The administration of justice, in a democracy, is, at once, a public and a professional problem. The efficiency of the machinery and the quality of the product are of more than passing interest to both lawyers and laymen. Reforms, to be effective, should include technical and lay viewpoints.

The bar takes pride in the technical ability and high character of its members. The record of that pride is found in proceedings of bar association gatherings, reports of necrology committees, legal biographies, and descriptions of celebrated trials. The building and maintenance of an honorable tradition is one of the professional duties of every lawyer. Unless each lawyer feels a continuing obligation to contribute to the prestige of the profession it can hardly be kept at a high level. Disbarment as a penalty for one, who, intentionally, or from inertia, fails conspicuously to bear a reasonable share of the burden, might appear harsh; but such a policy would help to discourage those who argue that the clever lawyer is the one who reserves his time exclusively for his clients.

The interest of the layman in the subject arises because, as client, or as a member of the general public, he is the one for whose benefit

*Director of the Duke University Legal Aid Clinic.
**The writer desires to record his obligations to Mr. Harry Goldstein of the Class of 1936 of the Duke University Law School for aid in the preparation of the footnotes.

1See “Canons of Professional Ethics of the American Bar Association,” No. 32. See also Willoughby, Principles of Judicial Administration (1929) 3.
3Baldwin, The Young Man and The Law (1920); Daugherty, Respect for the Law (1921) 46 A. B. A. Rep. 190, 191.
5Chambers, Samuel Seabury, A Challenge (1932); Harrison, Clarence Darrow (1931).
6Dartmouth College Case, as reported in 1 Warren, Supreme Court in United States History (1923). See also “Boston Slave Riot and Trial of Anthony Burns” (1854); “Trial of Laura D. Fair” (1871).
7See Preamble to “Canons of Professional Ethics of the American Bar Association”; also Canon 29.
the whole system was devised. He has, long ago, recognized that
the lawyer is essential. He does not have to be told that the ef-

ficiency and character of the lawyer are matters of primary impor-
tance. But in some respects his ideas are based on inadequate data.

The layman secures his information about the lawyer from per-

sonal contact as litigant, witness, or juror. As a participant he tends
to develop a subjective standard for evaluating the professional man,
in terms of the success or failure of his side of the particular case,
or because some personal characteristic of the lawyer appealed to
him. At second hand, the talk of his friends, folk sayings, classical
literature, the motion picture, newspapers, magazines, and critical
temporary books, supply mental pictures which may or may not be
accurate, but which tend to persist and to color further considera-

tion of the subject.

Perhaps because of the difference in source material, it comes
about that, when one superimposes the professional picture of the
lawyer upon the lay picture of that same personage, the outlines do
not coincide. Which is correct? Probably neither. The lawyer
tends to start his thinking with, and therefore, to overemphasize as
typical the character of the great leaders of the profession; the lay-
man, on the other hand, is besought by newspapers and other media
to focus attention upon the more colorful personalities who appear,
often against the lurid background of some sensational case. The

91 KENT, COMMENTARIES ON AMERICAN LAW 307.
10 Bond, The Law and Lawyers in English Proverbs (Nov. 1935) 21 A.
B. A. J. 724.
11 See HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN (1929).
12 The detective, Philo Vance, in the series of mystery stories by S. S.
Van Dyne is in contrast to the district attorney, Markham. Perry Mason, in
the motion picture series represented by "The Case of the Howling Dog," and
"The Case of the Lucky Legs," goes about as near to the line of unethical
conduct as it is safe to do.
13 During the months of November and December, 1935, a press clipping
service revealed a total of over 100 statements derogatory to the legal pro-
fession. Among them were such headings as:
"Called in Trial of H, P won't talk. Alleged runner of lawyer accused
by bar committee refused to reply on grounds he might incriminate himself."
"Judge may refer Lawyer's tactics to bar association."
"Perjury in posting bond alleged against S."
"Court suspends Queens lawyer. N, ex county bar head, denies mis-
appropriation charge.
"Grievance committee asks disbarment of four lawyers."
14 See Dawson, FRANKENSTEIN, INCORPORATED (March 1930) 19 AMERICAN
MERCURY 274; Beatty, Justice Cracks the Whip (June 1934) 117 AMERICAN
MAGAZINE 72; Flynn, Other People's Money (Oct. 30, 1935) 84 NEW REPUBLIC
MAGAZINE 333.
extremes of the profession are not necessarily fair samples. The
great bulk of lawyers, perhaps because of innate conservatism and
fear of unethical publicity, are largely inarticulate. It would seem
timely for both lawyer and layman to give more attention to the
public service rendered by the profession in the light of present day
needs. The layman may be surprised at the quantity, the lawyer
at the dearth, of the contributions.

It is because the duty of the lawyer is broader than serving the
interests of the client that one is justified in an investigation which,
otherwise, might seem a graceless prying into the privacy of his
work and his character. Public criticism of the profession in recent
years has made an inquiry into the quality of legal work a matter
of public and professional concern. Proposals for public control
of the professions are not new. But recently it has been urged
that the law be socialized, that lawyers be made purely public of-
ficials paid by and under the control of the state. Replying to this
has come a solemn warning from the President of the American Bar
Association that, if the profession does not act, the public may.
There are many reasons why this profession should favor reforms
initiated by itself rather than forced upon it from without.

