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# Oral History: A. James Casner

American Bar Foundation

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# Transcript of Interview with A. James Casner

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Olavi Maru, Interviewer

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BEGINNING OF TAPE AJC-A-I

M: I would like to ask you to begin with how you became involved in bar association work which is of course not common for law professors to do.

C: Well I don't know. I think it just sort of developed without any particular plan ahead of time. I found in the areas of the law in which I am primarily interested-that is the property field, generally-that you can't quite isolate yourself from the active practice and appreciate fully the problems that are involved. I've been on bar committees and things of that sort and I've always been somewhat active in the practice of law even though I've been a full time teacher. I've had consultant work for law firms and done some direct practicing with clients for a long, long time. That naturally gave me a relationship with the activities of the bar that some teachers may not have had.

M: Why were you appointed to the Committee [Special Committee on the Evaluation of Ethical Standards] to evaluate the Code of Ethics?

C: I don't know why. I think my recollection is that Justice [Lewis F.] Powell [Jr.] was the then president of the American Bar Association who decided to formulate this Committee and I think that they felt that there ought to be some input from the law professor side of the picture in developing any Code of Professional Responsibility and I assume that that led to the decision to have law professors on it. Why I was selected I don't know. I was asked by Justice Powell to serve and I of course have known Justice Powell for quite a long time. He did some work here at the Harvard Law School at one time, and I've known him since then. I had been on the Ethics Committee of the American Bar Association prior to this time and I've also been on the Unauthorized Practice of the Law Committee of the American Bar Association so that I had that particular background that might be of relevance in working on the new Code of Professional Responsibility.

M: One reason why I asked this is because some people-Committee members-told me that you were appointed because you were a tax lawyer. Now this isn't quite clear to me why there should be a tax lawyer on the Committee.

C: Well I don't know whether that has anything to do with it or not. I suppose that there are a great many ethical problems that arise in tax practice and that one having been heavily involved in that would have had some appreciation of the kind of ethical problems that do arise in tax practice and could bring [that experience] to bear on the discussions that we had on those particular matters. But I was not aware personally in my own mind that that was the consideration that led to my appointment.

M: Now I should like to ask you how the decision was reached in the Committee in the drafting process to divide the Code into Ethical Considerations and Disciplinary Rules. How did you decide upon the format of the Code?

C: Well I'm not sure that I recall, other than a process of discussion and development that led to thinking that you needed something that was rather direct and brief in the form of so-called 'Code provisions,' but that each of the 'Code provisions' needed to have some kind of broader amplification which was the general purpose of the more discursive type of presentation that we have in the Ethical Considerations. Also the Ethical Considerations were merely to be persuasive. They were not designed to be actually mandatory like the Code provisions themselves. They were designed to try to push things beyond where maybe the boundaries of the Code provisions would have taken you to have a vision of greater concern for the whole

matter of conscientious dealings on the part of lawyers in all kinds of transactions. I suppose the Code itself narrows you to a very limited straightforward presentation of a rather limited principle whereas in the Ethical Considerations you can be much more free in your amplification of that and point to lines beyond the narrow limits of the Code where things ought to go.

M: Now John [F.] Sutton [Jr.] in particular told me that he is somewhat disappointed that bar committees that interpret the Code now pull these and say in effect, 'you can' t do this because see such and such prohibits this.'

C: You mean in the Ethical Considerations.

M: That's right. And according to Sutton's views you really did not have this in mind at all.

C: I think it wasn't necessarily to be prohibitive like the Code itself. It was designed to be persuasive in the hopes that you would reach these result, not because you had to, but because you were persuaded they were right results to reach. Therefore I think I would be inclined to agree with him that to take them out of context and to put them into effect as being Code provisions themselves was beyond what we were planning that they should be.

M: I don't know if you have kept up with the opinions that have interpreted the Code, but there are quite a few that rely on Canon 9 simply saying, 'well such and such conduct may be all right, but it gives the appearance of impropriety and therefore we shouldn't do it.' I know Sutton was in particular disturbed about this because he said, 'Now there's nothing in any of the DR's under 9 that say that you may not do this because it gives the appearance of impropriety.' Is this the general view as you remember of the Committee?

C: I must say I don't think I have read all of this enough to be able to evaluate in particular instances how they've used it-whether they've used it improperly and beyond what we as a committee hope they would do. John undoubtedly has followed this more closely than I have and I think I can agree in general with the tenor of what John was saying that the Ethical Considerations were designed to present you with persuasive, what we hoped would be persuasive, ideas and thought but that they were not intended to be accepted by everybody or to become crystalized rules that this was wrong and that was right.

