Recent Law Review Articles Concerning the Legal Profession

This article is the fifth installment of what was begun in volume six of the Journal of the Legal Profession as a compilation of law review articles, comments and notes written about the legal profession and published between 1976 and 1980. Each subsequent volume of the Journal has expanded the compilation to include the articles written about the legal profession and published during the year preceding the respective date of the volume's publication. Accordingly, this volume contains a survey of the articles, comments and notes published in 1984.

This survey is organized into three parts. Part I summarizes some of the major articles dealing with the legal profession. Part II lists related symposia recorded in legal journals and reviews. Finally, Part III is an alphabetical listing by author of articles, comments, and notes regarding the legal profession that were not reviewed in Part I.

Part I


This article addresses the problem of lawyers who steal. The first major topic covered is the common law of New Jersey regarding attorney theft as reflected in that state's supreme court disciplinary proceedings. Following this is a presentation of the results of an empirical study of New Jersey attorneys who misappropriated funds or committed other acts of financial impropriety, their offenses and their punishments. The last major topic is the methods currently being used to combat attorney theft in New Jersey and proposals for changing those methods. The author concludes with praise for New Jersey as being in the vanguard nationally in the area of disciplining attorneys for financial improprieties and with the warning that the failure of courts to impose the strictest discipline in such cases will destroy what is left of public confidence in the legal profession.

The purpose of this article is to increase the sensitivity of practitioners to the fact that widespread practices in estate planning raise serious questions of attorney ethics. The author addresses the ethical issues implicated in various situations including the situations where an attorney is named as a beneficiary in a will he has drafted, where an attorney is designated as executor in a will he has drafted, and where an attorney is named as attorney for the estate in a will he has drafted. He also considers the ethical questions involved where an attorney serves as custodian for the wills he has drafted.

The various situations addressed are analyzed with reference to relevant ethical standards, case law and ethics opinions. The ethical standards contained in the Code of Professional Responsibility are compared with those found in the new Model Rules of Professional Conduct. The author also offers his ideas in the form of better approaches and alternative solutions to the ethical problems addressed.

The specific ethical problems identified as most prevalent in estate planning practices are conflict of interest between the attorney and his client and improper solicitation of future legal work. The author seems to believe that these problems arise from the fact that attorneys generally charge too little for estate planning services and must compensate by adopting unethical methods to ensure that they will be involved in the more lucrative business of probating wills. He concludes with a call for increased attorney awareness of the problems he has presented as well as the development of new standards to regulate estate planning practices.


Mr. Martin sets out to provide California attorneys with an analysis of the law as it applies to implicating evidence situations. His analysis includes discussions of the attorney-client privilege, the privilege against self-incrimination and the constitutional guarantee of effective assistance of counsel. He also discusses the various crimes to be avoided and the ethical duties which must be attended to by an attorney in handling implicating evidence. Finally, based on the preceding analysis of the law, Mr. Martin offers practical suggestions regarding actions that a California criminal defense attorney should take or refuse to take in connection with evidence that may implicate one of his clients in a crime.

Mr. Martineau offers an analysis of the concept of “officer of the court” and the courts’ use of the concept to regulate the legal profession and impose duties upon attorneys. His article purports to explain how the title developed in England, show how the title has been used in the United States to justify judicial control over lawyers, and examine the specific duties imposed upon attorneys by virtue of the title.

Mr. Martineau cites and seems to agree with the theory that attorneys were originally accorded the status of officers of the court in England as a mere logical extension of their continuing to enjoy the privileges, such as being subject to suit only in their own court, that many of them had been entitled to in previous positions as court clerks and other court officials. He continues to discuss American cases which have relied on the English label without analysis to support judicial control over the bar and criticizes the courts’ reliance as both unfounded and unnecessary. He gives examples of duties imposed upon attorneys as officers of the court, such as the duty to represent indigent clients, and explains how these duties actually flow from other sources.

In conclusion, Mr. Martineau asserts that for every use of the concept “officer of the court,” there is a better rationale for the power of courts to regulate the legal profession based on the needs of courts and the proper roles of attorneys. He decries the use of the label as a crutch for courts seeking to avoid the necessary analysis of the duties of lawyers as participants in our legal system.


This article examines the division of decision-making authority between an attorney and her client. The author identifies two theoretical models for decision-making: the paternalist model, under which the attorney assumes moral responsibility for the representation; and the instrumentalist model, under which the attorney will do anything for the client that is not specifically prohibited by law. These models provide the basis for the author’s analysis of decision-making under the recently adopted Model Rules of Professional Conduct.