No intelligent action can be taken, let the crisis be never so acute,
unless the facts are available. It is beyond the scope of this paper to
compile a complete picture of the lawyer as he appears to the public
eye. But it is possible to study the nature and product of the pro-
fessional machinery by which the quality of the work of the bar and
the character of its members is tested. The inquiry may be further
delimited, within reasonable space, if one proposes specific questions
such as: How effective is the present machinery for determining
the quality of legal work and character of the bar? What justifiable
criticisms may be leveled against the present product of that
machinery? If specific faults can be segregated, listed, illustrated,
and brought out into the light of day, their seriousness and, perhaps,
the nature of a remedy may be calculated.

\[15\]See, for example, Gisnet, A Lawyer Tells The Truth (1931).

\[16\]See the account of Darrow's Stirring defense of Loeb and Leopold.
Harrison, Clarence Darrow (1931) 247-273.

\[17\]See 12 Encyc. of Soc. Science, "Professions" 479.

\[18\]Laski, The Decline of the Professions (Nov. 1935) Harper's Magazine
676.

\[19\]Ranson, Which Road for the Legal Profession? (1936) 22 A. B. A. J
21, 23.
AN EVALUATION OF THE QUALITY TESTING MACHINERY

There is a long and distinguished history of the efforts of the bar, in the fields of legal education and admissions to the bar, to see that the stream which feeds the profession is filtered. Law school instruction in legal ethics is subject to several criticisms, but in other courses many student characteristics are evaluated. More is discovered by the bar examinations themselves. Those in charge have an opportunity for evaluation of applicants, which, in comparison with the occasions afforded after admission, is admirable. Standards are continually being raised. Elimination of those deemed unfit is as important a part of the procedure as the training of the rest.

The present problem arises after the applicant has passed the threshold. Thereafter, short of disbarable activity, he is practically free from supervision. The fact that he has passed examinations is only prima facie evidence of his ability to assume the responsibilities of law practice. The idea that, if left alone, he will surely gravitate to the place at the bar best suited to his talents, assumes a public able to evaluate professional ability, and willing to undertake an uncompleted professional task. It overlooks the damage which the inefficient lawyer does to the prestige of the profession. It is easier, but hardly dignified, to shift the professional responsibility of cleaning its own house to the shoulders of the lay public. The client properly objects to being used as an experimental guinea pig by each new legal generation.

In addition to the sobering effect induced by individual dissatisfied clients and the general public, there are two pieces of professional disciplinary machinery. The grievance committee and

20See the "Handbooks" of the Association of American Law Schools.
21See the various reports of the Section on Legal Education and Admission to the Bar of the American Bar Association.
24Sunderland, A Unified and Self-Governing Bar (1933) 11 TENN. L. REV. 236; but see Turrentine, May the Bar Set Its Own House in Order? (1935) 34 MICH. L. REV. 200 (an account of the emasculation of the State Bar Act by the Supreme Court of California).
the court,²⁵ with its quadruple powers,²⁶ are effective in their respective spheres. Their limitations of inaccessibility, complexity of machinery, and lack of fact finding devices are apparent.

Inaccessibility is a grave obstacle to certain groups of clients. Perhaps the ones most in need of professional guidance are those lacking ordinary self reliance, resourcefulness, courage, experience, persistence. They do not know where, or have not the ability, to make complaints. Traditionally, these are the widow and the orphan. In practice they include many sections of the public. Legal Aid societies meet many such.²⁷ It is said that those in the economic class above legal aid clients are similarly in need of special aid.²⁸ The present machinery imposes upon such a layman a burden of initiative, too often, beyond his capabilities.²⁹ If, for any reason, he fails to do his part, the whole evaluation process breaks down. If matters are not presented for determination the court and grievance committee cannot function.

²⁵Reed, Annual Review of Legal Education (1930) 5; Cheadle, Inherent Power of the Judiciary Over Admittance to the Bar (1932) 7 Wash. L. Rev. 320; Green, The Court’s Power Over Admission and Disbarment (1925) 4 Tex. L. Rev. 1, 17; Lee, Constitutional Power of the Courts Over Admission to the Bar (1899) 13 Harv. L. Rev. 233, 251.

²⁶The powers of the court in this direction are usually described as: the power of inquisition (People ex rel. Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487 (1928)); the power to punish for contempt (Blodgett v. Superior Court, 290 Pac. 293 (Cal. 1930)); the power to disbar, suspend or censure (In re Peck, 88 Conn. 447, 91 Atl. 274 (1914) the power to render summary judgment Schell v. the Mayor, 27 N. E. 957 N. Y. App. 1891).

