RECENT LAW REVIEW ARTICLES CONCERNING THE LEGAL PROFESSION

The following is a compilation of recent law review articles, essays, comments, and notes published during the last year concerning the legal profession. *The Journal of the Legal Profession* traditionally collects and analyzes the relevant literature which has come into existence since *The Journal*’s previous edition in order to keep the reader informed of recently published material dealing with legal ethics and the practice of law. The citations are arranged categorically, and some of the more interesting or noteworthy articles are briefly described.

I. ATTORNEY COMPETENCE


II. ATTORNEY-CLIENT RELATIONS


Michael F. Drywa, Jr., *Professional Responsibility,* 3 ROGER WILLIAMS L.J. 540 (1998). This article discusses the conflicts that exist in three situations: (1) when an attorney receives a loan from a client; (2) when an attorney obtains a security interest adverse to the interest of his client; and (3) when an attorney provides dual representation in additional loan transactions without disclosing the potential conflicts to the client. The article concludes that when the attorney is in a position to benefit from the relationship with his client, he must disclose all potential conflicts or be subject to disciplinary proceedings.

III. ATTORNEY-CLIENT CONFIDENTIALITY & PRIVILEGE


Cathryn M. Sadler, The Application of the Attorney-Client Privilege to Communications Between Lawyers Within the Same Firm: Evaluating United States v. Rowe, 30 ARIZ. ST. L.J. 859 (1998). United States v. Rowe presented one of the first opportunities for the federal courts to address the application of the attorney-client privilege to intra-firm communications, and although the Ninth Circuit held that the privilege may apply, it may nevertheless be necessary to seek outside counsel in order
to assure the attorney-client privilege is preserved in the context of a firm investigation.


William H. Simon, "Thinking Like a Lawyer" About Ethical Questions, 27 HOFSTRA L. REV. 1 (1998). This article points out that lawyers are called upon to deal with matters that require "professional judgment," and suggests that in lieu of the ethical rules prohibiting disclosure of client confidences except for in a few categorically defined situations, lawyers ought to be able to exercise their professional judgment to bring about substantive justice.

**IV. CONFLICTS OF INTEREST**


Susan V. Watson, Ethical Implications of Joint Defense or Common Interest Agreements, 12 ANTITRUST 59 (Summer, 1998).

Fred C. Zacharias, Waiving Conflicts of Interest, 108 YALE L.J. 407 (1998). This article explores situations when multiple clients may consent to concurrent representation by the same attorney. The article focuses on California's conflict-of-interest rules and notes that the prevailing justification for allowing waiver is to preserve client autonomy. The article further compares California's approach with that of the ABA, and concludes that the ABA's approach restricts client autonomy by prohibiting clients from waiving conflicts in certain situations. The author then proposes a Model Waiver Provision which attempts to address both the
concerns of autonomy and adequate representation. This Model Waiver Provision first identifies conflicts of interest that are nonwaivable. Part two of the Model Waiver Provision identifies the information clients need in order to exercise their autonomy with informed consent. Lastly, part three of the Model Waiver Provision focuses on lawyers and provides guidance as to how lawyers should approach the issue of waiver. The author further comments that a perfect rule in this area would provide firm enforceable standards of lawyer behavior in the context of consent.

V. FAMILY LAW


William A. Kell, Voices Lost and Found: Training Ethical Lawyers for Children, 73 IND. L.J. 635 (1998). This article explores the issue of how state domestic relations law intervenes in the family, and provides ways for attorneys representing the interests of children to know and understand what those interests are. The author discusses the ambivalence surrounding the issue of child empowerment, and specifically addresses when the advocate should take directions from a child and when the advocate should override the child’s wishes in order to protect the best interest of the child. The author also provides valuable lessons on dealing with children and reminds us to remain aware of how our own conception of adults results in discounting children as sources of information. Furthermore, the author suggests that in order to empower children, advocates must listen to them and see them for what they are: “unique individuals growing up in a society that tends to devalue their input.” In addition, the author cautions us to remember that children speak a different language, and attorneys representing children should act as translators, listening carefully to what the child is saying.
VI. GOVERNMENT ATTORNEYS


