

RECENT LAW REVIEW ARTICLES CONCERNING THE LEGAL PROFESSION

In keeping with the tradition of *The Journal of the Legal Profession*, the following section represents a selection of Law Review and Journal articles centered on the subject of the legal profession that were published in the last year. Brief summaries accompany selected entries.

I. THE ATTORNEY-CLIENT RELATIONSHIP

Robert M. Contois, Jr., *Ethical Considerations: Independent Professional Judgment, Candid Advice, and Reference to NonLegal Considerations*, 77 TUL. L. REV. 1223 (2003).

Gerald E. DeLoss, *HIPAA Requirements for Lawyers—Business Associate Contracts*, 79 N.D. L. REV. 41 (2003).

Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (2003).

Jennifer Tulin McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 SEATTLE U. L. REV. 75 (2003).

Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003).

II. CONFIDENTIALITY AND THE ATTORNEY-CLIENT PRIVILEGE

Alan F. Blakley, *To Squeal or Not To Squeal: Ethical Obligations of Officers of the Court in Possession of Information of Public Interest*, 34 CUMB. L. REV. 65 (2003-2004).

Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003).

Clark D. Cunningham, *How to Explain Confidentiality?*, 9 CLINICAL L. REV. 579 (2003).

Charles S. Doskow, *The Government Attorney and the Right to Blow the Whistle: The Cindy Ossias Case and Its Aftermath (a Two-Year Journey to Nowhere)*, 25 WHITTIER L. REV. 21 (2003).

Michael J. Riordan, *The Attorney-Client Privilege & the "Posthumous" Corporation—Should the Privilege Apply?*, 34 TEX. TECH L. REV. 237 (2003). In this article, Riordan examines the viability of the attorney-client privilege in the context of a statutorily dissolved corporate entity. By exam-

ining the historical and legal significance of the attorney-client privilege with respect to the "natural person," the author argues that, notwithstanding a statutory provision, the applicability of the attorney-client privilege to dissolved corporate entities exists only insofar as the "relative importance of the communication" outweighs the "need to disclose" the information.

American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307 (2003).

III. CONFLICTS OF INTEREST

Yvette Golan, *Restrictive Settlement Agreements: A Critique of Model Rule 5.6(b)*, 33 SW. U. L. REV. 1 (2003).

Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry Into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581 (2003).

Claudia T. Salomon & Jeremy D. Andersen, *Imputing Conflicts Across Firms*, 27 J. LEGAL PROF. 81 (2002-2003). In this article, Salomon and Anderson discuss the current ethical treatment of imputing conflicts of interest among different law firms that had previously maintained the co-counsel relationship. The authors note that courts largely examine the facts surrounding the firms' relationship rather than automatically disqualify co-counsel. The authors then outline the burden-shifting procedure utilized in determining the appropriateness of co-counsel disqualification.

Susan P. Shapiro, *Bushwacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87 (2003).

William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent? An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003).

IV. ATTORNEY COMMUNICATION

Louise L. Hill, *Publicity Rules of the Legal Professions Within the United Kingdom*, 20 ARIZ. J. INT'L & COMP. L. 323 (2003).

Jeffrey A. Parness, *Civil Claim Settlement Talks Involving Third Parties and Insurance Company Adjusters: When Should Lawyer Conduct Standards Apply?*, 77 ST. JOHN'S L. REV. 603 (2003).

Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2(Part I)*, 70 TENN. L. REV. 121 (2003).

Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2(Part II)*, 70 TENN. L. REV. 321 (2003).

Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2(Part III)*, 70 TENN. L. REV. 643 (2003).

Amy Dunn Taylor, *Mass Tort Litigation Management and Ethics*, 44 S. TEX. L. REV. 483 (2003).

V. ATTORNEY'S FEES

Lloyd C. Anderson, *Equitable Power to Award Attorney's Fees: The Seductive Appeal of "Benefit,"* 48 S.D. L. REV. 217 (2003).

Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65 (2003).