M: What kind of outside influence or input did you have in the drafting process-I mean the Committee of course. The preface states that there were some hundred odd groups that presented views and so forth.

C: We solicited all kinds of help from various interested organizations and bodies and a great deal of that of course, I mean all of that was brought in our discussions-the points of view that were expressed were always considered. John Sutton of course was hired as the reporter for the Committee. He was not a person who was a member of the Committee but he was designed to carry out the wishes and the desires of the Committee as they were formulated from time to time. Most of this sifted through him of course and as part of the presentation in connection with anything we considered as to whether there were diverse points of view about various things. But I think though we took these into consideration we tried to formulate as best we could our own judgment as to what should be done and not necessarily be the mouthpiece for any one of these organizations that were suggesting ideas and thoughts to us. We thought it was our job to do the best we could to come to our own judgment about these things after being fully advised and present our conclusions to the American Bar Association for consideration. There were some controversial things of course from time to time that obviously came up in this process. There were times when the Committee didn't always agree fully on certain things and sometimes it just naturally would lead to some kind of a compromise with respect to a position that didn't really satisfy anybody but at least you had to come to some judgment.

M: How did you decide which outside group or individual to call in so to speak?

C: My recollection is that it was pretty widely circularized among the bar as to our desire to have any comments and thoughts and suggestions that would be helpful. I didn't have anything to do with that process, but every once in a while somebody would say, 'did we send something to so and so?' There was never any attempt to curtail this. It was mostly a matter of if anybody had a suggestion, why let's see what they have to say.

M: Now some people have observed, and I think it's obvious to some extent at least, that trial practitioners were extremely strongly represented on the Committee. Well, I just wondered if this happened by chance or was there some design behind it?

C: Well I suppose it was in mind that this was supposed to be a committee that when it spoke it would have the confidence and the respect of the bar generally and therefore there was a tendency naturally to put on the Committee people that had established themselves with the bar. I mean, that we had a number of ex-presidents of the American Bar Association that were on the Committee was one noticeable factor and most of the people at least who came from the practicing bar were people that would be recognized by the bar generally as people in whom they had complete confidence as to their integrity and their purposes in trying to put together this particular arrangement. You've heard the word 'blue ribbon committee' sometime. This was supposed to meet the test of whatever a blue ribbon committee is and whether it did or not everybody's free to judge, but at least I think it started out with the idea that from the practicing bar standpoint it would be people that were well-known. I was somewhat well-known because I'd been active in bar work. So when you went to decide to get somebody from the legal teaching profession I suppose it lent itself somewhat to get somebody that was in the teaching profession that had also been active in bar work and had some had gained some position of confidence in the minds of others in what he had done in bar work. Jack [John] Ritchie had been fairly active in bar work and was fairly well-known within the profession. So there are probably many other teachers they could have selected who would have had the same basis but at least that probably went into the selection process from that standpoint.

M: I asked Ed Wright about the composition of the Committee and how people were appointed. He did say that Justice Powell specifically asked for two or three, I think he said three people to be on the Committee and the rest were appointed in consultation between Mr. Wright and Mr. Powell. My impression was that you and perhaps Dean Ritchie were the two plus Mr. Wright himself, of course, but he didn't say and I guess you don't know.

C: I certainly do not know. Ed never discussed it with any of us as to, so as far as we knew we all got there by whatever the same route without anybody having any prior status in getting there.

M: He did incidentally say that all members of the Committee just excellent people and there was no implication that some were. . .

C: . . .better than others, yes.

M: . . .or that some were forced upon him, you know.

C: No. I think that he was a very good chairman and his handling of the Committee was done with great astuteness in every way. For example, we tried to work toward the consensus instead of taking votes. We kept working on something until we had a pretty good consensus as to this was the general view that we ought to follow. He did ask me on several occasions when he couldn't be at the Committee meetings to preside and I was the one that did preside when he wasn't there. I had no official status by any appointment from the bar; it was generally understood that I would preside when he wasn't there and that didn't happen very often, it would happen on several occasions-he got sick once or something of that sort.

M: Some people have said, and in print, that the Code simply doesn't go far enough-it's better than the old one but it's not what it might be. Geoff[rey C.] Hazard [Jr.] is one of those. There's an article of his in connection with that. People have said, 'well it was really drafted with an eye on the House of Delegates so it would pass and no more.' What can you say about this?

C: Well I suppose that in anything of this sort you can't ignore the fact that there are certain issues that are involved here on which there is a great divergence of opinion in the bar and therefore you have to at some point decide whether you're going to improve the situation substantially by recognizing some of these outside factors or whether you're just going to push ahead and put them in willy-nilly. The result is you don't accomplish anything. I think anybody would be foolish to go into a project of this sort where you took the attitude that we're going to get this or nothing. However, I didn't sense any serious impediment in this although it was brought up from time to time as in any organization, 'well, if you take this position you're going to be running up against a stone wall for this or that reason.' One of the problems that I recall particularly was whether we should come out with a Code that would in a sense require specialization.