²⁷The most satisfactory material with respect to this group of persons is contained in the records of the legal aid societies of the United States. The National Association of Legal Aid Organizations publishes annual figures as to type of case received. The figures dealing with complaints against members of the bar for the past ten years are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of cases involving complaints against lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1924</td>
<td>976</td>
</tr>
<tr>
<td>1925</td>
<td>776</td>
</tr>
<tr>
<td>1926</td>
<td>765</td>
</tr>
<tr>
<td>1927</td>
<td>1,537</td>
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<tr>
<td>1928</td>
<td>1,240</td>
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<tr>
<td>1929</td>
<td>1,127</td>
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<tr>
<td>1930</td>
<td>1,628</td>
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<tr>
<td>1931</td>
<td>1,858</td>
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<tr>
<td>1932</td>
<td>1,633</td>
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<tr>
<td>1933</td>
<td>1,745</td>
</tr>
<tr>
<td>1934</td>
<td>1,709</td>
</tr>
</tbody>
</table>


²⁹One of the reasons for the popularity of administrative tribunals and officials in contrast to the old court procedure is the greater aid given the litigant.
Complexity of machinery is an obstacle of a somewhat different sort. The Grievance Committee, which views the problem solely as a disciplinary matter, distinguishes, as a first step, between those complaints which, to professional eyes, have merit, and those which do not. The former receive attention; the latter are rejected. The preparation of a complaint sufficient to move the committee necessarily involves the preliminary collection, organization and weighing of supporting information. Many clients do not possess the experience, training or ability to do such work. Others find it too expensive or cumbersome to hire a second lawyer to prosecute the first. If the defendant attorney keeps no records the task of the aggrieved client may be difficult, if not impossible. Granting the need for the grievance committee to maintain a quasi-judicial attitude, there is still a procedural gap to be bridged between the client and his remedy.

If the bar were to view problems of this sort as a part of its public relations field, the questions to be asked would be two: Has the client any sort of grievance? Has the client a legally meritorious grievance? Most cases involve the first and not the second question. At present there is too little attention paid to the complainant after it is decided the case has no legal merit. Yet such a client, doubly rebuked, may become sullen with resentment or cociferous with anger, outraged in his sense of propriety, bitter in his criticism. The damage to the prestige of the profession from this source cannot readily be measured, but it deserves to be considered as an important factor. A remedy is called for. Some additional machinery is needed to explain the rejection of the case to the client and, if possible, persuade him to accept cheerfully the opinion of the committee. It would help the public to know more about these legally unjustified complaints. The bar has done all too little in educating the public to adopt legally satisfactory criteria in professional matters.

The present machinery appears complex to the client because of the preliminary burden thrown upon him. If the present day typical grievance committee, itself, were to assume the task of detailed investigation, and explanation to the client, in every case which came to its attention, the expense would be a material item.\textsuperscript{30} So the defect is a continuing one.

\textsuperscript{30}The American Bar Association expended the following sums in the operation of the Committee on Professional Ethics and Grievances: 1932, $10,011; 1933, $7,193; 1934, $4,054. The cost of operation was far greater than that of any other committee with the exception of the Executive Com-
The third obstacle is the absence of fact finding devices. The bar should know with certainty as a background the nature and extent of the whole field of law practice. It should know further the nature and extent of the problems in the public relations field. Some of these occur seldom and can be disposed of by the ordinary disciplinary machinery. Others appear in groups. Special treatment is necessary. At present these group problems are classifiable under two heads. The client is the major victim in ambulance chasing, misappropriation of client's funds, certain aspects of lay encroachment upon the practice of the law. The public, or the adverse party, is the victim where an unholy alliance exists between attorney and client as in the fields of crime, bankruptcy, divorce and alimony.

At present until the unethical activity approaches a condition of public scandal, information seldom is available for the disciplinary groups. New machinery is needed, sensitive and comprehensive enough to give an accurate picture. In the above respects the existing machinery is inadequate.

It may be argued that inaccessibility, complexity, and lack of fact finding devices are, on the whole, beneficial; that it is poor policy to encourage criticism of the bar; that if a person does not take advantage of the existing machinery, it is a fair inference that the complaint has little merit. Such argument does not take into account the great differences between one client and the next. Even if the machinery were simple enough for the average reasonable man, the bar is faced too often with the unreasonable man. Because such a person does not forget his grievance it would seem the part of wisdom to keep his numbers down to an irreducible minimum. The bar is not the only group which has to deal with him.

The value of special machinery to make it easy to prepare and file complaints and provide patient, sympathetic, intelligent explanations of rejected requests as a matter of course, has been recognized.

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31 The activities of a lawyer in touch with the criminal underworld are described in Fowler, The Great Mouthpiece (1931).

32 The bankruptcy racket as a means of defrauding honest creditors is described in The Donovan Report on the Administration of Bankrupt Estates (1930), especially Part I.

33 The divorce racket is described in Bergeson, The Divorce Mill Advertisers (1935) 2 Law and Contemporary Problems 348.
by business. Better Business Bureaus do much to maintain commercial prestige by assuming the responsibility for investigating alleged improper practices. The layman cannot but notice a difference if he compares the businessman's anxiety to see if anything is wrong with the more conservative attitude of the grievance committee which, as a matter of professional courtesy, waits until well authenticated information is brought to it; which often meets in the private law office of the chairman, a place difficult for the public to find even if there is a notice on the office door; which has been trained to indulge the presumption of innocence of the accused until guilt is proven and assumes an attitude of quasi-judicial reserve lest it prematurely and negligently ruin the reputation of a fellow attorney. For lack of facts no one knows the nature and extent of the public bias.

The product of the disciplinary process—the data now collected by courts and grievance committees—is also subject to criticism. The reported cases deal largely with excess of zeal, energy, activity; too little with inertia, slothfulness, incompetence. Too many purely professional problems are, in practice, regarded as having an adequate remedy if, under the law, the client may sue the lawyer for damages. While general standards are clear their application to specific sets of facts, perhaps because the facts are not always set forth in detail in the opinion, leaves the reader of judicial opinions uncertain. Uniformity and predictability are lacking. Two examples must suffice—legal courage and legal incompetence.

