Recent Articles Concerning the Legal Profession

This represents the second publication of what is evolving as a continuing feature in the Journal. The corresponding lead-off article published in Volume Six presented various ethics-oriented comments, articles and reports that were publicized as early as 1976 and as late as 1980. However, as we are now beginning our second year of coverage of this subject, both this issue and future issues will highlight only those articles published in the immediately preceding year.

In this volume the survey is divided into three separate parts. Part I cites and reviews some of the major articles published in 1981 dealing with the legal profession as a subject matter per se. Part II of the article then lists the various related symposia and conferences that were conducted during 1981 and recorded in print. And finally, in Part III of this survey, articles, comments and features that were not reviewed in Part I are listed alphabetically by author. It is hoped that this guide will assist the reader in his or her attempts to maintain an awareness of the recent developments, studies and opinions made within or concerning the legal profession as a whole.

PART I


This article analyzes in-person solicitation as it relates to public interest law firms by examining the origins and history of the ban on solicitation by legal practitioners. Landmark Supreme Court cases which dealt with solicitation, legal advertising and the rights of free political expression, association and commercial speech were also presented and discussed.

The author examines the organization and function of public interest law firms, explaining that there are both foundation-funded firms and self-supporting groups. He explains that through application of a "motive test," one should look to the motive of a soliciting attorney rather than to the character of the solicitation when determining the degree of constitutional protection to be afforded to the solicitous conduct. Under such an analysis, it is ar-
gued that foundation-funded law firms should receive full constitutional protection regarding in-person solicitation. Additionally, however, the author maintains that the receipt of fees by self-supporting law firms is a subordinate motive to the primary desire to protect the public interest. And, assuming that to be true, he posits that the Supreme Court should therefore grant full constitutional protection to solicitations made by self-supporting public interest law firms.

Mr. Daly closes with an expression of his desire that the ABA clarify the ambiguities concerning solicitation that exist both in the Disciplinary Rules and in the Ethical Considerations. He in fact makes reference to one jurisdiction that has already afforded its non-profit foundation-funded law firms protection from the general ban on solicitation.


Mr. Maupin begins his article by discussing the existing environmental bar that did not in fact exist ten years ago. He warns that because the interests of an environmental lawyer’s corporate clients consistently threaten to conflict with the interest of the client’s officers, employees, other clients and the general public, much attention should be paid to the proposed Model Rules and their restrictions.

The article is divided into two separate parts. In Part I the author analyzes and discusses those situations in which various conflicting interests might exist between the lawyer’s corporate client and other parties that interact with that client. Within this section, particular emphasis is placed upon a lawyer’s duty to keep his client’s confidences versus his duty to disclose such confidences to the public when protection of the privileged matter could result in general harm. In Part II of his article, Mr. Maupin discusses those situations wherein the interests of different clients might conflict.

The major thrust of this article seems to be that the proposed Model Rules are “inconsistent” regarding their application to the ethical problems encountered within an environmental law setting. Nevertheless, Mr. Maupin concludes his study by explaining certain benefits that might be expected from the Model Rules as they govern the professional practices of the environmental attorney.

As the title suggests, the major premise of this article is that attorneys are particularly well-suited to serve as checks upon the judiciary due to their experience before judges and their understanding of the overall judicial process. However, due to the inadequate definitions of the boundaries of acceptable criticism of judges plus the related inconsistencies in the Code of Professional Responsibility, it is feared that attorneys generally refrain from exercising their First Amendment rights regarding criticism of judicial representatives.

The article discusses what it refers to as the "Frankfurter view" (restricting all potentially harmful comments about the judiciary) and the "Brennan view" (which restricts only those comments and remarks that actually cause harm). It then compares and contrasts various related opinions from state and federal courts, giving explanations as to why the particular results were reached in each given case.

