable fee for services performed is recognized in all instances where the lawyer has not contracted to perform for an inadequate amount.⁶⁹ The reasonableness of the fee is to be determined by the nature of the case, the amount involved, the results obtained through the attorney's efforts, the length of time devoted to the cause, and the like.⁷⁰ A contingent fee, if expressly agreed to between counsel and client, and specifically set forth in the agreement, will be upheld.⁷¹

A summary of the general legal basis for the courts' assertion of the right to police the profession was eloquently delivered by

⁶⁴ *Spillman v. Priest*, 123 Neb. 241, 242 N.W. 433 (1932).

⁶⁵ *Colick v. Colick*, 148 Neb. 201, 26 N.W.2d 820 (1947); *Diedrichs v. Stephenson*, 101 Neb. 366, 163 N.W. 153 (1917).

⁶⁶ *James v. McNair*, 164 Neb. 1, 81 N.W.2d 813 (1957); and cf. *Young v. Card*, 145 Neb. 857, 18 N.W.2d 302 (1945).

⁶⁷ Cf. *Hamilton v. Allen*, 86 Neb. 401, 125 N.W. 610 (1910).

⁶⁸ See discussion of this matter in *Solomon v. A. W. Farney, Inc.*, 136 Neb. 338, 345-351, 286 N.W. 254 (1939).

⁶⁹ *Neb. State Bar Assn. v. Dunker*, 160 Neb. 779, 71 N.W.2d 502 (1955); *Thurston v. Travelers Ins. Co.*, 128 Neb. 141, 258 N.W. 66 (1934).

⁷⁰ *Hemmer v. Metropolitan Life Ins. Co.*, 133 Neb. 470, 276 N.W. 153 (1937); *Strasser v. Strasser*, 153 Neb. 288, 44 N.W. 2d 508 (1950).

⁷¹ *Miles v. Cheyenne County*, 96 Neb. 703, 148 N.W. 959 (1914); *Martin v. Reavis*, 117 Neb. 219, 220 N.W. 238 (1928).

Mr. Justice Day of the Nebraska Supreme Court in a 1937 case, in which he observed:

When one seeks and attains admission to the bar of the courts of this state, he voluntarily assumes the obligations imposed by the ethical regulations generally recognized by the profession, and the violation of such rules renders an attorney subject to disbarment or suspension. . . .

But the basis of these decisions is the public policy of the state, and the public interest. . . . It is not in the public interest that a lawyer stir up litigation and strife among people in order to secure professional employment. Experience has demonstrated that there is a temptation, under such circumstances, to instigate litigation where no sufficient cause exists. . . .⁷²

As a result of this century and a quarter of attempts at professional improvement through the devising of ethical codes, statutory reforms and increasingly authoritative assertions of judicial power to punish transgressors, it may be said that the bar is at least more acutely conscious of its need to conform to some fundamental principles of behavior than at any time in its ancient history. It may also be said that the net result of the movement toward an enforceable code of ethics has been to divide the problems into two broad categories—those arising from the occasional “open and notorious” flouting of the standards, which call forth the punitive force of the judiciary; and those involving the question of the application of the general principle to specific practical situations.

The latter have been the fundamental reason for the development of the advisory opinions formulated by the national professional body as well as by various state and certain municipal associations. Indeed, because most practitioners are zealous to govern their behavior by the codes while the disbarred and suspended attorney is the proportionately rare exception, it would seem to follow that these numerous⁷³ interpretative memoranda—the advisory opinions of state, national and local professional bodies—are now

⁷² Hunter v. Crocker, 132 Neb. 214, 216-217, 271 N.W. 444 (1937).

⁷³ A total of 291 published opinions of the A.B.A. committee was compiled and published in the 1957 volume entitled, *Opinions of the Committee on Professional Ethics and Grievances*. To this was added a digest of 383 decisions, not embodied in formal opinions, taken from the minutes of the committee, *id.* at 627-648. There were 810 opinions from the files of the Association of the Bar of the City of New York, and 445 opinions of The New York County Lawyers' Association, included in a 1956 compilation of *Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyers Association*. The Michigan State Bar Association had published 165 opinions by early 1957; for most of these, cf. 29 Mich. State Bar Journ. 5 (1950); 36 Mich. State Bar Journ. 21 (1957).

becoming, even more than the statutes and the cases on the subject, the most authoritative guides to ethical procedures.⁷⁴ Accordingly, they provide the main portion of the present study which has attempted to sketch the basic features of professional conduct in the Nebraska bar today.

C. SELECTED ADVISORY OPINIONS

In the second opinion it was called upon to formulate, the American Bar Association committee was asked whether, as a matter of policy, state or local associations should undertake to investigate alleged instances of professional misconduct in the absence of a formal complaint. The committee seized upon this inquiry to stress the important opportunity thus presented to complement the statutory and adjudicatory efforts at enforcing ethical practices:

One of the chief purposes of bar associations is to exert organized effort to lessen abuses in the practice and administration of the law. When members of the Bar commit definite misdeeds affecting strong clients, such clients usually present formal complaints to the proper authorities. But sometimes there are credible reports or rumors of professional misconduct by members of the Bar against whom no formal complaint is made to the authorities . . . and as bar association action can rarely give relief to clients who may be wronged, clients often lack the public spirit to make a formal complaint and to assume the burden of substantiating its definite averments. Likewise individual lawyers hesitate to make the complaint unless they have personal knowledge of the misconduct, and are themselves at least as prominent in the profession as the lawyers involved. For these reasons serious misconduct would go uninvestigated if no committees of the organized Bar assume the burden.

Again not infrequently the press calls attention to supposed cases of misconduct by lawyers without making any definite charges, and if the facts go uninvestigated the local Bar as a whole is blamed for inactivity.

For the benefit of the profession, therefore, as well as the public good, it would seem desirable that some committee of the local bar association have authority on its own judgment and initiative to go into such charges without requiring any specific complaint to be filed.⁷⁵

⁷⁴ The best general study of the subject is Drinker, *Legal Ethics* (1953). Mr. Drinker was at that time, and still is, chairman of the A.B.A. committee. His book, as well as the volume of New York advisory opinions cited in the foregoing note, was published under the auspices of the William Nelson Cromwell Foundation, which has among its stated objectives the preparation and dissemination of published studies on the subject of professional ethics.