LEGAL COURAGE

The courts have had few occasions to pass upon the meaning of the word "courage," yet courage is a characteristic necessary at all points of a lawyer's daily routine. It may be demonstrated in the seclusion of his own office where he rejects unethical proposals of clients, refuses, because of conscientious scruples, to handle certain cases, plans campaigns for his clients which may involve him personally in public scorn or physical danger. It is present when he puts his duty to the court, the profession and the public above

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34See the various codes of business ethics. The standards of civic clubs approximate Canons of Professional Ethics. These are epitomized in the statement "The Customer is always right."
35See BUSINESS WEEK (Jan. 21, 1931) at 18.
37In Gardner v. State, 40 Tex. Cr. 19, 48 S. W. 170 (1898), distinguishing legal courage from temper, the court says:
his obligations to his client or himself. One must generalize about the lawyer's courage in private because there is seldom any record made.

Legal courage, exhibited in the public eye, is more readily studied. But it is in court that the principal opportunities for measurement occur. The lawyer who goes too far is guilty of contempt. The limit of legal courage is marked roughly by the following types of cases in which the court approved or did not disapprove action of the lawyer:

1. Situations where counsel endeavors to show the disqualification of a sitting judge. Where the ground alleged is the relationship of the judge in the fourth degree to some person who has a direct pecuniary interest in the suit, but is not a party to the record, alleging facts showing the bias or prejudice of the judge against the client, provided such facts are material to the issues and state just grounds for disqualification, even though they reflect on the integrity and good faith of the judge (but see the balance of the opinion contra) alleging as a basis for disqualification past transactions not involved in the pending case and an alleged intermeddling by the judge in the domestic affairs of the client of a nature indicating the hostility of the judge.

2. Situations where counsel injects himself into the proceedings. The filing and presentation of repeated motions which are thought to be for the purpose of delay or vexation, but which are not presented in a contemptuous or disrespectful manner and which do not

"Courage means that quality of mind which enables one to encounter dangers and difficulties with firmness, or without fear or depression of spirits; valor, boldness, bravery, etc. A man may be a person of mild and agreeable temper or disposition, capable of patience or forbearance with coolness under great insults or provocation, and yet he may be a man of great courage or vice versa."

38See the account of Lord Coke's controversy with King James I in his effort to maintain the supremacy of the common law. Lyon and Block, Edward Coke, Oracle of the Law (1929).

39Johnson v. State, 87 Ark. 45, 112 S. W. 143 (1908); cf. Bernstein v. La Fetra, 171 App. Div. 269, 157 N. Y. S. 386 (1916). See In re Hanson, 99 Kan. 23, 160 Pac. 1141 (1916) (where counsel said, "This court has been imposed on by counsel for defendant. This court has bitten so often on dope and extrinsic matter put out by opposite party that they are getting bold in the matter they put over." Quaere: Whether such ideas phrased in respectful language should be grounds for disbarment.)


41In re Cottingham, 66 Colo. 335, 182 P. 2d (1919); Also In re Rockmore, 127 App. Div. 449, 111 N. Y. S. 879 (1908); In re Dunn, 124 N. W. 120, 85 Neb. 606 (1909).
contain matter which, of itself, constitutes contempt; stating in open court that he refuses to appear as counsel in a particular case because he could not be treated fairly and that the court was unfair, so long as the statements are neither contemptuous, defiant or necessarily inconsistent with the candor and courtesy which should characterize intercourse between bench and bar; continuing to ask questions of a witness after the court has ruled against him.

3. Situations where counsel publishes, or, addressing an open meeting, makes a criticism of the court in general: charging that the judge was wholly unfit and incapacitated to hold court and that, as a result, the court had broken down and ceased to function, provided the attorney disclaims intention to question the integrity of the court and in the light of a statute defining contempt procedure; charging that a certain acquittal "was secured by a prostitution of the machinery of justice to serve the exigencies of the Republican party."

There are more cases on the other side of the fence determining what action by the lawyer exceeds the limits of courage.

1. Situations where counsel endeavors to show the disqualifications of a sitting judge; requesting in open court a substitution because "the said justice has formed, and, upon a previous trial expressed a most unqualified and decided opinion" contrary to the client; charging that the judge was "unduly active in prospective litigation before this court."

2. Situations where counsel injects himself into the proceedings:
   a. In open court—Persisting in arguing a point after the court has announced that its ruling is final.
   b. In briefs or motions—Maliciously charging a magistrate with directing the constable to influence a juror against the client, charging that the court was influenced by corrupt motives in certain rulings in pending cases, charging "They (counsel) have grown