The author completes her article by remarking that current guidelines in the Code of Professional Responsibility are too vague, lacking any appropriate standard by which attorney criticism of the judiciary branch may be measured and regulated. She suggests that both the Supreme Court and the organized bar ought to take steps to rectify persistent problems.


This article focuses its discussion on those situations in which there is a withdrawal of earlier afforded leniency in an attempt to penalize a criminal defendant for exercising his or her constitutionally given fundamental rights. The article concerns itself largely with the problems that arise when the various lower courts develop and follow conflicting standards when determining if prosecutorial vindictiveness has in fact occurred. Three standards of review or tests used in the various lower federal courts during such reviews are described and analyzed.

The author discusses the "unconstitutional conditions doctrine" which states that without some compelling justification, a state (or its officers) may not burden the exercise of fundamental
rights by selectively awarding governmental benefits to those individuals who waive those rights. To the extent that such burden is made to exist, a state violates substantive due process.

The article concludes with a series of proposals concerning the disposition of prosecutorial vindictiveness cases. The author suggests that absent some form of compelling justification, the unconstitutional conditions doctrine ought to apply when a criminal defendant has been effectively penalized (by the judge or prosecutor) after exercising his or her fundamental rights. On the other hand, however, if non-fundamental rights are involved, it is proposed that the courts simply exercise their discretionary powers to protect defendants from instances of prosecutorial mistreatment. This was likened unto the rational basis test seen in other constitutional law problems. The author also remarked, though, that there may arise some situations, not involving fundamental rights, wherein a due process review more stringent than a rational basis test is nevertheless required. In such circumstances the author calls for an intermediate level of review.


Mr. Cann begins his article with a general discussion of some of the problems commonly associated with the frivolous lawsuit and how some attorneys seem to have forgotten the prohibitions against the bringing of such suits. Concerning the adverse consequences of frivolous prosecutions, the author places particular emphasis upon the undue personal and monetary harassment placed upon defendants in such cases, the clogging of the judicial machinery brought about thereby, the resulting private mistrust of the overall legal system, and the frivolous lawsuit's contribution to the mistrust generally existing between members of today's society.

While attacking the frivolous lawsuit and all its collateral woes, the author also points out that there could be detrimental results if apparently frivolous lawsuits were overly proscribed. First of all, the word "frivolous" is seen as being described in only very general terms thus causing difficulties of application in any given case. Secondly, there is a danger that an over-zealous attempt to ban frivolous actions could have a possible chilling effect on a plaintiff's right to his day in court. Thirdly, the author remarks that what may appear to be a frivolous lawsuit today may be taken as good law tomorrow.
Mr. Cann also includes within his article a discussion of the regulatory sources of a lawyer’s duty to refrain from bringing frivolous lawsuits. He additionally examines recent decisions concerning the initiation of such suits and the potential liability of an attorney who files such an action.


In this article the authors begin their discussion with an analysis of the background of legal advertising and solicitation, examining 1) related Supreme Court decisions, 2) the varied responses to the subjects from the organized bar and 3) a series of recent litigation on the issue witnessed in the lower courts. A discussion is also made of the expanding number of legal clinics and the increased competition that they will arguably pose to the traditional law firms.

Utilizing a generally pro-advertising approach, the authors analyze some of the standard arguments given on behalf of legal advertising. However, they also present arguments for expanding the allowable content of legal promotions (to include such tactics as testimonials), giving opinions as to why such an extenuation would be advantageous. The authors also illustrate and describe what they define as a “general marketing plan” which should be used to maximize the effectiveness of legal advertising as a marketing tool.

After an in-depth presentation of the advertising issue, the authors engage in a more limited discussion of solicitation by attorneys. They suggest that with appropriate tests for acceptability, certain “benign solicitation” should be allowed in that it would help many consumers to become more knowledgeable both of their legal needs and the availability of legal services.


Generally, attorneys are permitted to advance to their clients expenses of a suit if the client is expected to repay such advances, regardless of the outcome of the case. With the revision of the related Disciplinary Rule, lawyers would be permitted to advance certain expenses with the client’s obligation of repayment being made contingent upon the final outcome of the case.