⁷⁵ A.B.A. Op. 2 (July 7, 1924).

Although this opinion addressed itself to the responsibility of the bar association committees in matters of complaints, it was symptomatic of the dynamic role in the general surveillance and education of the profession which the national committee conceived to be the purpose of its authority both as to complaints and advisory opinions. It had ample precedent for this, in the activity which the New York association had been carrying on since 1912,⁷⁶ and which other states had already begun to follow.⁷⁷ Since those dates, the body of these opinions has grown to a sufficient number and variety to provide a commentary on all of the principal propositions set forth in the canons.

1. *Relations Between Attorney and Court*⁷⁸

In all his conduct before the court, the lawyer is enjoined to act as an officer aiding the judge in the proper administration of justice. It has been contended by the national committee that this makes it incumbent upon the attorney to advise the court of any decisions adverse to his position, when it is apparent that opposing counsel is unaware of them and when it is equally apparent that the court should properly consider these decisions in judging

⁷⁶ 7 Neb. State Bar Assn. Proc. 46 (1914).

⁷⁷ 29 Neb. State Bar Assn. Proc. 244 (1938).

⁷⁸ See the classification of the canons in the opening part of this paper, pp. 705-707, *supra*. The sources of the advisory opinions cited in the following notes are varied; for the American Bar Association and the two New York associations, as well as for the Michigan State Bar Association, the sources have been indicated in note 73 *supra*. Those for New Jersey are taken from the Yearbooks of the New Jersey State Bar Association, 1946-49 (since that date the state supreme court has taken over the interpretation of the canons of ethics). The Missouri Bar Administration Advisory Opinions, Nos. 1-87, have been compiled in a pamphlet by the state advisory committee; their usefulness for the comparative analyst is somewhat reduced by the absence of dates. The Oregon opinions appear in a pamphlet published by the bar of that state, which contains the state bar act, rules of procedure in the state courts with reference to discipline, and the codes of ethics in addition to opinions through 1950, which are kept up to date by subsequent publications in the Oregon State Bar Bulletin. The Legal Ethics Committee of the Oklahoma Bar Association has published its opinions since 1950 in the weekly journal of the association. The Illinois State Bar Association opinions are mimeographed, and were sent to this writer through the courtesy of the state committee.

In the interest of brevity, the opinions cited in the following notes will not refer to these sources except in instances of direct quotation from certain state opinions. The sources will be found by reference to notes 73 and 78. With reference to Nebraska advisory opinion, see note 169 *infra*.

the case at hand.⁷⁹ It is also held to be the lawyer's responsibility to avoid any personal dealings with a judge, particularly one before whom he regularly appears, which would have any appearance of undue influence.⁸⁰ There is a generally recognized "reciprocal relationship of Bench and Bar . . . with reference to the matter of *ex parte* communications. No argument, either oral or written, which is intended or calculated to influence the Court, may ethically be made by a lawyer to a Judge in the absence of opposing counsel."⁸¹

These general principles of impartial behavior toward the court, set forth particularly in Canons 1 and 3, are subject to certain practical qualifications with respect to Canon 2 on the duty inherent in the profession of seeing that only the best qualified candidates are selected for the bench. But in cases of political—although generally non-partisan—election of judges, it has been pointed out that a candidate should not make unjust criticisms of incumbent judges or promise if elected to render decisions favorable to any particular group.⁸² An incumbent's use of his title or the prestige of his position as an electioneering device is generally condemned.⁸³ Individual lawyers may contribute financially to the campaign of a candidate when the candidate merits support and the circumstances warrant outside monetary aid.⁸⁴

The question of the protection of rights of indigent persons, particularly in criminal cases, has come up in smaller communities where there were not enough attorneys to make possible the complete separation of prosecution, judge and defense. Accordingly, the American Bar Association in a 1931 opinion ruled that a police judge or the juvenile judge in a rural community might properly defend indigent prisoners in higher courts of general jurisdiction, and added that the city attorney could with equal propriety defend indigents other than those whom he was compelled by law to prosecute.⁸⁵

In the treatment of criminal defendants, particularly by the

⁷⁹ A.B.A. Op. 280 (June 18, 1949); cf. also A.B.A. Op. 146 (July 17, 1935); N.Y. Bar Op. 643 (Nov. 10, 1943).

⁸⁰ A.B.A. Op. 89 (Dec. 3, 1932).

⁸¹ Mich. Op. 96 (Aug. 1946).

⁸² Mich. Op. 74 (March 1941).

⁸³ Id.; and cf. A.B.A. Op. 189 (Nov. 11, 1938).

⁸⁴ A.B.A. Op. 226 (July 12, 1941); but see the argument in N.Y. Co. Law. Op. 304 (1933), loc. cit. note 73 supra.

⁸⁵ A.B.A. Op. 55 (Dec. 14, 1931).

state's attorney, the canons have stressed the duty imposed by standards of fair play. It has been emphasized that a prosecutor may not properly induce a prisoner to withdraw a plea of not guilty under the threat of charging him with a more serious offense if he refuses.⁸⁶ Nor should counsel for the defense undertake to advise his client as to what he should do in the event that he flees from custody,⁸⁷ or to withhold from the court information as to the whereabouts of a client who has escaped.⁸⁸ Once a lawyer has accepted the retainer in the case of a criminal defendant, however, he is:

... authorized and required: to interpose in behalf of his client every available constitutional and statutory safeguard of the rights of the accused; to object to the presentation by the prosecution of any evidence against the accused unless such evidence is legally admissible; to urge every available objection to the indictment or presentment, to the jurisdiction of the trial tribunal and to the legal sufficiency of the proof presented; to present in behalf of the accused any testimony, believed by him to be trustworthy and relevant, which tends to meet the charge against the accused (whether by reason of the bad character of the prosecution's witness[es] or their unreliability or bias, or by reason of any other defect) which create a reasonable doubt of guilt either of any offense or of the particular degree of the offense with which the accused is charged.⁸⁹

2. *Relations Between Attorney and Client*

The conflict of interests which may arise in many ways from the fundamental duties imposed upon the lawyer when he is confronted with the particular needs of his client, has occasioned some advisory comment from virtually every bar association which has published its opinions. The private practitioner elected to public office with unfinished private business remaining, the family lawyer who is asked by both husband and wife to undertake divorce proceedings, the attorney who is asked by a client to prosecute a claim against a company in which the attorney has an investment, are common illustrations of the issues that blossom in this area.