M: Right.

C: And there were some of us that felt rather strongly on this whole matter one way or the other, but we finally concluded that this was not an issue that we could resolve and that therefore whenever we got to that point, we sort of said if there is specialization this will be the result, if there isn't, this, and so on. In other words the problem was approached in that way because we knew the history of this whole matter in the bar and knew that if we tried to take a positive position as an ethical matter that there had to be specialization or didn't have to be specialization that you would immediately destroy your whole product as far as getting any place was concerned, or at least I think most of us felt that way. Although it seems to me that was a sensible solution, you can see the specialization problem hasn't resolved itself even yet. In fact I read something not so long ago that the medical profession decided it's been a failure in the medical profession or at least it's. . .

M: . . . gone too far.

C: . . . gone too far and created some serious problems as to taking care of people properly from a health standpoint. So it may be like anything else if the answer isn't clearly one way or the other but there's got to be some middle road that can be found in regard to this matter. We did recognize some things that tended to give lawyers more of a chance to make known in some way their qualifications in particular areas, but we certainly didn't go all the way out on authorizing it from an ethical standpoint that you could in some way or another gain special qualification and publicize it.

M: Now there is a fair amount of discussion about fee schedules in Canon 2. This seems to be somewhat out of place in a sense that there is, well, seems to be too much. Why did you focus on this? There is a change in language that goes through different drafts.

C: Well, this was back in the days when minimum fee schedules had not been fully knocked in the head by the Goldfarb case [Goldfarb v. Virginia State Bar 421 U.S. 773 (1975)], and I suppose that we felt that charges must be reasonable in order for you to justify having the kind of control that the legal profession has in doing certain kinds of work and therefore you could not divorce completely from performing your public responsibility or performing your professional responsibility, the question of costs and charges that could properly be made. So it sort of comes up naturally at various points and some of the criticisms of the profession have been the expense that is involved in making available legal services and it led of course naturally to when you were considering the matter of lawyer referral services and you were considering the matter of providing services for those who were unable to pay for them. It naturally came into the picture as to how you resolved these problems that involved the rendition of legal services for those who can't pay for them. We always ran up against the problem of the Button case [NAACP v. Button 371 U.S. 451 (1963)] and some others--the problem of a labor union, for example, providing free legal services to the members of the union and we always then had to wrestle with the problem of solicitation of business and the problem of whose loyalty is the person to because he may be representing the member of the union against the union itself and the union is paying for it. It has a myriad of problems that come into that picture and so the whole matter of cost of legal services couldn't hardly be ignored.

M: Why did you have so much trouble with the group legal services aspect?

C: Well, it was an area that inherently involves some very fundamental problems of the relationship between the lawyer and his client, and that was the thing that always came up as to whether you can satisfy what many people thought was fundamental in the legal profession in the lawyer-client relationship, whether you can have that direct loyalty to the client when you are really working for the group that the client is a part of.

We did add some decisions on the matter of labor unions hiring counsel for their employees, and I think there was a general feeling on the part of a number of people that it would break down to some extent the independence of the bar if you found all lawyers really being hired by the head of a group to render services to that group. That would undermine the independence of the lawyer and in the long run the public would suffer from that.

M: Now there was a great deal of trouble with Canon 7 and some provisions in Canon 4 relating to disclosure of, I guess broadly speaking, clients' confidences. Do you recall why this did not get worked out, well, as clearly as it might have been at the time? These provisions have been amended back and forth and it is still somewhat unclear as to what may be revealed and when and how.

C: I don't have any particular recollection of this other than a general feeling that seemed to pervade that this is again fundamental in the lawyer-client relationship-that the matter of confidences be protected. It was out of that background that whatever we did came. This is an area where, as you know or may not know, in the tax field there's been quite a bit of difficulty in the courts in working out what it is the lawyer can and cannot set up as the attorney-client privilege in regard to various disclosures made in connection with tax matters. There's been a tremendous amount of litigation on it and continues to be, so that is not an easy problem to solve.

M: Now are you or were you satisfied with the Code by and large when it was finished?

C: Well I think I got a lot of satisfaction out of being a participant in it. It doesn't mean that any one of us came out of there with complete satisfaction that we were doing it ourselves. But I think I got a lot of satisfaction out of what I regarded as the thoroughness and the openness of the consideration of the problem and though I would not necessarily be happy as I might have been with the exact way in which things came out, but nevertheless I think it was thoroughly considered and debated and is quite an accomplishment in the light of everything that competes against making any progress on an area of this sort.