The author of this article conducts a discussion of a general representational or class action claim and states that it is often
difficult for an attorney to institute such an action without violating DR 5-103(B). She explains that the plaintiffs involved in such suits take such a small share of the ultimate recovery that to repay expenses would often result in a net loss to the party involved. Within the discussion of the general representational claim, the article includes an analysis of how such claims may be adversely affected through champertous activities of the bar. The author lists and describes various arguments against the repeal of the limitations currently contained within DR 5-103(B).


Relying on the adage that no man can well serve two masters, Mr. Wice discusses the potential problems facing a lawyer who chooses to defend two or more criminal defendants charged with the same offense. The author explains that while representing co-defendants is not per se violative of the right to effective counsel, numerous situations might arise wherein each defendant seeks to use defenses which are mutually inconsistent. Or, in a move to show his innocence, one defendant may opt to present evidence or arguments that would prove damaging to the other defendant involved. The author explains that joint representation in such circumstances amounts to a breach of the related Disciplinary Rules.

In his article, Mr. Wice explores the potential liabilities counsel may face in the event a conflict of interest does arise between jointly represented defendants. He also remarks that while the primary responsibility for avoiding such conflicts rests upon the practicing bar, both the bench and the bar ought to be mindful of the possible problems associated with joint criminal representation.


Mr. Mundheim establishes early in his article that he is a proponent of a liberal revolving door policy containing only minimal restrictions upon attorneys leaving governmental service for private practice. However, he also recognizes and discusses the problems associated with a strict adherence to his so called “benign view” of the revolving door concept in light of the general negative impressions of governmental activities spawned during
the post-Watergate era.

The article traces the history of the revolving door regulations beginning with a related 1872 Congressional statute and continuing up through the Ethics in Government Act of 1978 (and its amendments in 1979 which relaxed some of the earlier standards). Analysis is also made of the Kutak Commission’s impact upon the revolving door policy and the effect of a Second Circuit case (now vacated by the Supreme Court) upon the general concept.

Mr. Mundheim concludes by stating that in order to promote superior governmental service we should continue to support the interchange of enlightened personnel between the government and private sectors. He also remarks that overall limitations within the revolving door policy must be established with the understanding that as restrictions upon exiting from government service increase, the incentive on the part of qualified personnel to enter such service will correspondingly decrease.


This article is focused upon the belief that the growth of legal clinics has been restrained both by a general mismanagement of such firms and by a lack of adequate non-lawyer venture capital support. The article suggests that non-lawyer proprietorship of legal clinics could emerge as a solution to the managerial and financial ailments currently afflicting the clinic industry.

In his note, Mr. Nielsen examines a recent lower court opinion which squarely confronts the issue and which explains the present policy of quashing all attempts by non-laywers to open or manage legal clinics. However, the author also lists and describes possible checks and restrictions which either now exist or which could be implemented in order to minimize the risk of public injury from legal clinics sponsored and managed by lay personnel. He also analyzes possible social benefits which might accrue from lay ownership, including an enhancement of free enterprise, an increase in employment opportunities for trained attorneys and an occasion for lawyers to avoid purely administrative matters which could be efficiently disposed of by centralized management personnel. The author generally opines that the potential for harm from “licensed and otherwise restrained” non-lawyer legal clinic proprietors would not be great.
PART II