As background, the author discusses the distribution of decision-making authority under early American ethics codes. She characterizes the very early ethical standards as paternalistic and
notes the first evidence of the instrumentalist model in the Model Code of Professional Responsibility adopted in 1969. The new Model Rules approach is lauded as a joint venture model of authority which distributes decision-making authority based upon the legitimate needs of the lawyer, the client, and our legal system. The author continues by describing the text of the Model Rules as providing general guidance and requiring genuine dialogue between an attorney and her client as interdependent persons. She describes the joint venture work as a common enterprise in which both the attorney and the client are respected as individuals entitled to autonomy, dignity and responsibility. In addition to these individuality interests, economic and societal interests are analyzed with regard to their impact in deciding authority disputes between an attorney and her client.

Having examined the theoretical underpinnings of the joint venture model, the author goes on to an analysis of the factors which actually determine which of the attorney or client have the authority to make a particular decision. She devotes the remainder of her article to presenting the courts’ decisions in authority disputes. Her conclusion indicates that the advantage of the joint venture model over the paternalist and instrumentalist models is that the joint venture model is versatile enough to accommodate the fact that each lawyer-client relationship is multifaceted, interdependent and dynamic.


Mr. Nahstoll is concerned that the Model Rules of Professional Conduct are an inadequate structure of ethics and professionalism for the governance of lawyers. He gives the example of the matter of OPM Leasing Services in which a corporation was able to continue a phony loan scam with the aid of counsel while the attorneys involved attempted to comply with expert legal opinion that withdrawal from representation of the corporation must be accomplished in the way least likely to injure the corporation. Mr. Nahstoll laments that the applicable standards of attorney ethics neither prevented the continued representation nor even permitted the attorneys involved a more honorable course of action. He suggests that the legal profession may be on the verge of losing its status as a profession for want of a capacity for self-regulation.

Mr. Nahstoll focuses his examination of the inadequacy of the
Model Rules on the principle of lawyer-client confidentiality. He discusses six rules concerning the principle as they were proposed by the Kutak Commission and explains how these rules were modified and, in his opinion, shorn of much of their effectiveness, by the ABA House of Delegates. He blames the trial bar for encouraging too much emphasis on courtroom advocacy and discusses ways in which ethical rules should be varied to accommodate the needs of attorneys acting in diverse functions. He advocates special consideration of the attorney's role in negotiation.

Mr. Nahstoll's overriding concern is that attorneys should be able to act both in protection of the court and third parties, and in accordance with the attorney's own ethical and moral standards. To this end, Mr. Nahstoll concludes that the ABA House of Delegates should act quickly to amend the model's rules to conform with the proposals of the Kutak Commission.


Mr. See begins with a discussion of the contingent fee arrangement. After acknowledging the traditional justification that such fees encourage the attorney to work harder, he suggests that contingent fees can actually discourage an attorney from investing his time in a legal matter. His argument is that once an attorney on a contingent fee has reached a moderate settlement, he will be discouraged from attempting to spend additional time to push the settlement up because other uses of his time will yield more money. The client, on the other hand, will encourage the attorney to spend additional time on the matter because the time costs the client nothing and may result in a greater settlement. Thus there is a conflict of interest between attorney and client inherent in the economic incentives of the contingent fee arrangement.

Having established these principles, Mr. See goes on to discuss previously devised alternatives to the contingent fee and why those alternatives are insufficient to balance economic incentives. Following this discussion, he proposes a "risk enhanced fee" as a way to ensure that an attorney is appropriately compensated for additional services performed on a contingency basis. The risk enhanced fee is explained as the result of the division of an attorney's hourly noncontingent fee by the probability of success and the addition to that amount of a small "risk aversion supplement" to compensate the attorney for accepting a contingent fee. Mr. See concludes with reasons why the "risk enhanced fee" is the fairest
vehicle through which to preserve the advantages of the contingent fee for the client and at the same time reward the attorney for his time and for the risk that he has incurred.


Do prosecutors act ethically at trial? When they don’t, are they adequately disciplined? Mr. Steele answers these questions in the negative with an analysis of ethical violations by prosecutors and suggestions for a new approach to sanctioning prosecutors who violate the Code of Professional Responsibility.

At the outset, Mr. Steele examines the positions of some courts that reject the power to suspend or disbar prosecutors as extrajudicial impeachment in violation of the separation of powers doctrine. Following is a categorization of the types of prosecutorial misconduct at trial. Mr. Steele concludes his presentation of the problem of unethical prosecutors by discussing the phenomena that prosecutorial misconduct is most often punished by reversal of a defendant’s conviction.

Next, Mr. Steele proceeds to a review of the reasons for our system’s failure to deal effectively with ethical violations by prosecutors. He addresses the problems of who can be relied upon to report trial misconduct and the inadequacy of bar grievance organizations to deal with instances of prosecutorial misconduct. Finally, Mr. Steele offers a proposed statute and commentary for policing and sanctioning prosecutors. He concludes with a request for change in the way we control prosecutorial conduct at trial.