M: Could you tell us something about Mr. Wright? He clearly had a major role in the drafting of the Code, not simply by virtue of being chairman of it. I picked that up from here and there.

C: Well as I say, Ed was a very, very good chairman and I never felt at any time that I was in any way suppressed in expressing my views. He had, I think, a very good trait in a chairman-not to start out: 'well this is the way I think it ought to be, what do you think?' The whole approach was not one of having made up his own mind ahead of time and then trying to drive that through to a conclusion. I think Ed often went into these discussions with quite an open mind and made his mind up as the discussion progressed. I think that was true of many of us. We had some preconceived convictions [but,] we didn't always find that they stood up when they were subjected to the kind of give-and-take that any discussion of this sort would have. Therefore when we finally got around to it, Ed quite frequently would express himself on the position and there's no doubt that when he did express himself positively on some matter it was quite influential because we knew the time and care and thought he had given to the consideration. But I don't recall very many instances-I couldn't recall a specific one actually-where he tried to dominate or control it and drive something through that clearly was against the judgment of the majority of the Committee. I thought he was very fair all the time and let the discussion develop and let people make up their minds as it developed as he was doing himself.

M: John Sutton was the one who drafted all the provisions initially, right?

C: Yes. He would present us with an initial draft, but usually this was with the view that there had been some general discussion of the problem. So it wasn't where he simply said: 'Well here's the way it ought to be and

I'll put it together that way and see what they think.' Sometimes that happened, I suppose, that there were some things for reasons he never submitted to us. But my recollection is that he operated and didn't purport to do otherwise except under general guidelines that were laid down for him at least by the chairman as to what should be presented for consideration. But anybody who is in a position of a reporter, even though he's subject to these controls, cannot be ignored. He has a great deal of opportunity in the presentation of things to influence the final outcome to some extent. I happen to be reporter for the Restatement of Property and I put together this material for my advisors to consider, and while you always end up probably modifying it from what you originally presented because of comments and discussion, it still in the final analysis has certain earmarks of being your product that would stay with it.

M: Well, if I remember correctly then John Sutton initially came in with the skeleton framework of the Code as it stands.

C: Yes, yes, my recollection even there was some general discussion. . .

M: . . .previous to. . . .

C: He tried to carry out in general the guidelines, and sometimes they weren't very clear guidelines. It wasn't just turned over to him and said, 'Now you put together something you think would be all right.' My recollection is that there was always something he was trying to carry out, along some ways at least, some previous general discussion on matters that were involved. It gives you quite a bit of leeway though.

M: Oh, of course.

C: The discussion would be very general and bring us back something we could look at.

M: Do you remember if the Committee in effect decided on the skeleton framework and gave it to John Sutton to develop or what happened?

C: Well my recollection is that there wasn't any definitive decision of this, that there was a kind of a general discussion to see what you could put together keeping in mind what we said and take a look at it, that sort of thing. Now that's my recollection. These things kind of evolve and you forget some of the details of how it got to be and in what format it was, but anything that was brought back, even if it was started by John Sutton was frequently torn apart and sent back for complete revamping if it hadn't been previously discussed. So he was operating under guidelines. It was certainly very carefully discussed afterwards and wasn't accepted by any means automatically.

M: Oh he didn't imply that, or no one did, yes.

C: I'm sure he didn't.

M: But he did say-at least this is my impression or recollection-that he initially presented this framework and said, 'This is what I have in mind, what do you think of it?'

C: Well that may be true. It's a little hard sometimes when you have the discussion before or afterwards, but I'm sure that the initial framework was dented quite a bit before it got into the final.

M: Now Ed Wright mentioned in passing several times, that how proud he was of the consistency of language and so forth in the Code. It was my impression that possibly he personally worked it over in the end although he didn't say that and I didn't ask him.

C: I think that's right. He did a very careful editing job on anything before it was finally put out and I'm sure went over it word by word. He was a very modest chap, but he was not the kind that would any way puff himself up in this regard. You can't have too many people saying, 'I'd say it this way or I'd say it that way.' You've got to get consistency, you've really got to have (after you've agreed on substance and you're doing

purely editorial job) one person-two people at the most-do the editing job. I know he did take that responsibility largely on himself.

M: He was quite disappointed incidentally about some subsequent amendments. He said in fact that they were sloppy.

C: None of the amendments that I know of were ever sent back through [the Committee]. We abandoned and dissolved ourselves so that we never had a chance as a committee to test these amendments. It might have been wise for the Committee to continue to have some life at least to have anything in the way of amendments sent through it before presentation so at least they could have been checked carefully from the standpoint of consistency of presentation if nothing else.