Katherine L. Kendall, In Re Grand Jury Subpoena Duces Tecum: Destruction of the Attorney-Client Privilege in the Government Realm?, 1998 UTAH L. REV. 421. In the Clinton Case, the Eighth Circuit held that a federal government entity cannot assert the attorney-client privilege in order to avoid compliance with a federal grand jury subpoena. The author notes three reasons why this holding is troublesome: (1) it is based on a narrowly tailored search for controlling case law; (2) the attorney-client privilege protected conversations between government attorneys and government officials at common law; and (3) it fails to uphold the purpose behind the attorney-client privilege. The author further concludes that, in the future, government officials will be deterred from seeking legal advice, and if they do seek advice, they will not fully disclose all of the relevant information necessary for them to make an informed decision.

Nelson Lund, The President as Client and the Ethics of the President's Lawyers, 61 L. & CONTEMP. PROBS. 65 (Spring, 1998).


VII. ATTORNEY FEES & BILLING


VIII. ASSOCIATION WITH THE PRO SE LITIGANT


IX. ATTORNEY OBLIGATIONS TO REPRESENT THE INDIGENT

Steven Epstein, et al., *The Future of Legal Services: Legal and Ethical Implications of the LSC Restrictions*, 25 FORDHAM URB. L.J. 279 (1998). Legal Services Corporation (LSC) was created by Congress in 1974 to assist low income persons with legal representation. Over the past two decades, LSC-funded organizations have successfully represent-
ed fraud victims and fought for medical services for the elderly and poor, and for the rights of children. Nevertheless, LSC funding has been reduced and the types of services available have been limited as well. As a result, the author poses two questions: (1) Is it constitutional for the federal government to silence the voices of the poor; and (2) What ethical obligations do lawyers have to their clients in light of the restrictions?


X. ATTORNEY ADVERTISING & SOLICITATION


XI. ETHICAL ISSUES IN MEDIATION, ARBITRATION, AND SETTLEMENT NEGOTIATIONS


Agnes Wilson, *The Code of Ethics for Arbitrators in Commercial Disputes*, 770 PLI/Comm. 325 (1998). The author notes that although few cases of unethical behavior on the part of arbitrators have arisen, the American Bar Association and the American Arbitration Association agree that it is in the best interest of the public to set forth generally accepted standards of ethical conduct to guide both arbitrators and the disputing parties.
XII. ETHICAL ISSUES IN LITIGATION


Georgene Vairo, *Rule 11 and the Profession*, 67 Fordham L. Rev. 589 (1998). The author comments that, overall, Rule 11 has been successful in raising the professions’s ethical consciousness and has resulted in general improvement in practice standards. However, the author notes that the “Rambo-like” use of Rule 11 by too many lawyers has resulted in increased hostility within the profession. Nevertheless, the author thinks that Rule 11’s curative measures, as opposed to its compensatory sanctions, will be more effective in controlling unprofessional conduct, and as a result, the public’s confidence in the profession may be heightened.

Tracy Schachter Zwick, *Overprivileged? A Guide to Illinois Attorneys’ Privilege to Defame*, 86 Ill. B.J. 378 (1998). This article addresses what, when and where attorneys may speak without incurring liability for defamatory remarks. The author notes that although a lawyer may speak freely and maliciously, whether in court or out of court, so long as his speech is in some way related to the proceeding, the privilege to make such remarks should be curtailed. The author recognizes that justice often requires the ability for attorneys to speak freely; however, the author suggests limiting this freedom to that which is necessary to further the client’s interest.
XIII. EX PARTE COMMUNICATIONS

Garrett Hodes, Ex Parte Contacts With Organizational Employees in Missouri, 54 J. Mo. B. 83 (1998).