It is hardly to be disputed that an attorney may not ethically accept retainers from both sides in a controversy.⁹⁰ Under certain circumstances where all parties concerned have been made fully

⁸⁶ Mich. Op. 129 (Oct. 1949).

⁸⁷ A.B.A. Op. 150 (Feb. 15, 1936).

⁸⁸ A.B.A. Op. 155 (May 4, 1936); and cf. A.B.A. Op. 156 (May 4, 1936).

⁸⁹ N.Y. Op. 201 (Oct. 30, 1931), loc. cit. 98.

⁹⁰ Ore. Op. 2 (Aug. 15, 1936); cf. A.B.A. Op. 40 (Sept. 15, 1931); A.B.A. Op. 49 (Dec. 12, 1931); A.B.A. Op. 64 (March 19, 1932).

aware of the possible conflict of interests, and upon consent of the parties so informed, a lawyer may properly represent both interests,⁹¹ but the committees of both state and national associations are disposed to view such situations with disapproval or at least without enthusiasm. Lawyers in any official capacity—members of a state or municipal assembly, or a city or state's attorney⁹²—are under considerable burden to justify any service they perform for a private client. The suit against a former client is a standard illustration of the dilemma presented by the injunction against conflicting interests, and the advisory opinions on this problem are generally disposed toward a strict construction.⁹³

How such conflicts can arise out of the most routine experiences of a practitioner is shown in a case involving an Oregon attorney to whom a Nebraska law firm forwarded a claim based upon an accident in a Portland department store. The Oregon lawyer made an investigation as requested, after having prepared an opinion concerning the liability of the store, and found that the business was operated by a partnership and that one of the partners was a regular client of his. The Oregon attorney notified the Nebraskans of his discovery, and the latter notified him that he would be expected to treat such information as he had received from the plaintiff's counsel "in an ethical manner." Subsequently, an action was filed in Oregon against the store, joining therein the partner who was the regular client of the Oregon attorney involved. The board of governors of the Oregon State Bar agreed that the attorney should not, under these circumstances, defend the action or divulge the information he had received from the forwarding attorneys.⁹⁴

The client who leaves one lawyer and seeks to engage the services of another—like the patient who is continually switching physicians—presents the problem anticipated by Canon 7. Any lawyer has a right to discuss pending legal matters, in which he has not been adversely committed, with another attorney's client if he is sought out by the client; if thereafter he is retained as an associate counsel, it is considered to be his duty to notify the original lawyer thereof, and to refrain from handling the pending

⁹¹ A.B.A. Op. 243 (June 20, 1942).

⁹² Cf. Ore. Op. 10 (March 20, 1939), where conflict arose from attorney's office in the state legislature; Ore. Op. 24 (Feb. 23, 1946), where attorney was a member of a city council.

⁹³ Cf. Ore. Op. 21 (June 10, 1944); Mo. Op. 21 (undated); Mich. Op. 45 (April 1939); and see the numerous references in the New York opinions, loc. cit. note 73 supra, index under "actions against former clients."

⁹⁴ Ore. Op. 26 (Sept. 4, 1946).

cause until recognized by the first lawyer or advised that the first lawyer has withdrawn.⁹⁵ To solicit the business of another attorney, of course, is the crux of the unethical.⁹⁶

Once counsel has accepted a retainer, the permissible lengths to which he may go in supporting the client's case have elicited some advisory comment. The New Jersey State Bar Association has condemned the efforts of an attorney to obtain a Mexican divorce by "proxy" for a client when such proceedings were illegal under New Jersey statutes.⁹⁷ Permitting clients to send collection letters on the attorney's stationery is condemned,⁹⁸ as is a practice of obtaining and holding property of an adverse party until the client can obtain some concession from the adversary as a condition of the return of the property.⁹⁹

Correlative with this injunction of ethics is the duty of counsel to restrain clients who undertake improper actions on their own initiative. Once a case is in litigation, the attorney may not condone or aid his client's efforts to reach a settlement with the adverse party without the knowledge of the adverse counsel.¹⁰⁰ Nor is it considered desirable for a lawyer engaged as the counsel in the trial of a cause to serve as a witness for his client.¹⁰¹

The major point of honor in attorney-client relationships, perhaps, is the matter of preserving the confidences of the client. It is almost unanimously held that the duty to preserve such vital and intimate information outlives the employment of the lawyer by the party communicating the confidential matter.¹⁰² The duty is also found to extend to the secretarial personnel and other agents of the law firm when they have occasion to handle such information.¹⁰³ Once a lawyer has represented one party with respect to a particular claim, it is improper for him to represent the adverse party even though all of the facts involved are of public record.¹⁰⁴

⁹⁵ Mich. Op. 113 (May 1948); cf. Ill. Op. 127 (undated); A.B.A. Op. 10 (July 13, 1926); A.B.A. Op. 149 (Feb. 15, 1936); A.B.A. Op. 209 (Nov. 23, 1940).

⁹⁶ Cf. N.J. Op. of Sept. 11, 1947.

⁹⁷ N.J. Op. of Dec. 1946; cf. A.B.A. Op. 82 (Aug. 27, 1932); A.B.A. Op. 248 (Dec. 19, 1942).

⁹⁸ A.B.A. Op. 253 (June 26, 1943).

⁹⁹ E.g., Mich. Op. 93 (Nov. 1945).

¹⁰⁰ A.B.A. Op. 75 (Aug. 27, 1932).

¹⁰¹ Ore. Op. 48 (June 28, 1957).

¹⁰² Cf. Mo. Op. 52 (undated); but see Mich. Op. 7 (Oct. 1936).

¹⁰³ Ill. Op. 165 (Aug. 15, 1957).

¹⁰⁴ Mich. Op. 45 (April 1939).