Symposia


Articles include: An Overview: Responsibilities of Attorneys Under the Federal Securities Laws, Dennis J. Block; Recent Governmental Attacks on the Private Lawyer as an Infringement of the Constitutional Right to the Assistance of Counsel, Milton V. Freeman; Responsibilities of Lawyers in Connection with the Sale of Municipal Securities, Wallace J. Timmeny; Administrative Disciplinary Proceedings Under Rule 2(e), Ralph C. Ferrara; In Opposition to Rule 2(e) Proceedings, Judah Best; SEC Injunctive Proceedings Against Attorneys, Arthur F. Mathews; The Georgetown Proposals, Harvey L. Pitt; The Proposed Model Rules of Professional Conduct—and Other Assaults upon the Attorney-Client Relationship: Does “Serving the Public Interest” Disserve the Public Interest?, Marvin G. Pickholz; The Attorney-Client Privilege and the Work Product Doctrine in the Corporate Context, Richard H. Borow; Voluntary Corporate In-House Investigations—Benefits and Pitfalls, Robert G. Morvillo; and Considerations in Representing Attorneys in Civil and Criminal Enforcement Proceedings, Gary P. Naftalis.


Various topics include: Proposed Model Rules of Professional Conduct, Robert J. Kutak; Continuing Debate on Attorney’s Responsibilities to the Public and Third Parties, Theodore Sonde; Is There a Conflict Representing a Corporation and its Individual Employees?, Thomas B. Leary; President’s Counsel’s Client Relationship, Robert J. Lipshutz; Current Developments in Attorney-Client Privilege, Alan P. Kidston; and Communications Among Attorneys, Management and Auditors, Joseph Hinsey IV.


A sampling of the topics include: I) Models of Ethical Regulation, which discusses The Purpose of a Professional Ethics, Respecting the Client’s Ends: Contract and the Fiduciary Relation-
ship, and Bureaucratic Models of Ethical Regulation; II) Conflicts of Interest in Private Practice, which covers Personal Interests of the Attorney, Simultaneous Representation, Successive Representation, and Affiliated Attorneys; III) Conflicts of Interest and the Criminal Lawyer, which includes Conflicts of Interest in Criminal Representation, Conflicts of Interest in the Representation of Multiple Defendants, and Regulation of Conflicts Confronting the Defense Lawyer; IV) Conflicts of Interest in the Representation of the Poor, which discusses The Limited Availability of Legal Services for the Poor, Private Pro Bono Conflicts, and Legal Services Conflicts; V) Conflicts of Interest and Government Attorneys, which covers Conflicts of Function, Conflicts with the Attorney's Personal Interests, Vicarious Disqualification, and Sources of Regulation of Conflicts of Interest in Government; VI) Conflicts of Interest with the Public Interest, which discusses Class Actions, Private Attorneys General, and Test Case Litigation; and VII) Sanctions, which includes Disqualification, Civil Remedies, and Disciplinary Proceedings.


Articles include: Responsibility of Defense Counsel to “Other” Insurers, Ronald E. Mallen; The Representation of Multiple But Adverse Insureds—The Insurance Company's Perspective, Harold T. Boone; The Representation of Multiple Insureds—Defense Counsel's Perspective, Darrell L. Havener; Conflicts and Other Problems of the Attorney Engaged in the Practice of Property Insurance, Sheldon Hurwitz; Conflicts and Problems of the Workers' Compensation Attorney in Representing the Employer and Insurer Before Federal and State Boards, Richard W. Galiher, Jr.; Coverage Disputes with the Insured—The Insurer's Perspective, John J. Bianchesi; The Coverage Role of Defense Counsel, Thomas J. Weithers; Insured's Right to Independent Counsel in Conflicts of Interest Situations, Paul W. Fager; Confidentiality, Disclosure and Discoverability in the Representation of Insurer and Insured, Daniel J. Ryan; Conflicts Between the Insurer and the Insured, Henry B. Alsobrook, Jr.; The Role of Defense Counsel Regarding Settlement Demands and Opportunities, Robert E. Leake, Jr.; and The Relationship of the Excess Insurer, Primary Insurer and Defense Counsel—The Insurer's Perspective, (Summary only) George P. Bowie.
PART III

Article Listing


Warden, Rob, *Should a Lawyer Make $10,000 an Hour?*, 9 Student Lawyer 20 (1981).


Robert S. Presto