Ira H. Leesfield, Ex Parte Communications by Government Lawyers With Represented Parties, 72 Fla. B.J. 18 (1998). The author addresses the current concerns over Model Rule 4.2, and notes that federal prosecutors attempting to conduct a valid law enforcement investigation have been increasingly accused of violating the ethical rule pertaining to ex parte communications with represented persons. The author further comments that the lack of uniformity among the states makes it even more difficult for federal prosecutors to work together. Likewise, defense attorneys have used the vague wording of Model Rule 4.2 to "immunize" their clients from pre-indictment investigations. Currently, there is a committee working on a revised rule that will protect the attorney-client privilege, while at the same time, afford prosecutors the protection they need to investigate certain matters.

XIV. SANCTIONS & ATTORNEY DISCIPLINE

Melissa K. Atwood, Who Has the Last Word?: An Examination of the Authority of State Bar Grievance Committees to Investigate and Discipline Prosecutors for Breaches of Ethics, 22 J. LEGAL PROF. 201 (1998).


Christine S. Filip & Anne E. Johnston, Misleading Message May Spark Suit, 146 PITTSBURGH LEGAL J. 25 (1998). This article focuses on the duty of an attorney to keep his client informed, and points out that since 1995, over 850 suits have been filed against attorneys for a violation of this duty. Furthermore, the author recognizes that although many attorneys may have a good excuse for failing to keep their clients adequately informed, a good excuse may not be good enough for the courts, and as a result, disciplinary sanctions may be imposed. In addition, the courts have added to the penalties recommended by the disciplinary boards and therefore, the courts may impose harsher sanctions and penalties.

Gerald J. Kross, Professional Ethics—Attorney Misconduct—Rules of
Disciplinary Enforcement—The Supreme Court of Pennsylvania Held
That Because of the “Egregious” Nature of the Offense an Attorney May
Not Rely on Purported “Mitigating Evidence” to Avoid Disbarment When
He Perpetrates a Fraud on the Judicial System by Using an Impersonator
to Orchestrate the Conviction of One Client to Benefit Another Client, 36

Samuel T. Reaves, Procedural Due Process Violations in Bar Disci-

Christopher B. Young, Signed, Sealed, Delivered . . . Disbarred?

XV. MALPRACTICE

Jett Hanna, Legal Malpractice Insurance and Limited Liability Enti-
ties: An Analysis of Malpractice Risk and Underwriting Responses, 39 S.

Gary A. Munneke & Anthony E. Davis, Esq., The Standard of Care
in Legal Malpractice, Do the Model Rules of Professional Conduct De-

Melissa A. Thomas, When is an Attorney’s Breach of Fiduciary

Benjamin C. Zipursky, Legal Malpractice and the Structure of Neg-

XVI. ETHICAL ISSUES IN LAWYERS BUSINESS &
PROFESSIONAL ASSOCIATIONS

Thomas K. Byerley, Lawyers Sharing Office Space, 77 MICH. B.J.

James Coomes, The Scope of Lawyer Liability to Limited Partners
Arising Out of a General Partner’s Breach of Fiduciary Duty, 22 J. LEGAL

Anne W. Hill, When Outsiders Fill in Work Arrangements With
This article discusses the concerns with part-time or temporary lawyers,
and notes that they may increase a firm’s chance of incurring liability.
The author further addresses the potential for conflicts, which increases
each time a part-time or temporary lawyer works for a new or different
firm. Problems may arise in these situations because the court uses a
“reasonable client’s perception” analysis, and under such analysis, the relationship among the attorneys will be inferred in order to protect the client. The author then suggests that in order to limit a firm’s exposure to liability, the relationship with the part-time or temporary lawyer needs to be clarified, and further suggests several ways in which to do so.


XVII. JUDICIAL ETHICS


XVIII. EDUCATIONAL ADVANCES IN THE LEGAL PROFESSION


XIX. ETHICS PROPOSALS


XX. THE EXPANSION OF THE LEGAL PROFESSION


Christy L. Sharp