But where it is discovered that fraud or imposition has been practiced upon an adverse party, it becomes the lawyer's duty to inform all interested persons.¹⁰⁵ A lawyer-client relationship is not established where a client misrepresents his identity, so as to prevent the attorney from representing the opposing party and revealing such information as may be necessary to protect the legitimate client's interests.¹⁰⁶ When there is doubt as to whether an attorney-client relationship has been effected, the doubt should be resolved in favor of the preservation of any confidences.¹⁰⁷

"Reasons of sound public policy underly the injunctions of this canon," observed the Michigan advisory group in a 1954 opinion:

It is to the fundamental interest of the public, and to the preservation of the structure and administration of the law itself, that those needing and seeking the protection of the law should be privileged to communicate to legal counsel the circumstances of their affairs, and to receive guidance in the law, with the assurance that such communications will be held in strictest trust and confidence. Were the rules otherwise—in other words, if lawyers were permitted or required to publicize their client's confidences to public authorities or others—the administration of the law itself would inevitably suffer and deteriorate through public fear of the consequences of consultation with legal counsel.¹⁰⁸

3. *Relations With Opposing Parties, Witnesses and Counsel*

Canon 9 enjoins a lawyer to refrain from communicating in any way with an adverse party represented by counsel; this has been interpreted to include the prohibition of sending copies of letters being delivered to the adverse counsel.¹⁰⁹ It also has been applied to a practice which presents itself in various tempting forms to many practitioners—preparing an official-looking document in which the adverse party is warned that he is going to be the object of a law suit. Such an instrument is condemned because its primary purpose is to mislead and frighten a layman who receives it, to persuade him that the attorney actually has the power to compel him to come to the attorney's office and to agree to a settlement before the unfamiliar and forbidding machinery of the courts engages him.¹¹⁰

After a suit has been filed, it is held to be unethical for ad-

¹⁰⁵ Mich. Op. 59 (Feb. 1940).

¹⁰⁶ Mich. Op. 116 (July 1948).

¹⁰⁷ A.B.A. Op. 216 (March 15, 1941).

¹⁰⁸ Mich. Op. 163 (ec. 1945), loc. cit. note 73 supra, 39.

¹⁰⁹ Ill. Op. 108 (undated); cf. A.B.A. Op. 108 (March 10, 1934).

¹¹⁰ Ill. Op. 146 (Dec. 31, 1956).

justers of the insurance company involved to seek out the plaintiff's physician, without plaintiff's consent, and attempt to obtain full information about the injuries suffered by the plaintiff.¹¹¹ And it is held to be improper for a lawyer to interview the adverse party regarding the facts in the case without the consent of his counsel, whether or not the party is to be a witness in the case.¹¹²

There are, of course, certain qualifications to these general propositions of behavior. As the Oregon Bar's board of governors observed in a 1938 opinion, concerning communications direct with an adverse party represented by counsel, "if there are circumstances which would justify such communications, we suggest that they are quite unusual and that an attorney should refrain from such communication unless it appears that adverse counsel has consented thereto or has himself been guilty of such misconduct as to justify direct communication."¹¹³ It is, after all, seldom a hardship upon plaintiff's attorney to seek proper information from the adverse party and his witnesses by directing his requests through the adverse counsel. "The ascertainment of the truth is always essential to the attainment of justice and it is the duty of the attorney to learn the facts by every fair means within his reach."¹¹⁴ As a Michigan advisory opinion summarized it:

The general duty of counsel for a litigant may include not only the presentation of his client's claim or defense in open court but also the investigation of the facts underlying the controversy in order to properly plead the elements of the claim or defense. Such investigation may necessitate the interviewing of a witness or prospective witnesses for the opposing litigant, and is expressly permitted by Canon 39. Consent of the opposing counsel or party is not necessary.¹¹⁵

4. *Conduct During Trial*

Canon 20 makes clear that an attorney should not discuss any case which is pending, through a public medium such as a newspaper. When his client undertakes such discussion, the ethical position of the lawyer becomes somewhat more difficult to define. If he knows nothing about his client's action, he is under no duty to withdraw from the case, but is required to caution the client

¹¹¹ Mo. Op. 37 (undated); cf. Mich. Op. 69 (Oct. 1940).

¹¹² Mich. Op. 41 (Jan. 1939); cf. A.B.A. Op. 66 (March 19, 1932); A.B.A. Op. 187 (July 24, 1938).

¹¹³ Ore. Op. 9 (March 19, 1938), loc. cit. note 78, 99.

¹¹⁴ A.B.A. Op. 117 (Aug. 27, 1934); cf. also A.B.A. Op. 14 (Jan. 10, 1929); A.B.A. Op. 127 (March 15, 1935).

¹¹⁵ Mich. Op. 117 (July 1948), loc. cit. note 73 supra, 148; cf. Ill. Op. 163 (July 12, 1957).

against such practices; if the client persists, a withdrawal may then become justifiable.¹¹⁶

That this canon does not prohibit the issuance of statements concerning pending cases by public officials, provided these do not contain statements of fact likely to be prejudicial to the defendants, was the conclusion of the A.B.A. committee in a 1940 opinion. The opinion was prompted by the announcement in 1938 by the Attorney-General of the United States that the Department of Justice would thereafter issue public statements from time to time by way of clarifying public policy with respect to the prosecution of certain laws—specifically, the anti-trust laws. While indicating that it was not persuaded that the examples of these statements to that date had been free from potentially adverse effects upon the defendants' causes, the A.B.A. committee conceded that the Attorney-General as executive head of the Department of Justice was a public official with a duty of making a public report which was materially different from a statement issued by an attorney in a private suit.¹¹⁷

Fair dealing—the “very punctilio of honor,” as Mr. Justice Cardozo once put it—is the essence of a truly professional relationship between opposing attorneys and the court during the trial of a case. Any information or any action which affects an adverse counsel is to be called promptly to his attention.¹¹⁸ It is generally maintained that a lawyer may not, after a verdict has been given in by a jury, interview members of the jury as to what led to their conclusion.¹¹⁹ And once an attorney has agreed to a preservation of the *status quo* in a case, it is expected that he will not, without notice to the court and to opposing counsel, be a party to the filing of another suit on the same matter.¹²⁰

5. *Fiduciary Principles*

The general considerations of honorable conduct and good faith which permeate the canons defining the relationships between the several parties to litigation, in the case of trust property have required some special interpretations. Because in the natural course of events the attorney commonly comes into corporeal possession of his client's property, particularly in cases of settlement of claims by or against the client, legislatures and courts as well as advisory

¹¹⁶ Cf. Ill. Op. 116 (undated).

