Recent Law Review Articles Concerning the Legal Profession

This article represents the fourth installment of what has become a continuing feature in the Journal of the Legal Profession. The lead-off article published in volume six presented various ethics-oriented notes and articles published between 1976 and 1980. Each subsequent volume has included a review of such articles published during the year immediately preceding the date of each volume's respective publication. This volume continues that tradition by reviewing those articles published during 1983.

This review is divided into two sections. Part I summarizes some of the leading articles concerning the legal profession that were published in 1983. Part II is a complete listing of all such ethics-oriented articles published in 1983.

Part I


Ms. Abramovsky first discusses an attorney's obligation to disclose his client's confidential statements, particularly those concerning future crimes. The major problem facing the attorney in this area, according to the author, is the conflict between his duty of confidentiality as defined in the Model Code of Professional Responsibility [hereinafter Model Code] and his duty as an officer of the court. Ms. Abramovsky sees this as a three-fold conflict, the third consideration being the attorney's duty to zealously represent his client under Canon 7.

After identifying the conflict, the second part of this article addresses the specific language in the Model Code concerning confidential communications. The author points out that the attorney's duty to reveal a client's intention to commit a future crime is optional, not mandatory, under the Model Code. Ms. Abramovsky noted that the Kutak Commission proposed that such duty be mandatory, but the proposal was rejected at the 1983 ABA convention in New Orleans.

Taking the confidentiality problem one step further, the next section of the article addresses an attorney's ethical options when he is given the "fruits and instruments" of his client's criminal actions. The author notes that the attorney's uncertainty in this area is also due to a lack of specific guidelines. A brief discussion of the case law concerning this problem follows further illustrating the conflict of authority.
in this area. The author suggests the attorney’s burden be eased by requiring that any physical evidence acquired by an attorney be turned over to an administrative judge who would make the decision of whether the evidence should be admitted. The author, however, does not specify the extent to which the judge’s authority would reach.

In her conclusion, the author observes that the court invokes a balancing test in cases involving client confidentiality; courts balance the interests of the accused against the interests of society. Ms. Abramovsky opposes any mandatory duty of disclosure in such situations and suggests the only real solution here would be to encourage interested parties to compromise.


This article discusses the uncertainty surrounding an attorney’s ethical duty regarding the representation of an incompetent client. The author notes that an attorney who represents both a legal incompetent and its guardian is actually employed by two completely distinct interests. Mr. Ahrens states the general rule is that an attorney in such a situation has an ethical obligation to fully inform both parties of their rights and obtain their consent before continuing representation. The remainder of this article illustrates the failure of many courts to follow the general rule, citing specifically the Karen Quinlan case, In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) and the more recent case of Superintendent of Belcherton State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

In Quinlan, the author notes that the court appointed the incompetent’s parent as her guardian. Such appointment, Mr. Ahrens states, is based on the presumption that a parent will act in the child’s best interest. Mr. Ahrens criticizes the Quinlan court because it completely disregarded any conflict of interest questions in determining if the incompetent was adequately represented. The author suggests that the lack of adverseness in these situations is one reason for the courts’ failure to consider the conflict of interests issue, and uses the Saikewicz case to illustrate this point.

In the conclusion, Mr. Ahrens again argues that little attention is given to the conflict of interest problem in guardian cases because such cases lack any adverseness. Thus, the author suggests that in every case involving the representation of a legal incompetent an attorney appointed as guardian should fully argue the merits of the incompe-
tent’s case. Such adverseness, Mr. Ahrens believes, would reduce any danger of injustice to the incompetent’s rights.


This article examines the ethical duties of an attorney regarding the commencement of frivolous lawsuits, and the possible civil liability for such conduct. The first section of the article examines various ethical rules to determine if a specific ethical duty to refrain from instituting frivolous lawsuits exists. The author observes that under both the Model Code of Professional Responsibility and the “new” Model Rules of Professional Responsibility [hereinafter Model Rules] such a duty does indeed exist.