M: I gather he was really disturbed because this was a strong word coming from him in interview sessions at least.

C: Yes I know he talked to me about it several times and was very upset at some of it, some of the bad, as he judged it, drafting of amendments that didn't fit in completely with the whole approach.

M: O.K., thank you. I should like to ask you a few things about CLE work. How did you become involved in that in the 1950's which was really before its time?

C: In 1953 the American Bar Association was meeting in Boston and I suggested that we do something here for lawyers when they were in Boston. So we conceived the idea of having a program here that you could come ahead of time in attending the Bar and go and take some work.

M: And when you say here you mean at Harvard?

C: Right here at Harvard, coming to Boston anyway we'd like to have you see the facilities of Harvard and so on. So we gave two courses that year. I gave estate planning and Lewis Loss gave securities regulation. Estate planning had already started to become something that lawyers realized they couldn't just pick up on the side. The Revenue Act of 1948 had come along and made it necessary to redraft practically all wills and trusts and so forth. This is what we're going through now with the '76 act. So it was somewhat opportune and I had put out the only book on estate planning that existed under that title at that time, and what surprised us was how many lawyers we got coming back. I mean we had around 250 of them at that time-I'm not sure of these figures it's been so long ago, but out of that Louie Loss with his securities regulation, which was much more specialized in a sense, had about 25 or 30 and I had a class of somewhere around a couple hundred I think. We sensed then that maybe there was a need for-at least in certain fields-for lawyers to come back to school and that's what we said: 'You're going to go back to school, you're going to get assignments and do things somewhat like you would have done them as a student in law school.' We were encouraged and ever since then, not on a regular basis but on a periodic basis, we've given this program for lawyers here at the Harvard Law School.

Since then, of course, continuing legal education has mushroomed all around in various other ways that didn't exist at that time. Now it's become just an automatically acceptable thing for all lawyers that they really need to get some further training-they just can't sit back. Various ways of providing it to them have evolved over this period of time, but we kind of stumbled into it I guess at an early time and found out there was a need for it. We as a law school felt that we were uniquely qualified to give a certain kind of training, namely the kind we were trying when you really come back to school. And there are other aspects of it that the practicing bar itself was much better qualified to give and we were interested in studying it only as long as the bar generally felt we had something unique to offer that was needed. The bar has admirably supported our program here from the very beginning. I was a little bit worried that some other schools tried this and it didn't go over back in those days. Now more schools are coming back in again as a result of it spreading and we're getting more courses modeled largely on the course that we gave here. I proposed not so long ago that there be organized a national college of lawyers to be manned solely by law professors modeled somewhat on the Harvard program and that would then sit in various parts of the country, regions, to make this kind of education available without the expense of coming all the way to Cambridge or some other

place. Evidently I was too premature in suggesting this. It's not ready to be done yet. The schools are not ready to organize behind such an effort, so it has certainly been put on the shelf for the time being, that idea. The law schools are now doing this independently and they're mushrooming more and more. Law schools are getting involved along the lines of our program in continuing legal education.

I, of course, was in a field where even as a teacher you can't ignore the practice of law aspect of this problem-you can't get it out of books-you can't go to the library. For some 13 years after the war I would come here and teach my courses full time and then I'd get on the subway and go down to Ropes and Gray, one of the big law firms here in Boston. Where many of my colleagues would be in the library I felt the only place I'd get what I want was to go down and actually deal with clients. So for 13 years I led this double life teaching full time and then spending each afternoon down in the law office dealing with estate planning problems. And I don't think I could have possibly gotten the confidence of the bar and so forth in the field if it hadn't been that I was actually on the firing line with the things I was talking about and not simply theorizing about them.

M: The law schools, of course, have been criticized for not participating sufficiently in CLE activities. I know you made comments on this.

C: I'm one of the principal critics of it.

M: I know, yes. Well why haven't they, at least in the past why didn't they?

C: Well I think there was some concern on the part of law schools that this would divert their energies away from things that law schools ought to primarily be doing-that is they would be diverting their energies to teaching lawyers rather than sending their energies in teaching students who were coming into the legal profession. You only have so much energy to burn up. I mean if you're going to teach all year and then teach lawyers, you find in tooling up to teach lawyers is a lot more of a job than tooling up to teach students. These lawyers when they come are giving up time and time is their money and they're not interested in foolishness. It involves an entirely different teaching technique I think than used with students. You can't use the Socratic method. The Socratic method is too much of a time thief to work it out with the class, although it's a wonderful way to teach. You've got to have more time and lawyers don't have that time. So the whole process and the time it would take, I think, worried law professors quite generally.