42 Johnson v. State, 87 Ark. 45, 112 S. W. 143 (1908).
43 Hawes v. State, 46 Neb. 149, 64 N. W. 699 (1895).
45 In re Hickey, 149 Tenn. 344, 258 S. W. 417 (1924).
47 The Tweed contempt case. STRONG, LANDMARKS OF A LAWYER'S LIFETIME (1914) 81-86.
to believe (perhaps erroneously as a general proposition) that courts of equity recognize no limitations upon their powers, and that they enjoy most the finding of new plausible ways for their distinction of rights, however fortified by constitutions, statutes, or well established principles, if once it has been made to see into them personally desirable to accomplish that end; charging "the court (below) committed a colossal error in refusing to permit the equitable project, if the condition of this company was such that but sixty days thereafter, he (the vice chancellor) thought that this company should be strangled and destroyed." charging that the judge's action was "contrary to every principle of law governing injunctions"; charging the judge with "outrageous, persistent, continued, illegal and unlawful rulings," accepting bribes and co-operating with attorneys in a "diabolical plot" which was "a malicious, vindictive, corrupt concoction"; writing the judge, "it is our desire that no such decisions or orders (as those made by the judge) shall stand unreversed in any court we practice in" and commenting that the ruling "is directly contrary to every principle of law governing injunctions, and everybody knows it, I believe"; writing the judge a threatening letter and giving the press a story of a proposed libel suit against the judge; writing the judge "if one tenth part of the report of citizens of your district . . . be true, you are not only a blockhead, but you are the most corrupt man, both on the bench and off, that was ever elevated to judicial position."3

3. Situations where counsel publishes, or in open meeting, makes a criticism of the court, stating "seats on the Supreme Court of this state are a matter of barter, b-a-r-t-e-r, in plain words are bought and sold," "who paid money, how much was paid and who got the money at the election of the last supreme court judge;" inciting clients at a distance, who were parties to a suit to influence the action of the court by intimidation applied to members by publications in newspapers and printed circulars.

4. Miscellaneous situations.
   a. Against the judge.

Suing the judges—alleging that it was their duty to refrain from “negligently, wrongfully, improperly, wilfully, wantonly, maliciously and corruptly” making statements and findings without any legal basis, but that in rendering their opinion they did so in violation of their oaths of office; \(^{61}\) threatening the judge, as he was descending from the bench, with personal chastisement for alleged conduct during the trial of a pending case. \(^{62}\)

b. Against lawyers and parties.

Repeatedly causing oppressive criminal actions and proceedings to be begun against parties and attorneys opposed to the defendant in civil litigation; repeatedly, with ulterior motives, making threats of exposure and public disgrace against other attorneys; \(^{63}\) threatening opposing parties with criminal prosecution if payment is not made in a civil proceeding; \(^{64}\) inviting the opposing party into the jurisdiction upon pretense of arranging a settlement, but in reality to facilitate service of process upon him; \(^{65}\) criticism of other lawyers. \(^{66}\)

Greater latitude is allowed where the lawyer is out of the physical presence of the court and where the disagreement does not occur regarding a pending case. Wherever orderly procedures are provided by statute or rule of court for securing a change of venue, a new judge or a new ruling, the lawyer who creeps over the procedure is fairly safe. If the attack is upon the intelligence of the judge rather than upon his honesty or integrity, it is less likely to be corrected. Ordinarily a courteous, respectful demeanor will favor the attorney. Four obligations bind a lawyer—to his client, the court, the profession, and the community. It is natural that in close cases, courts should give weight now to one, now to another. Yet the result is absence of clear cut distinctions. The bar should be interested in having the application of the law brought to a greater degree of predictability than is observable in the two following examples:

1. Where counsel injects himself into the proceedings. In Hawes v. State, \(^{43}\) the attorney “having, in open court, stated that he refused to appear as counsel in the case of the State of Nebraska v. W. M. and F. J., now pending in this court, that he would not be treated fair and that this

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\(^{61}\) People v. Standidge, 333 Ill. 361, 164 N. E. 844 (1928).
\(^{62}\) Bradley v. Fisher, 80 U. S. 335 (1871).
\(^{63}\) In re Feinstein, 233 App. Div. 541, 253 N. Y. S. 455 (1931).
\(^{65}\) In re Steinberg, 233 App. Div. 301, 252 N. Y. S. 755 (1931).
\(^{66}\) In re Eaton, 60 N. D. 580, 235 N. W. 587 (1931).
court was unfair, thereupon the said H— was by the court found
guilty of contempt of court.” The appellate court, in reversing the
lower court, said, in part:

“But, to sustain a connection in such a case, it should
appear that the language or conduct imputed is per se con-
temptuous or innocent, according to the sense or manner in
which it is employed, the record should show it to have been
used in the culpable sense . . . Referring again to the findings
of the court, we are impressed with the fact that the state-
ments imputed to the accused are, per se, neither contemptuous,
nor defiant nor necessarily inconsistent with the candor and
courtesy which should ever characterize intercourse between
the bench and bar. . . . A candid statement to the court or
judge, in respectful language, of the reasons for such a cause,
so far from being a contempt, is rather to be commended, as
attending to remove the cause for whatever differences may
exist between them, by reminding the court and counsel of
their reciprocal rights and duties.”

In contrast with this is the case of *In re S. O. Pryor,* in which
counsel wrote the judge a letter containing the sentence, “I can
hardly believe that such is the fact, for it is directly contrary to
every principle of law governing injunctions, and everybody knows
it, I believe.” The court comments:

“Upon this we remark, in the first place, that the language
of this letter is very insulting. To say to a judge that a certain
ruling which he has made is ‘contrary to every principle of
law, and that everybody knows it, is certainly a most severe
imputation. . . . To say to a judge that his ruling is contrary
to every principle of law, may be simply a reflection upon
his intelligence; but to couple with it an assertion that every-
body knows it, is clearly an imputation upon his integrity.
How can a judge be honest, and yet decide contrary to that
which he, as well as all others, knows to be the law?