Following this section is a discussion of the attorney’s obligation to comply with the profession’s ethical rules. The author notes that the attorney has an obligation, to both the legal profession and his client, to comply with the profession’s ethical standards. He also points out that the attorney must balance the interests of both of these “parties” in making a determination concerning what his ethical obligation is. The author concludes this section by stating, however, that regardless of whose interests are superior, the attorney has an ethical obligation to refrain from filing frivolous lawsuits. This section is followed by a discussion of the ineffectiveness of the legal profession’s self regulation as a deterrent to the institution of frivolous lawsuits. The author believes that the existence of frivolous suits will continue to increase until more effective means of deterrence are developed.

The remainder of the article discusses the possibility of civil liability against one who institutes a frivolous lawsuit. The author observes that many jurisdictions have developed special statutes attempting to reduce the number of such suits. It is pointed out, however, that most of these statutes only protect against frivolous medical malpractice claims, and the more general statutes are usually eliminated by constitutional attacks. Thus, the author concludes that although such statutes may reduce some frivolous medical malpractice actions, they fail to reduce the overall number of frivolous suits. This discussion is followed by an examination of the various jurisdictions in which malicious prosecution actions are filed against those who institute a frivolous lawsuit. The author notes that courts have basically been unreceptive to such actions, and usually require the plaintiff to show “special injury” before allowing recovery.
The author concludes the article by restating the seriousness of the increase in the number of frivolous lawsuits and suggests that courts should be more receptive to suits for malicious prosecution based on a meritless lawsuit. The author believes that such conduct by the courts would help reduce the number of frivolous lawsuits filed in this country.


This article illustrates the confusion regarding an attorney’s ethical obligations when confronted with client perjury. The author begins his discussion by examining two criminal cases and two civil cases. He notes that in civil cases, the attorney confronted with client perjury has an obligation both to his client and to the court. The article points out that the attorney’s ethical obligation in this area is complicated further in criminal cases by the insertion of the criminal defendant’s constitutional right to a fair trial. The cases, illustrated by the author, all have differing results. The author follows this point with a discussion of how the confusion in this area is magnified by the application of four sets of ethical standards, i.e. the Model Code of Professional Responsibility, the ABA Defense Standard, and American Trial Lawyer’s Code of Conduct and the “new” Model Rules of Professional Conduct. The author notes that each set of rules suggests a different method of handling client perjury.

In the conclusion, the author states that this area is very unsettled and suggests that the attorney in such a situation use caution in determining his plan of action. The author suggests three safe methods of conduct for the attorney confronted with client perjury: (1) talk to the client and attempt to persuade him to disclose the falsity; (2) withdraw from the case, and (3) make a record.


When can a lawyer, engaged in negotiations, disclose his client’s fraud? This article examines the ethical obligations of this problem. The author begins by briefly summarizing the attorney’s general role in negotiations. This is followed by a thorough discussion of the attorney’s duty to disclose his client’s fraud under the common law, the present Model Code, and the “new” proposed Model Rules. A brief discussion of the “Freedman—Frankel Controversy” is also included. The remainder of this article consists of three hypothetical problems
concerning disclosure of a client's fraud in negotiation. Following each problem is a discussion of a suggested solution under both the Model Code and the Model Rules. The author is clearly in favor of adopting the Model Rules in this area. In the conclusion, the author discusses the advantages of the Model Rules over the present Model Code in this area.


As the title suggests, this article proposes the adoption of a new rule governing the private practice of former government attorneys. The Comment author is particularly in favor of the adoption of Rule 1.11 of the Model Rules. The author begins the article with a survey of the present rules governing the practice of former government lawyers. He points out how confusing the Canon 9 standard is, especially when it is read in light of other standards in the present code. This discussion is followed by an examination of recent relevant case law and committee rulings. The author is opposed to the harsh enforcement of the ethical standards in this area, particularly with regard to firm disqualification.