¹¹⁷ A.B.A. Op. 199 (Jan. 26, 1940).

¹¹⁸ Cf. A.B.A. Op. 47 (Sept. 18, 1931); A.B.A. Op. 124 (Dec. 14, 1934).

¹¹⁹ A.B.A. Op. 109 (March 10, 1934).

¹²⁰ A.B.A. Op. 25 (May 5, 1930).

committees have concerned themselves with the particular safeguarding of the interests involved.¹²¹ It is recognized that the property concerned in litigation may be the most likely security for the lawyer's fee, and a conveyance of the property for this purpose is permitted if it is made subject to any rights of the adverse party.¹²² But where, on the other hand, it is the lawyer who is indebted to the client, he may not ethically prepare a will for the client which, in the process of disposing of the estate, provides for the discharge of the attorney's indebtedness.¹²³

The fiduciary principle extends to Canon 38 relating to the lawyer's responsibility for making known to his client any and all remuneration he is receiving from other sources in connection with the client's case. A typical instance involves the retaining of an attorney by a mortgagor, where the attorney is expected to make search of the records, draw the bond and mortgage, and close the loan. The attorney receives part of the fees noted on the state and federal searches; he may also receive a commission from the mortgagee in placing the mortgage loan. The New Jersey State Bar Association held that he was required to make full disclosure of the fees and commissions to his client, even though the fees were statutory.¹²⁴

In the case of rebates from legal advertising, the Michigan advisory committee has ruled that (1) the attorney may not retain the rebate unless his client gives consent, and that (2) he may not retain it even then unless he credits the full amount to the client's account.¹²⁵ In divorce cases, where the wife's attorney receives all or part of his fee from the husband, it has been suggested that he may retain the fee if the wife consents and if there is no collusion in respect of the procurement of the divorce.¹²⁶ Generally speaking, in all cases a lawyer should refrain from charging a client for any item of expense not actually disbursed.¹²⁷

6. *Fees and Expenses*

Closely related to the handling of the client's funds is the matter of fixing a proper charge upon the client for professional serv-

¹²¹ Cf. notes 43-45, 62-65, *supra*.

¹²² A.B.A. Op. 29 (Aug. 19, 1930).

¹²³ Mich. Op. 112 (Dec. 1948).

¹²⁴ N.J. Op. of Sept. 11, 1947; and cf. Mich. Op. 126 (Oct. 1949); A.B.A. Op. 196 (Oct. 20, 1939).

¹²⁵ Mich. Op. 64 (March 1940).

¹²⁶ Mich. Op. 123 (April 1949).

¹²⁷ A.B.A. Op. 38 (May 4, 1931).

ices. The amount of the fee should be a matter of agreement between client and practitioner, and under ordinary circumstances no question of ethics is presented unless the fee demanded in a given case is flagrantly excessive.¹²⁸ A dispute commonly arises, however, where the fee was fixed in contemplation of a certain amount of professional service required for the client—for example, in the preparation of a defense to a complaint. Thereafter it is decided to prepare a counterclaim; or, in the case of the plaintiff's lawyer, the defense to a counterclaim may not have been anticipated. This may properly be made the subject of an additional fee.¹²⁹

Minimum fees set by local bar associations are to be interpreted as advisory only, since there is a strong likelihood that an agreement among all of the attorneys in a given community to observe such minima would subject them to a charge of violation of the anti-trust laws.¹³⁰ Nor can lawyers enter competitive bidding with other professionals in attempting to provide the lowest fee for legal work being commissioned by a municipal corporation.¹³¹ An agreement with a credit association to charge a predetermined fee to all association customers who are referred to the attorney is also held to be improper.¹³²

Contingent fees have presented a difficult ethical question to the codes, and the A.B.A. canon qualifies its endorsement by stipulating that they must bear the sanction of local law. Beyond this, it is stipulated further that the client in any case must bear the responsibility for reasonable expenses which may have been advanced by the lawyer.¹³³ A lawyer may not execute a percentage agreement with the wife in a divorce case for a part of the property settlement involved.¹³⁴

An attorney may with propriety, as a matter of convenience, advance expenses of litigation for persons who are already actual *bona fide* clients, but in such case only subject to reimbursement regardless of the outcome of the litigation. An advance to abide the outcome of the case, and without obligation of reimbursement, by the client unless the litigation terminates successfully, means simply

¹²⁸ A.B.A. Op. 27 (May 5, 1930).

¹²⁹ Mo. Op. 64 (undated).

¹³⁰ Ill. Op. 106 (undated).

¹³¹ Mich. Op. 133 (Jan. 1950).

¹³² Mich. Op. 153 (Oct. 1953); and cf. A.B.A. Op. 56 (Dec. 14, 1931).

¹³³ A.B.A. Op. 246 (June 20, 1942); Mo. Op. 20 (undated); and cf. Ill. Op. 137 (Sept. 17, 1955), and Mich. Op. 66 (May 1940).