I know when I first proposed this I had to sort of twist arms to get people to come in and do this because they'd say, 'Well, if I do this it's going to take me all summer to get ready to teach and then when I teach I'm going to be exhausted and I won't be able to do writing, research and other things that I'm expected to do as a member of the teaching profession.' And there's a certain amount of truth in that. You can't do this and everything else that you would like to do, something's got to give. That's been the big obstacle, I think, in getting the law schools to agree to take this and divert their energies. That's the reason I've proposed this national college because there'd be no one faculty then that had to devote all its energies. You could get teachers from this school, that school, and each school would be only slightly affected. I thought in that way we could overcome this main argument of it interfering significantly with the other aspects of the school. When we gave this program last summer here at the Harvard Law School we gave 34 courses that involved 28 professors being involved and that's a pretty big dent. Their energy was diverted to this enterprise. The reason that this is taken on here, I think, is those who have taught in the program have found that they got a great deal out of it in having to teach lawyers and in hearing the comments of lawyers. They felt that they were more attuned to the realities of the problems with which they were dealing. If other schools realize that this isn't a one-way street-not only are you giving to them, they're giving a great deal to you-more of them would be interested out of self-interest if nothing else.

M: I found it interesting that some people have suggested to me that some law teachers consider CLE as sort of second class stuff and it may reflect badly upon them in their careers.

C: This I think has been a factor in the picture that it was of that nature, that it wasn't scholarly and so forth. There used to be a time not so many years ago when if the student said, 'He teaches a very practical course,' that that was really condemning him-he isn't smart enough to teach anything else. I've never

understood. You can be just as analytical and theoretical in a practical setting as in one that isn't practical. But I think that this idea is changing now when they have seen the kind of people that are involved in this and their standing from a scholarly standpoint in the country. Their answer to it is defensive because it isn't every teacher that can teach lawyers. It requires something more than what is necessary to teach students, I think. It requires an understanding of the practical aspects of the problems in their field and some students, some teachers haven't got that and they're worried about putting themselves up in front of a bunch of lawyers. So I think some of it is defensive and it's a kind of a quick way to get out of it. When you see the people and the quality of people that enjoy teaching these courses on this faculty, no one would question their scholarly standing in the country. Paul Freund, for example, enjoys very much teaching these courses to lawyers. Archibald Cox and almost any-all of the distinguished people on this faculty have participated in this program. I think that's helped get over this hurdle that it is not secondary work, that it is really a very significant part of becoming a good law teacher.

M: Now you served on the Joint Committee on Legal Education, I think in the late '50's and early '60's. Do you remember, there was a conflict of sorts between the ABA and ALI as to who should do what in CLE?

C: I'm not sure that there was a conflict so much in the beginning or as to whether a conflict didn't develop later. In my days back there, the ABA had its committee that worked with the American Law Institute committee.

M: It was called a Joint Committee on Continuing Legal Education.

C: And at that particular time there wasn't any internal organization. Neither one had started to really develop its own philosophy in this area. As time went on I think (and this became more and more widespread) there was the natural development that it might be better for the American Bar Association to be the single guiding star or that the American Institute might very well predominate in the guidance because of its general make up. Certainly when I was on the Committee I didn't sense any conflict. It was operating really as a Joint Committee and joint interest of the profession. But as the American Bar Association got more and more involved, it got more and more I think in the position that it ought to have its own independence to some extent. That led to some conflicts I think that may still exist in some ways.

M: I don't think that there was conflict within the Committee, but there was conflict.

C: Organizationally.

M: Organizationally.

C: I think there was natural tendency to ask (from the standpoint of the American Bar Association) whether that was the right organization to be the guiding star. Probably more from the standpoint of the American Bar Association than from the standpoint of the American Law Institute.

M: Of course the American Law Institute was initially assigned accepted the task of maintaining the CLE program.

C: Right.

M: This was agreed upon between the ABA and ALI and then later on the ABA at least some people. . .

C: . . .felt that they should have a more controlling hand in that. I made two movies on continuing legal education-one on revocable trust and one on irrevocable trust-this was one of the earliest attempts to get involved in audio visual material for continuing legal education. It's of course grown tremendously since then, but the idea originally was that we have a film on irrevocable trust by that joint committee. The money was put up by the Metropolitan Life Insurance Company, seed money, some $60,000 to make this film. But after it was made, the film was turned over to the American Bar Association as the disseminating agency. I made

a later film with the money that the first film made and I just within the last month made an addendum to both films bringing them up-to-date in light of the 1976 act so they're now ready to go out and will be shortly updated accordingly. And I've been asked if I would make another film this coming summer-this is still in the process of being worked out. I just don't know all the facts that have led to this disagreement. I've sensed that there was some problem, but I've purposely stayed out of it. I have no knowledge of all the details of it.

