

How Bar Association Ethics Committees Operate

BY ROY SIMON

Ethics issues arise in your law practice every day. Most of them you can resolve fairly easily, usually by looking at the New York lawyer's Code of Professional Responsibility (which is reprinted in McKinney's in the volume on Judiciary Law, Sections 500-End), or by looking at the ethics opinions posted on the world Wide Web sites maintained by the New York State Bar Association (www.nysba.org, then click on Ethics), the New York County Lawyers' Association (www.nycla.org, click on Publications), and the Bar Association of Nassau County (www.nassaubar.org, then click on Judicial Review and then Ethics Opinions).

But sometimes you cannot resolve a problem, or you resolve it but lack confidence in your conclusions. In those cases, you may want to take advantage of the free services of a bar association ethics committee. Ethics committees are actively operated by the New York State Bar Association, the Bar Association of Nassau County, the Association of the Bar of the City of New York, the Suffolk County Bar Association, and the New York Country Lawyers Association. (Other bar associations may issue ethics opinions sporadically.) Each committee follows slightly different procedures, but all of them generally follow the same basic principles and offer similar services. Articles in later issues of NYPRR will discuss the particular procedures followed by each major ethics committee. This article sets out the basic procedures and principles followed by all of the major ethics committees in New York.

Three Limitations On Answers To Inquiries

Bar association ethics committees basically answer inquiries (a) about how the New York Lawyer's Code of Professional Responsibility applies to your own future professional conduct – not your past conduct or some other lawyer's (or non-lawyer's) conduct – (b) that you have not posed to any other ethics committee, and (c) that are not already the subject of litigation. Let me elaborate on each of those three limitations.

- *Your own future conduct:* An ethics committee is *not* a grievance committee (sometimes called a departmental disciplinary committee), and therefore will not answer inquired about whether some *other* lawyer is violating the Code of Professional Responsibility. If you believe that another lawyer is violating the Code of Professional Responsibility, you should contact a grievance committee (If you have non-confidential "knowledge" of another lawyer's misconduct that raises a substantial question about the other lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, then you must report that lawyer pursuant to DR 1-103.) Nor will ethics committees answer questions about the conduct of non-lawyers. However, because the Code of Professional Responsibility prohibits lawyers from assisting non-lawyers in the practice of law, ethics committees will sometimes respond to questions about the limits on your use of paralegals, disbarred or suspended lawyers, or other non-lawyers that assist you with your law practice.

The purpose of an ethics committee is to help you determine whether a proposed future course of conduct is ethical. An ethics committee will not tell you whether you have done something unethical in the past. Nor will an ethics committee give generalized legal advice. For example, ethics committees will not answer abstract general questions such as, “how may I ethically market my practice?” or “What system should our firm use to detect conflicts of interest?” Rather, you must send an ethics committee a specific proposal, and the ethics committee will tell you whether your firm may ethically do what you proposed to do. For instance, you may ask an ethics committee whether a proposed marketing method is ethical or whether a specific representation will create a conflict of interest.

- *Not posed to any other ethics committee:* You cannot forum shop among ethics committees. You have to choose one. The New York State Bar’s Ethics Committee, for example, asks you to sign a form acknowledging “that your request involves your own personal conduct and that you have not submitted a similar inquiry to another bar association.”
- *Not the subject of litigation:* A bar association ethics committee will not answer questions that ought to be directed to a judge handling pending litigation. For example, an ethics committee will not tell you whether you must produce certain documents in discovery or whether you should prevail on a motion to disqualify your firm due to a conflict of interest. Nor will an ethics committee provide opinions that you can show to the judge to obtain an advantage in litigation. For example, an ethics committee will not tell you whether you can be sanctioned for conduct that is already the subject of a motion for sanctions filed by your opponent. The theory is that an ethics committee should neither duplicate the work of a court nor interfere with the litigation when the committee has no mechanism for hearing both sides of the story and no assurance that the facts posed to the committee are complete and accurate.