¹³⁴ Mich. Op. 72 (Dec. 1940).

paying or bearing the expenses of the litigation and constitutes . . . unethical conduct.¹³⁵

The advancement of money to a client, as the foregoing quotation indicates, is akin to the contingent fee in that it is ringed with *caveats*. Court costs, money for the expense of bringing in witnesses, and expenses legitimately related to the prosecution of the case are considered permissible.¹³⁶ But the advancement of money to pay fines, to cover the cost of medical examination of a client under a contingent fee arrangement, and to cover living expenses are usually condemned; "advancements of living expenses . . . are most important tools used in the solicitation of cases," an Illinois opinion points out. This encourages lawyers to bid against each other, and also tends to involve them too deeply in an investment in a personal injury case.¹³⁷

7. *Conduct of the Business of Law Practice*

By far the most prolific source of commentary on professional ethics has been the canon on advertising; and at the same time it has called forth the most divergence of views among state and local bar committees. As to the number of opinions, the A.B.A. has published 97 such pronouncements to date, the New York associations well over a hundred, Michigan 67, Illinois 24, Oregon 17 and Missouri 16. Obviously, with such a quantity of material, a separate study on this single phase of ethics may ultimately be necessary; within the limits of the present paper, the main propositions—and conflicts of view—can only be generally outlined.¹³⁸ It is significant that this canon has been amended five times since its adoption—more than any other; it is also interesting to note that the first opinion delivered by the A.B.A. committee in 1924, and two of the first three given by the New York County Lawyers' Association in 1912, dealt with this canon. The view expressed by the national agency, it is fair to say, represents an attitude to which the bar in general has subscribed ever since; the question, however, has had what appear to be interminable possibilities of variation which have demanded continual new considerations. In any event, the A.B.A. said:

The essential dignity of the profession requires that the solicitation of professional employment should be avoided. Canon 27 of the Canons of Ethics disapproves all forms of solicitation as unprofessional and specifically states that "solicitation of business by circu-

¹³⁵ Ore. Op. 6 (Feb. 20, 1937).

¹³⁶ Cf. Mo. Op. 27 (undated).

¹³⁷ Ill. Op. 151 (Feb. 6, 1956).

¹³⁸ Cf. Table II in the Appendix.

lars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional." The Canon makes no exception as to solicitation from other members of the profession, and contains no warrant for regarding such solicitation as differing from or being less improper than similar solicitation addressed to laymen¹³⁹

Local custom cannot justify any practice smacking of advertising or solicitation.¹⁴⁰ For a number of years the canon gave reluctant consent to the common practice in smaller communities of publishing "card" advertisements in the local newspaper; in 1937, however, this publication was outlawed and cards were limited to approved law lists.¹⁴¹ The law lists themselves were subsequently hedged with precautions in a separate canon (43), and the attorney's general relations with the newspaper were likewise made the subject of a special statement (Canon 40).

Although, in view of the several and somewhat ambivalent amendments which have affected Canon 27 over the years, there is an understandable lack of complete consistency in A.B.A. advisory opinions addressed to the differing provisions of the canon, it is in the state pronouncements that the sharpest degree of conflict has developed—between the states and with the national association. Local custom, many local committees ardently argue, should certainly operate to keep such a general ethical principle in touch with realities. In the final analysis, the variety of opinions demanded by the advertising canon is obviously due to the persistence and recurrence of particular local procedures which refuse to be forced into a uniform mold. Table II undertakes to portray these variations of interpretation in the matter of professional publicity.

The growth of the partnership and the law firm by 1928 accounts, in all probability, for the fact that Canon 33 headed the list of thirteen new canons added to the code in that year. The partnership presented a variety of problems of conduct, including the matter of sharing business with laymen (e.g., accountants) which was substantially the subject of Canon 34. "A member of the Bar who has ceased practicing law is like any other layman and may enter any business or business association permitted laymen," observed the Missouri committee. "However, if the member of the Bar . . . is continuing to practice law, then such an association or the refer-

¹³⁹ A.B.A. Op. 1 (Jan. 15, 1924); cf. N. Y. Co. Op. 1 (Jan. 1912); N. Y. Co. Op. 3 (Feb. 1912). It is possible that Canon 46 has qualified the statement as to "solicitation" through other attorneys.

¹⁴⁰ A.B.A. Op. 4 (July 7, 1924).

¹⁴¹ Cf. A.B.A. Op. 275 (Sept. 20, 1947).

ence of business therefrom is improper."¹⁴² In particular the advertising of specialized services (e.g., income tax consultation) by a layman associated with a lawyer would be improper, even if the lawyer's name were not mentioned.¹⁴³ Where such an association between a practitioner and a lay specialist is permitted, the lawyer must cease to hold himself out as such and confine himself to the activities open to lay accountants.¹⁴⁴

Carrying the name of a deceased partner in a firm name has been a practice subjected to a number of restrictive advisories. It is conceded to be proper if the fact of death is appropriately noted, and if the carrying of the name is discontinued within a reasonable time.¹⁴⁵ A former partner who has left the firm is not to be listed where the function of the firm name is to identify present members of the firm.¹⁴⁶ Nor should a partner elected to a judgeship or other public office permit his name to be continued on the firm's list.¹⁴⁷

The primary objection to a partnership with laymen is the facility with which the association lends itself to solicitation of professional services of the lawyer. Early in the history of Canon 34, it was announced in various states that this undesirable effect was not avoided, but rather enhanced, by the maintenance of so-called branch offices by the attorney, where the branch office was maintained with a realtor or other lay businessman.¹⁴⁸ It is generally considered that the employment of lay collectors by a lawyer is unethical.¹⁴⁹ The division of fees with any such laymen is disapproved; as for dividing fees with other lawyers, such as a forwarding lawyer, it is generally considered to be proper in such cases and to the extent that the forwarding attorney has rendered certain services to the client, but not where his sole function has been to pass the material along to another practitioner and where his client expects nothing more from him.¹⁵⁰

The increasing practice of employing attorneys by trade associations and by corporations led to the canon on intermediaries and a succession of advisory opinions on that subject. A feature par-

¹⁴² Loc. cit. note 129 supra.

¹⁴³ A.B.A. Op. 234 (Feb. 12, 1942).

¹⁴⁴ A.B.A. Op. 269 (June 12, 1945); and cf. Mich. Op. 24 (Aug. 1937).

¹⁴⁵ Cf. Ore. Op. 15 (May 20, 1939); Okla. Op. 11 (Dec. 30, 1950).

¹⁴⁶ A.B.A. Op. 97 (May 3, 1933).

¹⁴⁷ A.B.A. Op. 143 (May 9, 1935).

¹⁴⁸ Mich. Op. 26 (Sept. 1937).

¹⁴⁹ Cf. Mo. Op. 14 (undated).