“We remark, secondly, that an attorney is under special
obligations to be considerate and respectful in his conduct
and communications to a judge. . . .”

In complaints against the administration of justice not related
to a specific pending case, greater leeway is allowed. Yet, even
here a difference of opinion in application of the rules is disclosed,
for example, in the two following cases: In Rhode Island, in the
case of *In re Troy,* an attorney in a public meeting made the
charge that seats on the Supreme Court were the subject of barter.
The court, finding him guilty of contempt, used the following lan-
guage:
"The charge against the respondent is that of unprofessional conduct. We are called upon to determine whether his conduct has been such as to indicate that the license granted to him has been unworthily exercised, and whether he is fit to continue as a member of the bar and as an officer of the courts of this state. Such unfitness would equally be shown by proof of a false charge, maliciously made against the integrity of the justices of either court. A calumny of that character, if believed, would tend to weaken the authority of the court against whose members it was made, bring its judgments into contempt, undermine its influence as an unbiased arbiter of the people's rights, and interfere with the administration of justice. The cases are numerous in which courts, having authority over admissions to the bar and having the power of disbarment, have not hesitated to discipline attorneys for false and unwarranted attacks upon the integrity of inferior courts, and judicial officers. . . . We find the respondent guilty of gross official misconduct. . . . It is within the right of every citizen, whether a member of the bar or not, to publicly advocate and by fair and legitimate criticism and argument to urge changes in the law with reference to any matter including the election of the judiciary. . . . Because a man is a member of the bar, the court will not under the guise of disciplinary proceedings, deprive him of any part of that freedom of speech which he possesses as a citizen. The acts and decisions of the courts of this state, in cases that have reached final determination, are not exempt from fair and honest comment and criticism. It is only when an attorney transcends the limits of legitimate criticism that he will be held responsible for an abuse of his liberty of speech. We well understand that an independent bar, as well as an independent court, is always a vigilant defender of civil rights."

On the other side, in the Pennsylvania case, *Ex parte Steinman,* the lawyers, who were editors of a newspaper, printed a story about a case charging that the acquittal "was secured by a prostitution of the machinery of justice to serve the exigencies of the Republican party," and added that as the judges belonged to that party it was "unanimous — for once — that it need take no cognizance of the imposition practiced upon it, and the disgrace attaching to it." The court said:

"We may safely assume that it meant to charge, and did charge, that the judge had decided the case wrongfully from motives of political partisanship. We have no hesitation in pronouncing such a publication to be a gross libel on its face."
Nothing can be more disgraceful—not even perhaps that of direct bribery—than such an imputation on the motives of judges in the administration of justice. . . . Whether a libel is an offense of such a character (as to show that the attorney was not fit to associate with honest men) may be a question, but certain it is that if the libel in this case had been upon a private individual, upon a public officer, such even as the district attorney, the court could not (under the statutes) have summarily convicted the defendants and disbarred them. . . . But the graveness of the offense of the complainants was that the publication was a libel on the court of which they were attorneys, and this, it is earnestly contended, was 'misbehavior in their office' which gave the court power to exercise summary jurisdiction by removing them. (The court then refers to a change in the law.) We need not say that the case is altered and that it is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship. No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a courthouse, or if they do, it is only at intervals as jurors, witnesses or parties. To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system."

In these two examples the courts, in determining whether or not to discipline the lawyers, disagree upon what are, in a measure, similar sets of facts and cite in support of their actions conflicting duties. The obligations of the lawyer to his client and to the court in one case; to the court and to the public in the other, cannot be evaded. Yet the conscientious practitioner, through lack of predictability, faces a real dilemma.

LEGAL INCOMPETENCE

One would expect to contrast cowardice with courage. This is impossible, because search has failed to reveal cases involving con-
duct to which the term cowardice can accurately be affixed. A broad definition would include scurrilous attacks upon the court or its officers where there are no facts justifying such action and where the lawyer, having exhausted his logic, is attempting to browbeat or threaten the judge.

Aside from authorities, it seems that cowardice, in a very real sense, may affect the conduct of an attorney. A lawyer who agrees to a settlement because he is frightened by the prestige of his opponent; or who refuses to take into court a case, which should be litigated, because he recognizes his own inability in dealing with litigation procedure, but will not acknowledge it by associating with him a more experienced practitioner, may be guilty of cowardice. The nearest approach of judicial decisions to the subject is the slim list of cases in which legal incompetence has been made the basis for disciplinary action. It is interesting to note that in many of them the action of the court is based upon several factors such as fraud, dishonesty and one cannot tell how for incompetence alone would have affected the situation. It might almost be said that legal incompetence is not a basis for disciplinary action. This is bad enough but there is a further evidence of indifference.

The bar has indicated its willingness to shift the responsibility for the maintenance of reasonable standards of professional competency to the shoulders of the lay public. There are many cases where a client in a civil action has recovered damages from a lawyer for negligence. But after the recovery which has judicially determined the attorney's fault, there seems to be no case in which professional concern has been severe enough to bring about a disciplinary action.

