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. Since that volume, each volume of the *Journal* has included articles dealing with issues concerning the legal profession and published during the year preceding the date of the volume’s publication. The 1988 volume, however, includes not only articles from 1987, but also articles published as recently as September 1988.

The survey is divided into two parts. Part I consists of a short summary of several of the articles, comments, and notes. Part II is a list of the articles from 1987 and up to September 1988 in an inverse chronological order (i.e., most recent articles listed first).

**PART I**


Professor Simon states that the two conventional approaches to an attorney’s ethical decision-making, namely libertarian and regulatory, are both mechanical in their operation. He believes in a “discretionary approach” which allows a lawyer to take actions that are not governed by “mechanical” rules, but rather are tied to the relevant circumstances of the case and are most likely to promote justice. Advocates of the conventional approach claim that such a discretionary system would provide inadequate guidelines for attorney conduct. Professor Simon rebuts this assertion by stating that such a discretionary system would actually help because attorneys would be governed by each other and by the need to fairly represent their clients. In fact, Simon asserts, a discretionary approach would correct what he feels is the main defect in the present system of legal ethics enforcement—that is, mechanical rules sometimes prevent merited but questionable claims from being handled due to attorneys’ fears of ethical violations.


Mr. Appel, who as Deputy Attorney General for the State of Iowa served as counsel in the *Whiteside* case, attempts to analyze what the
case really means to attorneys’ ethical rules in the United States. He feels that many courts have read the case as sweeping more broadly than it actually does in the area of the effect of the Constitution on attorneys’ codes of ethics. The Article is divided into three parts. Part I deals with the ethical and constitutional issues inherent in a client perjury dilemma. Due to the different focus of ethical rules and a defendant’s constitutional protections, Appel believes that it is possible that local rules may require conduct by an attorney that makes a trial constitutionally defective. The opposite may also be true—that mere violation of an ethical rule does not necessarily taint a conviction.

Part II analyzes Whiteside with a special emphasis on the limited character of its constitutional holding. Appel states that the case stands for the proposition that a defendant’s constitutional rights are not violated by an attorney who prevents his client from perjuring himself. In dicta, the Court stated that there is no constitutionally mandated code of ethics, and that the states have broad leeway in the area of attorney conduct. Part III deals with the impact of Whiteside on later decisions and attorney-client relationships. While the impact of the case on attorney-client relationships has been slight, Appel asserts the impact on courts has been varied. Courts have ranged from interpreting Whiteside to mean that an attorney may be disbarred for knowingly allowing a witness to perjure himself on the stand, to requiring withdrawal in those circumstances. Appel concludes by stating that Whiteside only stands for the proposition that no constitutional barriers exist to ethical mandatory disclosure rules.


Mr. Jones states that up until the 1960s, the legal profession was relatively stable because attorneys were loyal to their original firms and to other attorneys. Circumstances, however, have brought about and will continue to bring about the sort of change which will tend to disrupt this stability.

The Article is broken down into three parts. Part I deals with the causes of change, such as the increasing complexity of the matters lawyers must handle for their clients and the growing consumer consciousness among those shopping for attorneys in the United States. Part II concerns itself with the effects of change. Examples of this are the greater lateral movement of attorneys and the “branching out” phenomenon of firms with competition being the watchword. In Part III of the Article, the author outlines the challenges of change concluding that attorneys need to take the best aspects of their tradition/heritage and
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combine them with the best parts of today's profession. Several areas, however, are in need of reevaluation. An example of this is the need for reevaluation of the philosophy and methods of legal education. Jones concludes that lawyers should be optimistic about the profession because he believes attorneys will be able to combine the old and new to make a better overall profession.


The three authors, all members of the Federal Trade Commission, attempt to analyze attorney advertising and the regulations that police it. They first examine the legal history of restraints on advertising by attorneys. It is noted that up until 1975, state bars could prevent advertising by attorneys entirely. However, several cases since then have made advertising possible, limited by some restrictions. Next, the Article presents an economic analysis of the effects of attorney advertising. The authors dispute critics' claims that advertising could cause a spread of disinformation, promote frivolous litigation, and increase prices. The Article ends by examining evidence that measures the impact of attorney advertising on both the price and quality of legal services. The authors conclude that empirical studies have shown no reduced quality of services from lawyers who advertise. Further, a study by Professor Steven Cox showed that the price for attorneys who advertise was lower than for those who did not advertise.


David Dunn, the author, points out that professional sports teams have gone from an era of refusing to negotiate with sports agents (usually attorneys), to an era of dealing almost exclusively with agents because many of today's professional athletes cannot "fend" for themselves. This, however, has led to abuse.

The note initially examines examples of blatant abuses, such as those of the infamous Norby Walters and Lloyd Bloom, who have been accused of "buying" athletes and overcharging for services. The author next examines previous ineffective attempts to regulate agents by the various sports leagues and the states. League regulations are ineffective because they are voluntary and without real sanctions. Regulation of the sports agent industry by the states has had a minimal effect nationally because only a few states have enacted regulations and these are inconsistent. The need for federal regulation that would cover all states is offered next by the author. He discusses one such piece of proposed
legislation, The Professional National Sports Agency Act, which is undergoing a congressional committee hearing at the present time. In the author’s view, the legislation is fraught with problems, such as lack of criminal sanctions. The proposal made by Dunn for federal legislation is to have federal guidelines including sanctions, but allow each separate sports association to fill in specifics and bear the costs of administration.

PART II

Article, Book Review, and Symposium Listing


Penegar, The Five Pillars of Professionalism, 49 U. PITT. L. REV. 307


Note, It’s a Mistake to Tolerate the Mary Carter Agreement, 87 COLUM. L. REV. 368 (March 1987).


Fisher & Siegal, Evaluating Negotiation Behavior and Results: Can We Identify What We Say We Know?, 36 CATH. U.L. REV. 395 (1987).


Jeffrey H. Roberts