¹⁵⁰ Ill. Op. 118 (undated); cf. A.B.A. Op. 153 (Feb. 15, 1936).

ticularly condemned is the persistent effort of many associations and occasional corporations to arrange for the hired lawyer to render services for individual members.¹⁵¹ A related practice which comes under professional disapproval is the preparation of pamphlets or newsletters on legal subjects to be distributed to all members within the group, if the publication includes the name of the attorney and his firm, and particularly if it is known or stated that he is retained as general counsel for the group.¹⁵² The A.B.A. prefers that such bulletins make explicit that they are for general information and not for the guidance of any individual member.¹⁵³

The continuing professional rule against any utterance which may make conspicuous the availability of a particular attorney's services has extended to the regulations with reference to legal specialists in Canon 45, notices to other attorneys (46) and the aiding of unauthorized practice of law (47). Although for historical reasons the specialists of admiralty and of patent, trademark and copyright practice have been treated as exceptions and have been allowed to be listed on letterheads and in general classified directories,¹⁵⁴ the trend is against any relaxing of the prohibitions in general. "The use of the words 'Lawyer' or 'Attorney' . . . has always been considered sufficiently informative," declared a Michigan opinion in ruling that the holder of both LL. B. and M. D. degrees could not use a combination letterhead indicating a practice in both areas with a specialty in medical jurisprudence.¹⁵⁵ Such a specialty can only be made known to local attorneys if the service is rendered exclusively to other lawyers.¹⁵⁶ Practice before an administrative agency has been held not to be a specialty to be noticed to other practitioners.¹⁵⁷

Unauthorized practice of law is recognized as being a subject in general within the province of the courts in each locality;¹⁵⁸ but numerous advisory opinions, extending to this subject from the area embraced by Canon 35, have been given on the auxiliary

¹⁵¹ Mich. Op. 42 (Jan. 1939); Mo. Op. 5 (undated); Ill. Op. 136 (undated).

¹⁵² E.g., Neb. Op. of Dec. 13, 1955; Mich. Op. 57 (Feb. 1940).

¹⁵³ A.B.A. Op. 273 (Oct. 25, 1946).

¹⁵⁴ Cf. Mo. Op. 81 (undated); A.B.A. Op. 203 (Nov. 23, 1940).

¹⁵⁵ Mich. Op. 28 (Dec. 1937).

¹⁵⁶ A.B.A. Op. 184 (July 23, 1938).

¹⁵⁷ A.B.A. Op. 198 (July 12, 1941).

¹⁵⁸ A.B.A. Op. 198 (Oct. 21, 1939).

considerations arising from an attorneys' employment by a corporation or association. The basic rule to be derived from reading Canons 35 and 47 together appears to be that an attorney may properly perform legal services for a lay agency such as a corporation or group, where these are services required by the agency as a client in its own capacity. Where the effect of the counsel's service to the agency is to permit it to provide legal assistance to members or customers in terms of their individual legal problems, it amounts to unauthorized practice.¹⁵⁹

It has been said that the essence of a profession is a specialized body of knowledge, a basic minimum requirement for admission to the group, and a self-enforcing discipline of the membership. In the body of canons represented under this heading, the legal profession through its code has given as much practical force as possible to the third of these essentials.

8. *General Professional Responsibilities*

Throughout the canons runs the theme of high professional morality, but it is punctuated for emphasis by nine canons which address themselves specifically to the function of morals in practice. Purchasing an interest in a suit, and stirring up litigation, are two particular prohibitions. The purchase of choses in action,¹⁶⁰ or the acceptance of stock in a corporation for which services have been engaged, even where the stock is intended as payment of the fee,¹⁶¹ are typical of the practices disapproved under these canons. Nor may an attorney permit a group to solicit persons to join in an action which the group proposes that he bring in its behalf, where the solicited persons are asked to sign percentage contracts employing the lawyer.¹⁶²

All of these canons, of course, look to the same general objective as Canon 29, which is entitled, "Upholding the Honor of the Profession." The latter, however, affords the means of reducing the proposition to concrete terms. Together with Canons 31 and 41, it admonishes the practitioner not to abet any client in an act which

¹⁵⁹ Cf. the various illustrations in the A.B.A. opinions annotated under these canons, loc. cit. note 73 supra, as well as the subjects indexed under these headings in the state and local collections cited in notes 73 and 78 supra.

¹⁶⁰ A.B.A. Op. 51 (Dec. 14, 1931); cf. A.B.A. Op. 176 (Feb. 19, 1938); Mich. Op. 65 (March 1940).

¹⁶¹ A.B.A. Op. 279 (June 18, 1949); A.B.A. Op. 246 (June 20, 1942).

¹⁶² Cf. Mich. Op. 101 (March 1947).

either violates the law or in any way tends to thwart the administration of justice—e.g., arranging for *mala fide* residence in another state to institute divorce proceedings,¹⁶³ counseling any group on means of violating a given law with impunity,¹⁶⁴ and the like. The Mexican divorce artifice has already been cited,¹⁶⁵ as has the abetting of a client's flight or concealment from apprehension in a criminal action.¹⁶⁶

Canons 15 and 16, discussed earlier, admonished the attorney to keep both his own actions and those of his clients within the bounds of propriety in the prosecution of the client's case. In Canon 44, the bar has attempted to define the lawyer's position when his relationship with his client undergoes a drastic change after the case is well under way. A Nebraska opinion strikingly illustrates an instance in which such a change does *not* warrant an attorney's withdrawal: where the attorney originally undertook a case for an indigent client and, having won in the trial court, is then confronted with an appeal by the adverse party. The advisory opinion was that he was obliged to meet the expense of appellee's briefs and filing costs under the same terms that he had agreed upon for the trial of the cause. The destitute condition of the client had been known to counsel from the beginning.

The withdrawal of this attorney would simply mean that some other attorney would of necessity have to assume the burden which this attorney now declines to assume if the rights of this litigant are to be protected. The original contract of employment by this attorney carried with it the implied agreement on his part to conduct the litigation through to its conclusion. A withdrawal by the attorney at this late date and in this stage of the litigation is . . . a violation of that implied agreement.¹⁶⁷

III. SUMMARY

Any study of ethics in professional practice is of necessity an unfinished one. The steady output of advisory opinions indicates

¹⁶³ A.B.A. Op. 84 (Aug. 27, 1932); but see A.B.A. Op. 268 (June 21, 1945).