The authors begin by positing a conceptual distinction between the “right to expression” and “the right to know” as important to an understanding of first amendment protection for lawyer advertising. According to the authors, the source of protection for advertising is the right of individuals to know and, therefore, advertising has been held to deserve a lesser degree of constitutional protection than the almost absolute protection which has been accorded to the right to expression.

Nonetheless, the authors go on to identify supreme court precedent which, according to the authors, appears to have validated the use of direct mail advertising by attorneys. State court decisions which have condoned direct mail advertising are compared
with state court decisions which have expressly disallowed such advertising. Guidelines are gleaned from the cases including the principles that mailings must be accurate and cast in an informative as opposed to a solicitous vein. The practical advantages of direct mail over other forms of advertising are disclosed.

In conclusion, the authors encourage attorneys to investigate the position of local authorities with regard to direct mail advertising and weigh the risk of challenge to a mailing. Direct mail advertising is advocated as an effective and economic alternative to mass audience appeals.

PART II
Symposia

*Alternative Dispute Resolution in the Law Curriculum, 34 J. Legal Educ. 229 (1984).*

Articles include: *Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles,* Frank E.A. Sander; *Legal Education and the Changing Role of Lawyers in Dispute Resolution,* Albert M. Sacks; *A Comprehensive Approach to the Theory and Practice of Dispute Resolution,* Eric D. Green; *Mediation in the Law Schools,* Leonard L. Riskin; *Using Negotiation to Teach about Legal Process,* Marc Galanter; *Anthropology and the Study of Alternative Dispute Resolution,* Sally Engle Merry; *Some Thoughts on Dispute Resolution and Civil Procedure,* Martha Minow; *Civil Procedure and Alternative Dispute Resolution,* Paul D. Carrington; *Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses,* Gerald R. Williams; *A Pedagogy for Negotiation,* Robert B. Moberly.

*Attorney Fee Shifting, 47 Law & Contem. Probs. (1984).*

Topics covered include: *Toward a History of the American Rule on Attorney Fee Recovery,* John Leubsdorf; *The European Experience with Attorney Fee Shifting,* Werner Pfennigstorf; *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario,* Herbert M. Kritzer; *Predicting the Effects of Attorney Fee Shifting,* Thomas D. Rowe, Jr.; *An Economic Analysis of Alternative Fee Shifting Systems,* Ronald Braeutigam, Bruce Owen, John Panzar; *Fee Shifting and the Implementation of Public Policy,* Frances Kahn Zemans; *Citizen Suit Attorney Fee Shifting Awards: A Critical Examination of Government— “Subsidized” Litigation,* Bruce Fein; *The Role of Attorney Fee Shifting in Pub-


Topics covered include: Legal Education and the Good Lawyer, Richard Wasserstrom; The Moral Responsibility of Law Schools, Terrance Sandalow; Against Autarky, David Luban; Moral Implications and Effects of Legal Education, Thomas L. Shaffer; Ethics in Academe-Afton Dekanal, David H. Vernon; Law Schools as Institutional Teachers of Professional Responsibility, Norman Redlich; Of Law and the River, Paul D. Carrington.


Topics covered are: Clinical Legal Education—A 21st Century Perspective, Anthony G. Amsterdam; What Is The Use of a Law Book Without Pictures, Paul R. Baier; Simulation Teaching: A Twenty-Second Semester Report, James M. Brown; The Problem Method in Legal Education, Gregory L. Ogden; Group Learn-
Law Review Articles

ing in Law School, Roark M. Reed; Learning Criminal Law Through the Whole Case Method, Melvyn Zarr.


Essays include: Some Observations on the Present State of Law Teaching and the Student Response, John W. Wade; Comments: A Response to Professor Wade, William Burnett Harvey; Legal Education: Some Compliments and Some Complaints, Robert B. McKay; Statutory Law in Legal Education: Still Second Class After All These Years, Robert F. Williams; Some Thoughts on Legislation in Legal Education, Quintin Johnstone; Statutory Law in Legal Education: A Response to Professor Williams, Maxine T. McConnell; Some Thoughts on the 'New' Law School Constituency: The Public Interest Lawyer, Robert Belton; The Socratic Method in Legal Education: Moral Discourse and Accommodation, John O. Cole.

PART III

Article Listing

Ackerman, Law Schools and Professional Responsibility: A Task
Chao, Donating Legal Services, 4 CALIF. LAW 49 (October 1984).
Comment, Ethical Considerations for the Justice Department When it Switches Sides During Litigation, 7 U. PUGET SOUND L. REV. 405 (1984).


Hendrickson, Ethical Concerns in Multi-Jurisdictional Estate Planning, 123 TR. & EST. 31 (November 1984).


Note, Legal Malpractice: A Tort or Contract Prescriptive Period?

Evelyn H. Coats