Albert Choi, *Allocating Settlement Authority Under a Contingent-Fee Arrangement*, 32 J. LEGAL STUD. 585 (2003).

Susan Saab Fortney, *I Don't Have Time to be Ethical: Addressing the Effects of Billable Hour Pressure*, 39 IDAHO L. REV. 305 (2003).

William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813 (2003).

Christine Hurt, *Counselor, Gatekeeper, Shareholder, Thief: Why Attorneys Who Invest in Their Clients in a Post-Enron World Are "Selling Out," Not "Buying In,"* 64 OHIO ST. L.J. 897 (2003).

James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223 (2003). In this article, Moliterno argues that ethics rules proscribing a lawyer from providing financial assistance to a client or from acquiring an interest in the client's litigation should be discarded. After examining the historic background of champerty, maintenance, and barratry, the author challenges the modern reservations preventing the revision of these rules. The author argues that neither conflict of interest, the risk of frivolous litigation, nor the threat of unfair "client-getting" practices supports the continuation of these rules, and that they should accordingly be abrogated.

Edward A. Morse, *Taxing Plaintiffs: A Look at Tax Accounting for Attorney's Fees and Litigation Costs*, 107 DICK. L. REV. 405 (2003).

Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. 125 (2003).

VI. ATTORNEY AS ADVOCATE

David S. Caudill, *Advocacy, Witnesses, and the Limits of Scientific Knowledge: Is There an Ethical Duty to Evaluate Your Expert's Testimony?*, 39 IDAHO L. REV. 341 (2003).

Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Fathers*, 78 N.Y.U. L. REV. 2103 (2003). Etienne argues that the zealous advocacy of criminal defense lawyers detrimentally results in increased sentences for their clients. The article asserts that federal judges using the Federal Sentencing Guidelines respond to the defense attorney's "overzealous advocacy" by interpreting such as indicative of the defendant's insufficient "remorse." Etienne argues that by using the "acceptance of responsibility" provision of the federal guidelines, judges increase the defendant's sentence to punish both the de-

pendant and the “overzealous” lawyer. The author argues that this adversely affects the attorney-client relationship, as well as the role of the lawyer as zealous advocate.

Geoffrey C. Hazard, Jr., *Lawyer as Wise Counselor*, 49 LOY. L. REV. 215 (2003).

Anthony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 VA. TAX REV. 589 (2003).

VII. THE PRO-SE LITIGANT AND THE RIGHT TO COUNSEL

Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55 (2003).

Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288 (2003).

VIII. REPRESENTING THE CORPORATE CLIENT

John M. Burman, *Ethical Considerations When Representing Organizations*, 3 WYO. L. REV. 581 (2003).

James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors with Independent Counsel*, 48 VILL. L. REV. 1077 (2003).

Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859 (2003).

Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003).

Robert W. Gordon, *A New Role For Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003).

Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL'Y 195 (2003).

Marc I. Steinberg, *Lawyer Liability After Sarbanes-Oxley—Has the Landscape Changed?*, 3 WYO. L. REV. 371 (2003). In this article, Steinberg asserts that the ethical consequences and risk of liability to corporate counsel remain largely unchanged by the requirements of the Sarbanes-Oxley Act of 2002 and by subsequent SEC regulatory provisions. The author outlines the existing prescriptions found in professional rules and in state and federal securities laws to assert the duties of corporate counsel—particularly regarding the issue of “noisy withdrawal.” The author concludes by arguing that the lawyer facing such withdrawal should suggest that the client secure a “second opinion” from outside counsel.

E. Norman Veasey, *State-Federal Tension in Corporate Governance and the Professional Responsibilities of Advisors*, 28 J. CORP. L. 441 (2003).

Manning Gilbert Warren III, *Revenue Recognition and Corporate Counsel*, 56 SMU L. REV. 885 (2003).

