RECENT LAW REVIEW ARTICLES CONCERNING THE LEGAL PROFESSION

Volume Six of the JOURNAL OF THE LEGAL PROFESSION contained a compilation of law review articles, comments and notes published about the legal profession between 1976 and 1980. Subsequently, each volume of the JOURNAL includes articles dealing with issues concerning 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 1986.

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.

PART I


Recognizing that law professors have considerable power over their students, Professor Freedman suggests three ways in which that power is often abused. Professor Freedman first urges that sexual exploitation by professors should be recognized as unprofessional conduct and as cause for dismissal. Turning his attention to the plagiarism of student work by law professors, the author argues that law professors should be subject to the same guidelines as psychologists, who are required to give publication credit. Finally, stating that professors are too unwilling to review exam grades, Professor Freedman argues on behalf of due process in grading, urging that law professors should be more open-minded.


This article begins with a discussion of the “constitutionality of disciplining judges for improper speech” under the first amendment. The author advocates using the test applied to public employees and the balancing approach that the Supreme Court has used which weighs the right of free speech against the threat the speech poses to the effi-
ciency of the governmental agency. "The test employed by the Supreme Court in analyzing the speech of public employees generally involves consideration of both (1) whether the speech is a matter of public concern; and (2) the damage done to the governmental agency by the employee's speech." Relying on Pickering v. Board of Education, 391 U.S. 563 (1968), this article advocates the same test for analyzing the extent to which a judge should be disciplined for his speech.

Professor Gross first focuses on the in-court judicial speech of a judge. He argues that Pickering and its progeny should be applied to judicial speech. This article then focuses on that speech which has, in fact, caused the judge to be disciplined, the most frequent of which are vulgar, abusive, or insulting statements. Necessary judicial speech that is required by statute, court rule, or common law is unlikely to result in discipline.

Finally, the author studies out-of-court judicial speech. He concludes that a judge may be disciplined if the judge makes out-of-court statements which might cause the public to believe that cases would be decided based on matters other than the merits of the case. Disciplinary action also might be warranted if a judge makes judicial statements which might cause the public to lose respect for him, or if he makes public comments about pending litigation.

Lefstein, Incriminating Physical Evidence, the Defense Attorney’s Dilemma, and the Need for Rules, 64 N.C.L. REV. 897 (June 1986).

This article advocates the development of clear rules defining the defense attorney's responsibilities regarding incriminating physical evidence. Neither the Model Code of Professional Responsibility, the Model Rules of Professional Conduct, nor the Criminal Justice Standards Relating to the Defense Function provide adequate guidance. Thus, new rules are needed to better guide an attorney faced with the problem of what to do with incriminating physical evidence.

This article begins by reviewing cases in which an attorney is ordered to produce incriminating evidence. These cases are examined to determine when an attorney must comply with a subpoena or when the evidence will be protected by the attorney-client privilege or the privilege against self-incrimination. This article then discusses whether defense attorneys have an ethical duty to voluntarily disclose incriminatory physical evidence and when a failure to disclose such evidence may result in criminal charges. Finally, Professor Lefstein examines the criminal justice standards and makes suggestions for improvement in
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these proposed ethical standards.

This article discusses the obligations imposed upon attorneys to report ethical violations by other attorneys. It begins with a discussion of the duty of a bar applicant to report ethical violations under the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. Following this is a discussion of the ethical obligations placed on an attorney to report violations under the codes of professional responsibility. In addition, these obligations are compared with the obligations imposed on private citizens to report misconduct. This article concludes with a discussion of the appropriateness of placing an additional reporting requirement on attorneys.

Patterson, An Analysis of Conflicts of Interest Problems, 37 MERCER L. REV. 569 (Winter 1986).
This article divides conflict of interest problems into two dimensions: judgmental and relational. According to the author, the first step to take when dealing with a conflict of interest problem is to determine the type of conflict. Such problems involve judgment because the lawyer must decide whether the problem involves a "per se conflict, an actual conflict, or a potential conflict." If a per se conflict is involved, the attorney may not represent the client. However, if an actual conflict or a potential conflict exists, the client may be able to consent to representation regardless of the conflict. Conflict of interest problems are also relational because the conflict can arise from three sources: "The lawyer's relationship with the client, the relationship between clients, and the lawyer's relationship with a former client."

After a discussion of the different dimensions of conflict of interest problems, the author examines the problems that can occur when a client chooses to disregard a conflict of interest, and discusses different situations in which a client may or may not be able to waive a conflict. Finally, the author examines important issues encountered when disqualifying attorneys because of conflict of interest problems.