68See notes 54 to 58, supra.
69Bryant's case, 24 N. H. 149 (1851) (Incompetence no basis for disbarment on ground that statute imposed no requirement as to the knowledge of law), Smith v. State, 14 N. Y. 228 (1829) (By dictum, court may withdraw license because of attorney's loss of learning or mental capacity). See also People ex rel Chicago Bar Assoc. v. Charme, 288 Ill. 220, 123 N. E. 291 (1919) (No disbarment because of lack of diligence or good judgment); Also In re Boland, 140 Wash. 148, 248 Pac. 399 (1926) (An attorney can not be disbarred or suspended for a single act of negligence not amounting to gross incompetency); People ex rel Chicago Bar Assoc. v. Wing, 284 Ill. 647, 120 N. E. 451 (1918); Gould v. State of Fla. 127 So. 309 (1930) ("It would be a severe remedy to disbar an attorney for carelessness, inattention to duty, ignorance of his client's rights, and the remedies to enforce them, or even for an occasional equivocation in an effort to appear better informed and more alert than his client suspects...). Inattention to duty accompanied by deceit or imposition has been held ground for disbarment or suspension. See 69 A. L. R. 707.
70The writer desires to acknowledge his indebtedness to Russell L. Hiller, a student at Duke University School of Law, for material collected for the course of Legal Ethics, 1935-36 in a paper entitled "The Civil Liability of an
LEGAL STANDARDS

A SUGGESTED REMEDY

The foregoing review of cases indicates that, while there is legal machinery for listing quality and character, it does not cover the field nor is its product adequate to supply the basis for a code of standards. It is not clear on the facts how far a lawyer may go in discharging his obligation to a client without coming in conflict with his duty to the court. His dilemma presents the justification for remedial machinery and a more specific set of standards indicating the maximum and the minimum limits of his activity. Granting the need for flexibility, reasonable leeway, consideration of every case on its own merits, and all the other customary qualifications of a new proposal, those who agree that a dissatisfied client is a menace to professional prestige, may admit the need for a remedy in two directions:

1. A fact gathering agency to provide a basis for measuring the quality of legal work.

2. A code containing provisions more specific, more detailed, more nearly related to the daily work of the lawyer.

Both of these suggestions deserve further consideration.

The fact gathering agency should include two elements—a system of uniform record keeping in the individual law office, and a central agency for receiving information.

THE SYSTEM IN THE LAW OFFICE

Most law offices have adopted systems for recording the facts and progress of each case. Heretofore that data has been used to only a slight extent beyond the four walls. Legal aid societies have developed the healthy habit of using their records for many

Attorney to his Client for Negligence, Mis-management and Incompetence." The following references are taken from that paper:

purposes, such as a basis for remedial legislation.\textsuperscript{71} Physicians have learned that the records of their patients' progress are of value in the public health field, in preventive medicine, in recording the progress of certain remedies.\textsuperscript{72}

The first step in securing the facts is to require, by common consent, bar association edict, rule of court or statute, that all law offices keep certain minimum records regarding their cases and clients. No elaborate system is desirable. A simple card for each case might contain the names of parties and witnesses, the nature of the case, and a dated chronological listing of what was done. If one wished more, a filing system and a follow up system might be added.

The practice of keeping this data would act as an incentive to the individual lawyer to maintain a high standard of effectiveness. It would provide a most effective defense to unmerited criticism and would give the Grievance Committee an impersonal summary of facts if a client wants to complain. There should be only three occasions, and then only in response to a court order, when anything more than the statistical information might be brought to light: (a) in the interest of the client, (b) in the interest of the attorney, (c) in the interest of the public when circumstances indicated the existence of an unholy alliance between attorney and client. Thus there would be no conflict with the rules providing for confidential inviolability of facts given in the attorney-client relationship.\textsuperscript{73} If the report indicated that in X county there were ten instances of ambulance chasing this year, as against fifteen occasions last year, the record would be highly impersonal. The fact that yellow fever had declined during a certain period in no way violates the confidential relation of physician and patient. Yet, if the facts are required to be kept by the lawyer they may be secured under proper

\textsuperscript{71}Records of legal aid societies have been a significant factor in convincing legislatures that the uniform small loans law was a practical method of combating the loan shark; other legal aid activities looking toward legislation are in the fields of court costs and the collection of wage claims. See "Report of Legal Aid Committee of American Bar Association," 1924, p. 386; 1925, p. 456; 1927, p. 324.

\textsuperscript{72}N. Y. CONSOL. LAWS (Cahill, 1930) c. 46, § 320 (reports of tuberculosis by physicians); c. 46, § 25 (duty to report contagious disease). N. C. CODE ANN. (Michie, 1935)§ 7192 (physicians to report cases of venereal diseases to health authorities); Ill. REV. STAT. ANN. (Smith--Hurd, 1933) c. 91, § 106. See statistical studies of health and medical care, CARTER, STATISTICS IN SOCIAL STUDIES (1930) at 31.

\textsuperscript{73}The attorney's privilege against disclosure of confidential communications would obviously not be violated by such an index. See 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2290 et seq. for a complete account of the privilege.
circumstances. It appears that this device will supply the basic raw material.

THE FACT GATHERING AGENCY

The fact that the information is in the lawyer's office is not a complete solution of the problem. A central depository for facts about law practice containing an impersonal index would seem essential.

The suggested machinery would be simple and inexpensive in operation. It would be, in effect, an office for the collection of legal vital statistics, organized and operated like the existing bureaus which gather data more closely related to the field of the medical profession. A room, a filing system, clerks, a statistical procedure, and periodic reports would cover the essentials. Funds for it might be secured from the public treasury, the bar, commercial agencies, or from private foundations. Supervision and control should be exercised by the county bar association. An office might be located in each county or group of counties. The clerk of the court might assume the duties if the enterprise became a public agency.