IX. REPRESENTING THE GOVERNMENTAL CLIENT

J. Nick Badgerow, *Walking the Line: Government Lawyer Ethics*, 12 KAN. J.L. & PUB. POL'Y 437 (2003).

Edward C. Carter III, *Limits of Judicial Power: Does the Constitution Bar the Application of Some Ethics Rules to Executive Branch Attorneys?*, 27 S. ILL. U. L.J. 295 (2003). In this article, Carter asserts that the judicial promulgation of certain ethics rules—specifically those that regulate the discretionary activities of the prosecutor—are impermissible usurpations of the role of the executive branch. Carter asserts that such rules run contrary to the constitutional doctrine of separation of powers.

Robert J. Marchant, *Representing Representatives: Ethical Considerations for the Legislature's Attorneys*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 439 (2002-2003).

X. LAW FIRMS

Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 Geo. J. Legal Ethics 335 (2003).

Robert W. Hillman, *The Hidden Costs of Lawyer Mobility: Of Law Firms, Law Schools, and the Education of Lawyers*, 91 KY. L.J. 299 (2002-2003).

Robert W. Hillman, *The Property Wars of Law Firms: Of Client Lists, Trade Secrets and the Fiduciary Duties of Law Partners*, 30 FLA. ST. U. L. REV. 767 (2003).

Douglas R. Richmond, *Subordinate Lawyers and Insubordinate Duties*, 105 W. VA. L. REV. 449 (2003).

XI. MULTI-DISCIPLINARY PRACTICE

Janice A. Alwin & Jason P. Eckerly, *Raising the Tax Bar: Redefining the Roles of Accountants and Lawyers for a Practical Solution to the Multidisciplinary Practice Debate*, 1 DEPAUL BUS. & COM. L.J. 257 (2003).

Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client's Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17 (2003).

Karel Ourednik IV, *Multidisciplinary Practice and Professional Responsibility After Enron*, 4 FLA. COASTAL L.J. 167 (2003). In this article, Ourednik examines the role of multidisciplinary practice in the United States, and discusses the intersection of multidisciplinary practice (MDP) with the Model Rules of Professional Conduct. Acknowledging the ethical difficulties with respect to fee sharing, conflicts of interest, and confidentiality, the author, nevertheless, advocates the allowance of MDP, particularly in the elder law context.

XII. MULTI-JURISDICTIONAL PRACTICE AND THE UNAUTHORIZED PRACTICE OF LAW.

Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795 (2003).

Gary A. Munneke, *Multijurisdictional Practice of Law: Recent Developments in the National Debate*, 27 J. LEGAL PROF. 91 (2002-2003).

Daniel R. Ray, *Regulating Legal Assistant Practice: A Proposal that Offers Something for Everyone*, 11 WASH. U. J.L. & POL'Y 249 (2003).

XIII. ALTERNATIVE DISPUTE RESOLUTION

Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. ON DISP. RESOL. 505 (2003).

Jay Folberg, *Arbitration Ethics—Is California the Future?*, 18 OHIO ST. J. ON DISP. RESOL. 343 (2003).

Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality In Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399 (2003).

Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227 (2003). In this article, Peppet examines the concept of Contingent Fee Mediation. The article challenges the role of the neutral mediator by introducing a “contractarian” approach wherein the parties to the mediation define the mediator’s role with respect to their specific needs. The author outlines possible contingent fee arrangements and examines the ethical implications of contingent fee mediation.

XIV. BAR ASSOCIATIONS AND THE REGULATION OF LAWYERS

Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures or the Market?*, 37 GA. L. REV. 1167 (2003).

Ann Hubbard, *Improving the Fitness Inquiry of the North Carolina Bar Application*, 81 N.C. L. REV. 2179 (2003).

Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977 (2003).

Carla D. Pratt, *Should Klansmen Be Lawyers?: Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857 (2003).

William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639 (2003).

Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303 (2003).