¹⁶⁴ A.B.A. Op. 287 (June 27, 1953).

¹⁶⁵ Cf. note 97 *supra*; and see A.B.A. Op. 248 (Dec. 19, 1942).

¹⁶⁶ Cf. note 88 *supra*; Mich. Op. 22 (Sept. 1937).

¹⁶⁷ Neb. Op. of Nov. 23, 1955; on circumstances properly excusing the attorney, cf. Okla. Op. 3 (April 12, 1950). The Nebraska committee informally suggested seeking funds from local service organizations or inquiring into the availability of certain county funds to apply against the costs of the appeal. See also Mich. Op. 127 (Oct. 1949).

that new situations are continually arising to present different questions of practical application. There is also the fact that any esoteric expression of ideals must be treated with a certain degree of sophistication—i. e., the actual cases of disbarment and suspension represent the fractional minority who deliberately flout the rules of professional conduct; the advisory opinions reflect the desire of another body of practitioners to do right by their calling—but they also doubtless represent a distinct minority. In between lies the great majority of members of the bar—doubtless subscribing in principle to the canons and the interpretations set out in the advisory opinions, but inarticulate in the matter and rather disposed, in proportion to their degree of practical experience in the law, to use their own judgment as to the course of action to choose in disposing of a particular piece of business.

It is in the functioning of this majority that the most important chapter in the case history of ethics in practice will eventually be found. In other words, in the complaints and grievances actually certified to the various district committees of the Nebraska bar, or their counterparts in other jurisdictions, the law in action as regards professional ethics can be studied. This material was not available at the time this article went to press; it is hoped that an analysis of this material can be made and incorporated in a future article at an early date—for in a study of the day-by-day practices of working lawyers throughout Nebraska which have prompted inquiry by the local committees, an identification or description of the actions specifically complained of, and a checklist of the dispositions made of these complaints, it will be possible to understand what the ultimate practical impact of the ethical codes actually has been.¹⁶⁸

The reader of this paper will also note the conspicuous paucity of Nebraska opinions. This is not to be taken as an indication that the state advisory committee has not been active in the preparation of such opinions—quite the contrary.¹⁶⁹ It simply means that Nebraska, like most states, has not seen fit to compile these opinions

¹⁶⁸ This material is in the process of being collected. Although data on the complaints prior to the integration of the bar and the formation of the district committees is probably no longer accessible, it is worth pointing out that the committees of inquiry from the period of the first World War to 1937 annually reported on the disposition of complaints heard by them throughout the year.

¹⁶⁹ Cf. reports of the state committee in the annual proceedings of the state association, E. g., 37 Nebr. L. Rev. 64 et seq. (1958).

and make them generally available in published form.¹⁷⁰ It is hoped that this situation also may be remedied, and that at an early date it will be possible to supplement the present study with some single publication which will make available to the state bar the summary of Nebraska interpretations of the day-by-day questions of professional conduct. In view of the state's pioneering work in the devising of the codes of ethics, and in the implementation of their practical functioning through the early committee of inquiry and the subsequent integration of the state bar, both of these projects (the compilation of the advisory opinions and the analysis of the practical disposition of complaints and grievances) would further enhance the high professional tone which the legal fraternity of the state has consistently maintained.

TABLE I

Adoption and Amendment of the Canons
of Professional Ethics of the
American Bar Association

		<i>Adoptions</i>	
CANONS 1-32		ADOPTED	1908
" 33-45		"	1928
" 46		"	1933
" 47		"	1937
		<i>Amendments</i>	
CANON 7		AMENDED	1937
" 11		"	1933, 1937
" 12		"	1937
" 13		"	1933
" 27		"	1937, 1940, 1942, 1943, 1951
" 28		"	1928
" 31		"	1937
" 39		"	1937
" 43		"	1933, 1937, 1942
" 46		"	1956

¹⁷⁰ Certain of these opinions have begun to be published in the Nebraska State Bar Journal, following suggestions to that effect at the 1957 state convention. It is suggested, however, that a single comprehensive pamphlet of selected opinions of general interest to date would more immediately serve the interests of the practicing attorney in the state, while the publication of new opinions in the Journal would have the effect of keeping this pamphlet continually up to date.

TABLE II
The Varied Opinions on Professional
Advertising (Canon 27)

Subject	A.B.A. Opinions*
ADVERTISING BY BUYING SPACE	
—IN NEWSPAPER	41, 43, 69, 107, 191, 260
—IN LOCAL COMMUNITY PROGRAMS, BULLETINS, ETC.	207
—IN SPONSORING LOCAL ATHLETIC TEAMS	*
—IN BAR ASSOCIATION PUBLICATIONS	24, 227
SOLICITATION OF BUSINESS	
—BY CONTACTING OTHER ATTORNEYS.....	1, 36, 152, 232
—BY CONTACTING INDIVIDUALS	5, 9, 111, 173
—BY EMPLOYMENT IN LAY FIRM	35, 233, 234, 273
—BY SOLICITATION OF LOCAL BAR ASSOCIATION	13, 121, 172
—THROUGH ADJUSTERS AND OTHER LAY SPECIALISTS	214, 225
LISTING IN LOCAL DIRECTORIES	
—SPECIAL TYPOGRAPHY (BOLD FACE, ETC.).....	53, 241
—STATING SPECIALTIES	159, 183, 251, 284
USE OF ATTORNEY'S NAME	
—IN PUBLICATIONS OF EMPLOYING CORPORATION	285
—IN PUBLICATIONS OF GROUP SOLICITING	
LAW BUSINESS	31
BRANCH OFFICES IN LAY FIRMS	*
DISTRIBUTION OF GIFTS TO CLIENTS	59
PUBLICITY THROUGH NEWS STORIES	42, 43, 62, 140, 184
DISTRIBUTION OF CIRCULARS	73, 120
RUNNING FOR POLITICAL OFFICE	74

*These national opinions should be compared with those listed under the same headings in the state and local opinions, loc. cit. notes 73 and 78.