However, the rule against answering questions in litigation is not inflexible. Ethics committees will sometimes answer questions related to litigation, such as whether you may reveal certain confidential information during settlement negotiations or whether you may refuse to put a client or witness on the stand if you think they are lying. Whether a committee will answer a question related to pending litigation depends on many factors, including whether asking the same question to a judge would prejudice the inquiring attorney’s client. But even if an ethics committee is willing to answer a question relating to litigation, the answer often will not come before the litigation is over.

Limited Jurisdiction, Limited Authority, And Limited Speed

Bar association ethics committees have at least three serious drawbacks.

- *Limited jurisdiction:* Ethics committees are not miniature courts that will construe the whole body of law and procedure. The jurisdiction of bar association ethics committees is limited to interpreting the Code of Professional Responsibility. Thus, ethics committees will not answer “questions of law,” such as whether an ambiguous provision of the New York Judiciary Law applies to your conduct, or who is “entitled” to disputed property held in escrow, or whether a given court rule applies in your situation, or whether certain conduct constitutes the unauthorized practice of law. As a result, many questions posed to bar associations are never answered, or are answered only partially.

- *Not binding:* Even when ethics committees answer questions, their opinions are not binding on anyone. Courts, grievance committees, and other lawyers are free to accept them or reject them. A lawyer does not obtain immunity from judicial sanctions, legal malpractice suits, or from professional discipline by following the advice in an ethics Opinion. As a practical matter, however, a lawyer who follows an ethics committee's advice is unlikely to be sanctioned or disciplined unless the facts presented to the ethics committee were materially incomplete or inaccurate. As long as the inquiry accurately and completely states the facts, a court or grievance committee is unlikely to second-guess a committee whose sole area of expertise is the Code of Professional Responsibility.
- *Very slow:* Bar association ethics committees depend almost entirely on volunteers. The lawyers who write the opinions must therefore find time in their busy schedules to research and draft the opinions. Moreover, ethics committees meet no more than once a month. Therefore, it usually takes anywhere from six weeks to three months to obtain a written ethics opinion. But there is a way to get quick insight into an ethics problem.

If You Need An Immediate Answer, Or Have A Very Simple Question, Call An Ethics Hotline

Lawyers who have a simple question or need an immediate answer to a more complex question should call an ethics hotline. Ethics hotlines are maintained by the Nassau County Bar, the New York City Bar, and the State Bar. They are staffed by ethics committee members and provide free advice by telephone. However, the advice represents the views only of the person answering the hotline at the time you call; a hotline cannot speak for the entire committee. Moreover, a hotline answer represents only the immediate reactions of the person who answers your oral inquiry to the hotline, not careful research and robust debate within the committee. Ethics committee members who staff hotlines in New York will not ordinarily conduct any research and will not provide written responses. Nevertheless, if you don't want to take the time to draft a written inquiry or if you need an answer right away, an ethics hotline is a reasonable alternative to seeking a written opinion. If you need a written record of the call for your file, write a memo to your own file immediately after your call to the hotline.

If You Need More Advice, Hire A Lawyer

If you need a broader range of advice than you can obtain from an ethics committee or ethics hotline, hire a lawyer who concentrates on professional responsibility matters. For example, if you want answers about your past conduct, or about another lawyer's conduct, or about questions of law, or if you want advice on something complex such as forming a new business with a non-lawyer or developing a new system to check for conflicts of interest, you might want to invest in legal advice tailored to your situation. After all, it's still true that lawyers who represent themselves have fools for clients. And when your professional conduct is at issue, you don't want to act like a fool.

How can you find a lawyer who knows a lot about professional responsibility? Call someone who serves on an ethics committee and ask for a referral to a lawyer who counsels lawyers regarding professional responsibility. Or call someone who writes for NYPRR, or who has represented a client in a case like yours, or who has written about professional conduct in books or legal periodicals or who belongs to the Association of Professional Responsibility Lawyers (APRL). The fees you spend to protect and improve your own law practice are likely to be dollars well spent. The reputation you save may be your own!

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