M: Well, in 1947 the Practicing Law Institute it was agreed upon that it would join up somehow. Of course it became a competitor instead.

C: That's right and I'm on the board of trustees of the Practicing Law Institute right now. I know that the attitude that should be taken in this area is that nobody should be necessarily ruled out of participating in continuing legal education as long as they are really giving something that the bar needs. Therefore it shouldn't at the present time be ruled out unless it is on the ground that they are not presenting to the profession something that they should, or misrepresenting things then they ought to be brought up. And, as you know, this is one of the things that worries us now is we've got so many people in this field now that lawyers are being bombarded with this program and that program and this program and how do they decide which one to go to and so forth. And it may be that we've got to get some kind of organization out of this, that everybody participates in so that it is kept in some kind. We did have a meeting out in Chicago not so long ago which was designed to try and where all CLE organizations came in.

M: '75.

C: We tried to discuss the various aspects of this because it was amplifying in so many directions. But I'm not sure that in the long run continuing legal education may not be benefitted by the fact that there have been a number of fingers in the pie and out of this eventually will survive what is needed by the profession rather than try to cut off this kind of evolvement and development too soon. For example, on the 1976 act I have been going around the country speaking. I've been in Minneapolis, Milwaukee, Chicago and Des Moines, going to Detroit in a couple of weeks under the auspices of what is known as the Midwest Regional Continuing Legal Education Organization. This differs from most of them in that it's a proprietary organization. This raises the question whether there should be allowed to be in the field those that are in here to make money for themselves. Well my issue on that is are they rendering something for the bar that the bar needs and doing it in a better way than others because they are proprietary? It doesn't seem to me that just because something is proprietary ought to say that's tainted or bad. The end result should be what are they doing for the bar that is needed to be done, and are they overcharging the bar for it? The bar's able to decide whether they're being overcharged or not. And you look at the charges of this organization compared to the charges of those that are purely nonproprietary and their prices, generally speaking, are lower. Well the uniqueness of this organization, if it has a uniqueness, is that it is for all practical purposes manned only by law professors that they bring in to talk to lawyers. And this is somewhat getting back to my national college idea that they're bringing law professors to the various parts of the country that and they're rendering a service and they're paying us to do this out of the income instead of putting up to the bar. I just think sometimes you may get a better result if you pay somebody to do some of these things rather than saying it's all got to be done gratis situation.

M: Is this organization owned by law professors?

C: No, it's not owned by it, it's a completely private organization, has its board made up of lawyers and board of advisors and judges, and its headquarters are in Minneapolis. But this is the kind of thing that has come in that's made it possible to make available to lawyers a different format, if you will, in the personnel instead of having local lawyers or lawyers from some place go around and assign topics to them, one little topic here and a topic there and they come in and talk for 45 minutes and then somebody else comes on. This is a cohesive presentation. I go on and go on all day, you see. It's organized by one person all day, and it doesn't have this disjointed effect of somebody speaking a few minutes here and somebody there and so on. Anybody that's called in is somebody that has made some reputation in the field, that is versed in the field as a whole. Normally professional teachers know how to present something better for purposes of teaching. I'm not sure that this isn't a good thing for the nonproprietors to have to compete with in the situation rather than say it's bad simply because somebody's making some money out of it.

M: And you go into Minnesota and Iowa, the compulsory CLE states?

C: Most of the time they go in under co-sponsorship with some local organization. For example in Iowa it was co-sponsored with Drake University Law School; in Detroit where we're going in a couple of weeks it's co-sponsored by the University of Detroit Law School; in Minnesota, of course that's where they're headquartered in Minnesota. But anyway, all I'm saying is that we don't want to get too narrow a point of view as to how continuing legal education can be produced in the most effective manner as long as the cost to the bar is kept within basis and as long as the bar is getting something that is important for them to get, I don't think we ought to rule out some organization merely because it is proprietary. This is coming up the same way before the bar on whether the American Bar can approve proprietary law schools. That issue is up now as I understand it.

M: That's right. The Foundation did a short study on this.

C: In the past it's sort of been automatic to not approve it, and that's too narrow a point of view.

M: How will the compulsory CLE effect what is going on now? I mean the national programs like PLI and ABA and Joint Committee?

C: What question?

M: What effect will compulsory CLE states have on the national programs? By national I mean people who cover the country.