XV. JUDICIAL ETHICS

Hon. Howland W. Abramson & Gary Lee, *Judicial Ethics Advisory Committees Should Render Opinions Which Adhere to Binding United States Constitutional Precedents*, 41 DUQ. L. REV. 269 (2003). In this article, Abramson and Lee argue that judicial ethics codes must comply with the Constitution, particularly with respect to the fundamental rights secured by the First Amendment. The authors contend that judges do not “waive” their Constitutional rights—specifically their right to freedom of speech—as a result of assuming their judicial office. The authors then examine numerous examples of judicial ethics cases that deal with free speech, particularly those dealing with the judge’s political activity.

Alex B. Long, “*Stop Me Before I Vote For This Judge Again*”: *Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges*, 106 W. VA. L. REV. 1 (2003).

Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375 (2003).

XVI. MALPRACTICE AND THE INEFFECTIVE ASSISTANCE OF COUNSEL

Sheila Martin Berry, “*Bad Lawyering*”: *How Defense Attorneys Help Convict the Innocent*, 30 N. KY. L. REV. 487 (2003).

Phyllis Coleman & Ronald A. Shellow, *Ineffective Assistance of Counsel: A Call For a Stricter Test in Civil Commitments*, 27 J. LEGAL PROF. 37 (2002-2003).

Meredith J. Duncan, *Criminal Malpractice: A Lawyer’s Holiday*, 37 GA. L. REV. 1251 (2003).

George S. Mahaffey, Jr., “*All For One and One For All? Legal Malpractice Arising from Joint Defense Consortiums and Agreements, the Final Frontier in Professional Liability*”, 35 ARIZ. ST. L.J. 21 (2003).

Lonn Weissblum, *A Modest Proposal for Classifying Lost Punitive Damages in a Legal Malpractice Case: Look to the Deceased Tortfeasor for Guidance*, 27 J. LEGAL PROF. 67 (2002-2003).

XVII. ATTORNEY MISCONDUCT

Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209 (2003).

Arthur F. Greenbaum, *The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259 (2003). This article surveys the overall effectiveness of Model Rule 8.3 and the lawyer’s duty to report professional misconduct. The author examines whether the rule requiring a lawyer to report professional misconduct is of value to the profession, and answering in the affirmative, outlines the principle issues requisite for the construction of a properly drafted rule.

XVIII. PRO BONO AND PUBLIC INTEREST

Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1 (2003).

Talcott J. Franklin, *Helping Lawyers Help Others: Creating a Pro Bono Program Designed to Attract and Retain a Large Volunteer Pool*, 27 J. LEGAL PROF. 23 (2002-2003).

David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209 (2003).

XIX. ETHICS RULES GENERALLY

Michael Bohlander, *International Criminal Defense Ethics: The Law of Professional Conduct for Defense Counsel Appearing Before International Criminal Tribunals*, 1 SAN DIEGO INT'L L.J. 75 (2003).

Edward C. Brewer III, *Some Thoughts on the Process of Making Ethics Rules, Including How to Make the "Appearance of Impropriety" Disappear*, 39 IDAHO L. REV. 321 (2003).

Alfred L. Brophy, *Race, Class, and the Regulation of the Legal Profession in the Progressive Era: The Case of the 1908 Canons*, 12 CORNELL J.L. & PUB. POL'Y 607 (2003).

Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527 (2003).

Joseph P. Tomain & Barbara G. Watts, *Between Law and Virtue*, 71 U. CIN. L. REV. 585 (2003).

XX. SYMPOSIA

Symposium, *Regulating the Lawyer: Past Efforts and Future Responsibilities*, 103 COLUM. L. REV. 1236 (2003).

Symposium, *The Legal Profession: Looking Backward*, 71 FORDHAM L. REV. 1181 (2003).

Symposium, *Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591(2003).

Symposium, *Nebraska and the Model Rules of Professional Conduct*, 81 NEB. L. REV. 1315 (2003).

Symposium, *The Second Annual Symposium on Legal Malpractice and Professional Responsibility*, 34 ST. MARY'S L.J. 733 (2003).

Symposium, *Ethics 2000 and Beyond: Reform or Professional Responsibility as Usual?*, 2003 U. ILL. L. REV. 1155 (2003).

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