Stanley, Can We Defend Both? A Defense Counsel's Dilemma, 22 TORT & INS. L.J. 59 (Fall 1986).
When an attorney represents both an insurance company and its agent employee, several important ethical considerations must be examined to insure that no conflict of interest exists or develops. In this article, the author examines the various considerations a defense counsel must examine when dealing with such a situation. First, the author examines situations in which a conflict of interest might develop be-
between the company and its agent. For example, a conflict would develop when an insurance company decides to proceed against its agent for contribution or indemnification. This article then examines the applicable ethical guidelines and how they affect the defense counsel. In addition, since courts have yet to deal with a case where the attempted representation of an insurance company and its agent have caused a conflict of interest, the author explores analogous situations and how conflicts of interest are resolved in those areas. In conclusion, the author discusses options other than withdrawal available to defense counsel in such conflict of interest situations.


This article advocates the adoption of a fairness standard in negotiations. "[W]hen serving as a negotiator lawyers should strive for a result that is completely fair. Principled negotiation between lawyers on behalf of clients should be a cooperative process, not an adversarial process." The author notes developments which indicate that current standards could be changed. For example, the appearance of law school courses on negotiation may lead to a willingness to adopt a fairness standard in negotiating. Additionally, law reviews have begun focusing on the ethics of negotiating. Although a new standard is needed due to the lack of an acceptable one today, such standards have failed to develop despite the fact that negotiation has become the best understood and most frequently used alternative to litigation. Consequently, it is the lack of standards which give rise to the tactics of deceit and abuse of power prevalent in today's negotiations.

**PART II**

A. Symposia


Articles include: Rees, Why Do We Need a Separate Women's Bar?; Smearman, The Impact of Women in the Law. A Tribute to Judge Rita C. Davidson. Children or Career; Daugherty, The Winter of our Discontent; Sjoerdsma, Part-time Practitioners; Thurlow, Views From the Bench. Profiles.

PART III

Article Listing

Andelt, Marketing Legal Services, 42 J. MO. B. 103 (March 1986).
Ayer, How to Think about Bankruptcy Ethics, 60 AM. BANKR. L.J. 355 (Fall 1986).
Baird, Legal Creativity: Flashes, Blocks, and Toads, 12 LITIGATION 28 (Summer 1986).
Comment, Professional Responsibility, 35 CATH. U.L. REV. 1225 (Summer 1986).
Denniston, When Your Client Lies, 6 CAL. LAW. 55 (July 1986).


Egelko, State Bar Discipline Under Fire, 6 CAL. LAW. 55 (June 1986).


Friedberg, A Comment for Tom Shaffer: the Ethics of Race, the Ethics of Corruption, 88 W. VA. L. REV. 670 (Summer 1986).


Janofsky, Is the 's' in 'Esquire' Becoming a $ Sign?, 59 WIS. B. BULL. 13 (August 1986).


Landis, Sharing the Partnership Cake—Are Some More Equal Than Others?, 60 LAW INST. J. 410 (May 1986).

Lefstein, Incriminating Physical Evidence, the Defense Attorney's Dilemma, and the Need for Rules, 64 N.C.L. REV. 897 (June 1986).


Marie, Competency and the Legal Profession: the Current Reality


Messing, The Latest Word on Solicitation, 60 FLA. B.J. 17 (May 1986).


Note, Has Lawyer Advertising Finally Received the Protection It Deserves? Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S. Ct. 2265, 15 Stetson L. Rev. 543 (Spring 1986).


Note, Zauderer v. Office of Disciplinary Counsel (461 N.E.2d 883
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Patterson, An Analysis of Conflicts of Interest Problems, 37 MERCER L. REV. 569 (Winter 1986).


Rhode, Solicitation, 36 J. LEGAL EDUC. 317 (Sept. 1986).


Schwab, Talking to the Press, 12 LITIGATION 26 (Summer 1986).

Selinger, “The Ethics of Dissent and Friendship”—a Response to Professor Shaffer, 88 W. VA. L. REV. 666 (Summer 1986).

Shaffer, The Ethics of Dissent and Friendship in the American Professions, 88 W. VA. L. REV. 623 (Summer 1986).

Shaffer, The Profession as a Moral Teacher, 18 ST. MARY’S L.J. 195 (1986).


Stanley, Can We Defend Both? A Defense Counsel’s Dilemma, 22 TORT & INS. L.J. 59 (Fall 1986).


Tiedemann, The Outer Limits of Florida Appellate Advocacy, 60 FLA. B.J. 11 (May 1986).


Von Nessen, Problems Resolved With Oath of Allegiance, 60 LAW INST. J. 952 (Sept. 1986).


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