The remainder of the article is devoted to a discussion of Rule 1.11 of the Model Rules. The author is particularly impressed with the clarity of the new rule. She points out how Rule 1.11 complements other sections of the "new" code and parallels the federal law, especially the law surrounding the 1978 Ethics and Government Act which is also briefly discussed in the article. One major advantage of the new rule, the author states, is that it removes from consideration the professional impropriety standard of Canon 9.

In the conclusion, the author urges the adoption of Rule 1.11. She believes that this rule will reform the law in this area, and thus, reduce the present confusion. The article also points out the importance of having good lawyers in government practice, and contends that Rule 1.11 would help achieve this goal by easing the transition between private and public practice.


This article discusses the general law regarding a prosecutor's duty to disclose evidence favorable to the defense, concentrating on a uni-
que Fifth Circuit's rule of law. The author begins with a short synopsis of the prosecutor's general duty to disclose exculpatory evidence as defined in the Model Code. Following this synopsis is a discussion of the U.S. Supreme Court's rulings on the subject. This discussion includes a brief history of the law concerning a prosecutor's duty to disclose exculpatory evidence followed by a discussion of the Brady rule. The author thoroughly examines this rule, and discusses the effect that subsequent cases have had on the rule, the modifications, and the policy considerations of the rule.

The next section of the article examines the Fifth Circuit's approach in cases on this subject, concentrating on the famous Garrison rule. The author discusses the uniqueness of the Garrison approach, focusing on its distinction between impeachment evidence and substantive evidence. This discussion is followed by a brief survey of the other circuits' interpretation of the Garrison rule. This section is followed by an analysis of Garrison in light of the various circuits' interpretations.

The author concludes that the Fifth Circuit's distinction espoused in Garrison is not valid even though it is followed regularly by the Fifth Circuit. This conclusion is based on the hostility towards Garrison in the other circuits, and its contradiction of the Brady rule and subsequent Supreme Court decisions.


Are publication rights agreements ethical? This article discusses this question, and the various states' approach to the problem. The author notes that some states have enacted statutes governing the validity of publication rights agreements. The Model Code addresses this problem, but is not usually followed by the courts. The author lists the various arguments for and against the existence of such agreements. This discussion is followed by an in-depth study of the "Son of Sam" statutes enacted in some states, illustrating the strengths and weaknesses of such statutes.

The remainder of this article is a discussion of the author's proposed solution to the publication rights problem. The author proposes any funds received from publication rights be used as contingent fees in criminal cases. The author contends that this proposal would fix the attorney's fee at some specified amount. If the defendant won the case, his attorney would be allowed to receive his specified share and the remainder would go to the defendant. If the defendant was convicted, however, the funds received for publication rights would be
used to compensate the victim of the crime. The author argues that adoption of such proposal would serve to align the interests of both the defense attorney and the defendant, increase the defendant’s incentive to exercise his free speech, and also increase the public’s confidence in the judicial system. The author admits that his proposal is not the ideal solution, but in light of the present system contends it is a marked improvement.


This article briefly summarizes Texas law concerning the ethical duty of an attorney regarding forwarding fees. The author begins the article with a discussion of the difference between disciplinary rule 2-107 as stated in the Texas Code of Professional Responsibility [hereinafter Texas Code] and as stated in the Model Code. The author notes that the Texas Code specifically addresses forwarding fees whereas the Model Code does not. An analysis of three Texas cases discussing the ethical aspect of forwarding fees follows. The author concludes that such fees are valid in Texas if they conform to DR 2-107 of the Model Code.

**Part II**

**Article Listing**


Merrick, *Legal Ethics for the Principled Lawyer (Client Funds)*, 18 Docket Call 26 (Summ. 1983).

Note, *Missouri Attorney Advertising Restrictions Overturned: May Spell*
Steinberg, Corporate Securities Counsel—Conflicts of Interest, 8 J. Corp. L. 577 (1983).

Charles Miller