To it reports covering the functioning of the entire machinery for administering justice should be made. In the present instance only those reports relating to standards of work of lawyers need be noticed. The idea of a ministry of justice is not new.74

The form of such a report should be kept as simple as possible.75 Each law office should report, upon the conclusion of each piece of legal business, the following: a symbol representing the client; a symbol representing the lawyer, the nature of the matter, the results. Each client should report upon the conclusion of each piece of legal business the following: the client's name, the lawyer's name, the nature of the matter, the client's evaluation of the lawyer's work, as either "better than satisfactory," "satisfactory," "not satisfactory"; if the work is not satisfactory, reasons should be given.

Opposing counsel and other parties, witnesses, and interested persons might make reports similar to the clients.

Each judge before whom counsel appeared might report his opinion of the quality of the work giving the name of the proceed-

74See Acheson, A Minister of Justice (1933) 31 THE LEGAL AID REV. 8; Cardozo, A Ministry of Justice (1921) 35 HARV. L. REV. 113; Bacon, On A Ministry of Justice (1935) 22 VA. LAW REV. 175.
75For a description of an attempt to develop a device for measuring the efficiency of work of family case work agencies, see Hurlin, Statistical Studies of Dependencies (1931) STATISTICS IN SOCIAL SCIENCES 43.
ing, the name of counsel and grading the work as "more than satisfactory," "satisfactory," or "not satisfactory." Perhaps it would be easier to obtain a blanket report indicating that out of a certain number of lawyers appearing before a judge during the period so many were above average, so many average, and so many below average.

Such opinions are now formed. The only new factor would be the recording. Allowing for the personal considerations which might affect the accuracy and judgment of the recorders, the lack of courage in expressing on paper evaluations of one's fellows, the plan will provide certain material not now available, to grant immunity to action for libel to recorders might be a wise precaution.

The material thus gathered would be available for several purposes. Those lawyers against whom complaints of undue seriousness or volume were filed would stand out from among their fellows. The presence of legal "rackets" would be more readily detected in such a comprehensive collection of data. They could be dealt with if the proper bar committee followed the trail directly into the offices where conditions warranting investigation existed.

Each county could produce periodic reports which would indicate through statistical curves what was happening in the public relations field of the bar.

The reports for each state might be collected from the various counties by the state bar association and should be interesting for comparative purposes. Similarly, the American Bar Association might gather from the various states national data of even greater interest. County, statewide, and national reports would be purely statistical and anonymous including the type of legal problem in which the complaint occurred, the nature of the complaint, and the disposition. Comparative figures from year to year would prove graphically which problems were increasing and which were diminishing, whether the battle was being won or lost, whether or not specific remedial devices were effective. In a word, here would be the facts on which to base defenses against public criticism, or platforms for aggressive reforms where needed. 76

The fact gathering agency would add to the present grievance committee the following elements: accessibility, simplicity adapted to the capabilities of the most hesitant complainant, and a comprehensive collection of facts.

Periodically, the grievance committee, from its survey of the facts, might recommend to the Bar Association, the court, or the legislature changes in the rules establishing standards of quality and character.

THE VALUE OF THE ORGANIZATION

Few proposals for reform are perfect. The only effective procedure for determining their value is by weighing the advantages and disadvantages. Objections to the present suggestions will be based upon the regimentation, expense, apparent novelty, and yet these may be more than offset by the usefulness of the device in the present emergency. The legal profession is, and has been the subject of vigorous attack. The best evidence that the situation is serious is found, not in the statements of dissatisfaction appearing in the public press, but in the defensive activities of the profession itself.\(^7\) If lawyers were not aroused to the significance of the public relations field of the bar, one would not expect to see them engaged in such activities as: the increase in the integrated bars,\(^7\) the opposition to lay encroachments,\(^7\) the American Bar Association program of leadership in legal reform.\(^8\) Contact with facts rather than with theories has produced these reactions. The reasonable lawyer should be greedy for more facts and should welcome the setting up of a fact gathering device. The emergence of bar surveys of a less comprehensive and continuous sort\(^8\) than the present proposal indicate that regimentation, expense and novelty are not insurmountable obstacles.


\(^{80}\)See National Bar Program addresses on a more effective disciplinary procedure (Aug. 1935) 21 A. B. A. J. 514 and following.

The threatening problem of public control of the professions is no idle dream. The lack of a clear line of distinction between the functions of the legislative and judicial branches of government, the layman's curious mixture of confidence in, and hostility to, any professional man are not vague ideas. The more keenly a member of the bar feels the external pressure — legal, social, and economic—the more likely he is to see value in placing the profession upon a firmer foundation of public respect which can be attained only by continuous contact with the facts.

CONCLUSION

Here, then, is a situation and a proposed remedy. The fact gathering agency is no panacea, but neither is it essentially impracticable. The use of vital statistics by the medical profession is accepted as valuable. The use of statistics as to business conditions by mercantile and commercial organizations is universal. By devising a similar system to bring it data as to the administration of justice, the legal profession will protect itself, reassure the public, and provide a realistic basis for those legal reforms which are necessary to an ever changing social order.