C: Well I think it depends upon how the compulsory education is worked out. If it's worked out along narrow state lines it could only be done by the states. So far wherever there's been any kind of compulsory program it has not been worked out that way. For example, when we give our program here we got approval from Minnesota and Wisconsin and Iowa which were states that people who attended our program would get credit for their compulsory so that they have approving the agencies that could give the hours that they would recognize. They haven't taken a narrow intrastate line, therefore with that situation national programs, as long as they can satisfy the local requirements, should continue to prosper. And I would hope that it wouldn't develop along narrow state lines where you could only have people giving the programs who were within the confines of the states-I think that would be very unfortunate and very undesirable in the improvement of the lawyers of the state.

M: Well this could have some effect conceivably on bar admissions, perhaps.

C: Well I've always been in favor of a more national approach on admission to the bar rather than on the narrow approach of state lines, and that's beginning to break down somewhat. There are some states now that do give the national bar examination, and I guess automatically admit them in the various states that recognize the results of that program. But you get a certain amount of difficulty to overcome here and you don't keep the admission of the bar completely within the control of states. I don't mind that so much as I do mind the education idea being that you can only get an education within the confines of your state. Maybe now you'll get some people say, 'Well if you're going to practice in "X" state you ought to go to the "X" state law school because they concentrate on state practice.' Well in the first place they don't concentrate-any good law school doesn't concentrate on state practice; and secondly that isn't the purpose of the law school anyway to make you an information fountain of local law. It ought to have a broader base of education than that.

M: There's one question that I forgot to ask you about the Code. There is one entire canon devoted to unauthorized practice. Why a whole canon out of nine?

C: Well I suppose that's somewhat historical. There had always been a separate statement in regard to that particular aspect of the problem. It is hard to work it in in other aspects because it really involves conduct of laymen-it doesn't involve conduct of the bar except as cooperating with the conduct of laymen. It's probably

one of the touchiest problems that we have. I think that it was still thought that you couldn't bury it into the aspect of some other Code provision. I suppose that historical background and the continued controversy about the problem felt that it had to be brought up and surfaced as a major aspect. And I suppose it is a major aspect of the survival, in a sense, of the profession as an independent. Once you open up the practice of law to anybody without the controls and disciplines of the profession you are going to make it impossible or very difficult for the profession to survive as a servant of the public interest. So it's not unimportant. Of course I come out of a background of having been on the Unauthorized Practice Committee of the American Bar Association for some time and it's been a committee that many people thought has been very narrow minded in its approach to problems. I think that it's because the full scope of the problem is not understood and there certainly have been some members of the Committee that have been very narrow in their administration of it and find almost anything that anybody does is with the practice of law and therefore you ve got to be a lawyer to do it. But they've carried it to too great an extreme I think.

M: As you said, the Committee has been viewed as having a sort of a rather narrow viewpoint and a knee-jerk reaction to anything that. . .

C: That's right, it's just keeping the monopoly for the profession.

M: Right.

C: It's got to be justified that it's in the public interest, I mean, and if you can't justify it as in the public interest, why then it doesn't deserve to be preserved. But I do feel that within a certain range the legal profession is in the public interest to have it, and to have it subject to the disciplines and controls that it is subject to and that that involves, at least within certain limits, the possibility of economic survival. When you add all those up it does involve at least the protection against certain inroads in the public interest.

M: Why did you not circulate parts of the Code as the ALI restatement drafts are circulated?

C: For comment and criticism?

M: Yes.

C: Are you sure that that wasn't done?

M: It was not.

C: In any degree?

M: No. The draft of February '69 was the first one that was sent out for to a mailing list of a thousand, I guess.

C: Well I suppose if there's any logic back of it, it was that until you had something fairly complete and somewhat interrelated it wouldn't really be in the position to evaluate the product very well and you would be spending a great deal of time responding to suggestions that were going to be dealt with in other parts of the Code and that would effect the statements there and that's about the only justification I can think of that it was just a matter of economy of time and effort. You must remember we met once a month for. . .

M: Four or five years.

C: . . . four or five years-that was a very heavy workload on the Committee and there was some problem as to circulating the evaluating comments that would have caused an increased workload. But I had some feeling that certain segments were brought in at meetings that we had in which we discussed things. In other words [it] wasn't that we operated completely in secrecy, I remember one meeting in New York where people came in from certain organizations and we asked them questions and got comments and reactions on phases of the Code we were working on and told them and said, 'Well do what do you think of this and

what you think of that?' so that we weren't operating as we went along without some input from outside the Committee.

M: Well, Ed Wright told me that these people were told only in most general terms as to what the Committee was doing that we're working on, say, unauthorized practice problems and what are your views on. . .

C: . . .on that and as a result of those meeting, though, it might be something that I was thinking about that ought to go into the Code and would get out on the table and you'd get a common reaction back. It wasn't that we handed them a finished product and said, 'What do you think of this?'

END OF TAPE AJC-A-I

END OF INTERVIEW

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