

PROFESSIONAL RESPONSIBILITY SECTION SPRING 2007 NEWSLETTER



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This newsletter is a forum for the exchange of information and ideas. The opinions expressed here do not represent the position of the Professional Responsibility Section of the American Association of Law Schools.



MESSAGE FROM THE CHAIR

THE END OF LEGAL ETHICS AS WE KNOW IT?

By Russell G. Pearce (Fordham)

With my first newsletter column as chair, I would like to try something a little different and begin a conversation regarding the current state of our field.

The story of the last generation was the expansion of legal ethics. It became a required course, often taught with the three credits that signaled the minimum hours generally allotted to significant courses. Scholarship in the field proliferated and some of it achieved respect.

Nevertheless, as a field, legal ethics never moved beyond a second-class position. In contrast to the way they treated important areas of the curriculum, many law schools were not concerned that those who taught legal ethics classes were also scholars in the field.

Is this the high point of the field of legal ethics?

Some evidence points in this direction. At one major law school that has historically been a leader in the field, the Dean sought – though unsuccessfully – to end the required legal ethics class. Is this an isolated effort or a harbinger of a future trend?

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My pessimistic view is that the energy behind the expansion of legal ethics is fading. Even those who defend legal ethics, such as the authors of the recent reports on curricular reform from the Carnegie Foundation or the Clinical Legal Education Association, are long on rhetoric and short on concrete commitment to ethics teaching and scholarship.

Why would legal ethics enter a period of decline? In part, this might inevitably result from the cyclical nature of academic trends. Perhaps, though, it reflects an underlying weakness in the field. As one of my colleagues never fails to remind me, legal ethics has never developed a mature paradigm, where the work of the community of scholars was to refine a consensus framework. Why would that be? I would suggest that legal ethics is always on the wrong side of the fact/value divide that demarcates what is serious and important in legal education. If legal ethics embraces morality, it finds itself on the margins of an academic community that disdains moral conversation. If legal ethics embraces the world of facts, it finds itself on the margins of an academic community that considers technical ethics little more significant than etiquette. Until legal ethics can surmount these challenges, its place in the academy will remain secondary, at best.

This is my view of the current state of the field of legal ethics in law schools. What is yours? I would like to include as many short responses (no more than 450 words) as possible in the next issue of the newsletter.

[Deadline for these submissions will be August 14, 2007. Editor reserves the right to edit to conform to available space. Please submit to Glee@widener.edu



SECTION ANNOUNCEMENTS

In response to the 2007 Annual Meeting program that our Section cosponsored with the Section on Student Services related to Impaired Students and Lawyer Assistance Programs, Pennsylvania Lawyers Concerned for lawyers is sponsoring a gathering of the deans of students for Pennsylvania's law schools this May.



MEMBER ANNOUNCEMENTS

At the **DePaul University College of Law** in Chicago, this year's Clifford Symposium on Tort Law and Social policy featured a Legal Ethics theme. The symposium gathered an all-star faculty to discuss *Distortions in the Attorney/Client Relationship: Threats to Sound Advice*. The program ran April 19th and 20th.

Next October 17-19, the **Cumberland Law School at Samford University** in Birmingham, Alabama will be hosting a conference on *Credentialed for What: Exploring Business and Law Education for Public Obligation*. Confirmed speakers include William May of the Institute for Practical ethics and Public Life, Sandy Douglas, President of Coca-Cola North America, and Deborah Rhode of Stanford.

The Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South Carolina School of Law will host a conference entitled "Mentoring -- the Future of the Legal Profession" in Columbia, SC on March 27-29, 2008. The conference will be co-sponsored by the ABA Standing Committee on Professionalism.

Professor Larry Dubin of the University of Detroit Mercy School of Law has produced a number of video and television programs and has some extra copies of these programs, which he will send, free of charge, to any professor interested in viewing the program for use in a Professional Responsibility class.

These programs include *What Went Wrong? Conversations With Disciplined Lawyers*, *I Stand By The Accused*, *Lawyer Misconduct: Conversations With Victims*, *A Lawyer Made In Heaven: The Virgil Hawkins Story*, and *Legal Heroes*, which was positively reviewed in the *Georgetown Journal of Legal Ethics* and profiles three lawyers who represent the best that our profession has to offer.



DEVELOPMENTS IN THE LAW REGULATING LAWYERS

By Roy Simon (Hofstra)

Below are some significant national and state developments since the Fall 2006 Newsletter came out in November, plus some anticipated future developments. If you know of developments that I missed, or if you learn of new developments that I should mention in the next column (or if you have corrections to this column), please contact me at roy.simon@hofstra.edu.



NATIONAL DEVELOPMENTS

Several significant developments have occurred at the national level, mostly involving the ABA, since the November Newsletter.

ABA Model Rules of Professional Conduct: The ABA has not amended the black letter rules in the Model Rules of Professional Conduct since the last newsletter, and no proposed amendments to the black letter rules are circulating. But at the ABA's February 2007 Mid-Year Meeting, the ABA added the following new sentence at the end of Comment 14 to Rule 5.5 (the rule governing multijurisdictional practice): Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a

major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.

The Model Court Rule on Provision of Legal Services Following Determination of Major Disaster is the next item in this column.

ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (a/k/a “the Katrina Rule”): After Hurricanes Katrina and Rita devastated the Gulf Coast in 2005, legions of lawyers from around the country converged on the stricken areas to provide pro bono assistance to people in need. At the same time, thousands of lawyers from Alabama, Mississippi, and Louisiana fled the devastation of their home jurisdictions and attempted to carry on their law practices temporarily while physically located in other states. Technically, by practicing in jurisdictions where they were not admitted, both the pro bono lawyers and the relocated lawyers were engaged in the unauthorized practice of law.

To address the problem, the ABA President formed the Task Force on Hurricane Katrina. The Task Force initially encouraged states to adopt emergency measures, which many states did, but the Task Force recognized the need for a permanent rule that would (a) allow out-of-state lawyers to provide pro bono legal

services in an affected jurisdiction and (b) allow lawyers in the affected jurisdiction whose legal practices had been disrupted by a major disaster to practice law on a temporary basis in an unaffected jurisdiction.

A new Model Court Rule on Provision of Legal Services Following Determination of Major Disaster to accomplish those dual purposes was drafted by the ABA Standing Committee on Client Protection, which was assisted by Stephen Gillers of NYU. (The draft was originally proposed in September 2006 as a new Rule 5.8 in the Model Rules of Professional Conduct, but comments persuaded the drafters to recast it as a model court rule.) At the ABA’s February 2007 Mid-Year Meeting, the House of Delegates voted to adopt the new model court rule. The full text of the rule and a helpful explanatory report are available on the home page of the [ABA Standing Committee on Client Protection](http://www.abanet.org/cpr/clientpro/home.html) at www.abanet.org/cpr/clientpro/home.html

ABA Model Code of Judicial Conduct: At the ABA’s February 2007 Mid-Year Meeting, based on three years of intense and often controversial work by the ABA Joint Commission to Evaluate the Code of Judicial Conduct, the ABA voted to adopt a comprehensively revised Code of Judicial Conduct. The Joint Commission’s Chair is attorney Mark I. Harrison of Phoenix, and its Reporters are Professor Charles Geyh of Indiana University School of Law and Bill Hodes, who was formerly a full-time professor there. The amendments are too pervasive and complex to summarize here. The full text of the amended Code of Judicial Conduct, as well as written comments, transcripts of

public hearings, the Joint Commission's reports, and other useful information about the Code of Judicial Conduct, are available on the Commission's home page at

www.abanet.org/judicialethics/home.html.

Federal Rules of Civil Procedure:

Important amendments to the Federal Rules of Civil Procedure took effect as scheduled on December 1, 2006. The amendments relate to problems of electronic discovery (not a core ethics problem, but frequently raising difficult ethics issues) and the inadvertent production of privileged information during discovery (a perennial problem that is also addressed by ABA Model Rule 4.4(b)). The most significant amendment is the following new Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure:

(B) *Information Produced.* If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

A related amendment to Rule 16(b)(6) provides that a district court's scheduling order may include "any agreements the parties reach for

asserting claims of privilege or of protection as trial preparation material after production;".

For more information about the amendments, and for official updates, new proposals, and background information regarding the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and other federal rules, visit the official web site of the U.S. Courts at

www.uscourts.gov.



DEVELOPMENTS IN THE STATES

Broad Trends: Over the past five years or so, many states have reviewed their ethics rules in light of the work of the Ethics 2000 Commission, the ABA Commission on Multijurisdictional Practice, and the 2003 amendments to ABA Model Rules 1.6 and 1.13. Since the Fall 2006 Newsletter was published in late November, two jurisdictions (the District of Columbia and Ohio) have comprehensively amended their ethics rules as previously scheduled; three jurisdictions (Connecticut, Rhode Island, and Wisconsin) have announced an effective date for comprehensive amendments; and five jurisdictions (Florida, Illinois, Missouri, New York, and Washington) have amended some ethics rules (mostly about advertising). Two states (Maine and Michigan) are in the late stages of considering comprehensive ethics rules amendments developed by bar committees. Finally, some states (like Florida and Virginia) always seem to be considering amendments. Details are below, state by state.

Another broad trend is the adoption of ethics rules or court rules requiring lawyers to disclose whether they carry professional liability insurance. In August 2004, when few states required lawyers to disclose their malpractice insurance coverage, the ABA adopted a Model Court Rule on Insurance Disclosure. Today, many states require some form of malpractice insurance disclosure, either on their bar registration statements or directly to clients, and other states are actively considering some form of legal malpractice disclosure rule.

For a state-by-state, up-to-date chart showing the status of rules and proposed rules governing disclosure of professional liability insurance coverage, see

www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf.

For a chart of state-by-state responses to the work of the Ethics 2000 Commission, visit

www.abanet.org/cpr/links.html. For

detailed information about developments in particular states, visit the web sites given after each state listed below, or find a link to individual state resources at

www.law.cornell.edu/ethics/listing.html,

www.abanet.org/cpr/links.html, or

www.legalethics.com. For now, here are some important developments that have occurred since the Fall 2006 Newsletter (as well a few developments that I missed when I wrote the Fall column).

Alabama (www.alabar.org): Effective September 19, 2006, Alabama quietly adopted a shortened version of ABA Model Rule 5.5. The amended rule provides, in essence, that an out-of-state lawyer does not engage in the unauthorized practice of law when the

lawyer represents a client on a “temporary or incidental basis” in Alabama with respect to “transactional, counseling, or other nonlitigation services.”

Arizona (www.azbar.org): Effective January 1, 2007, Arizona has adopted Supreme Court Rule 32(c), which is modeled on the ABA Model Court Rule on Insurance Disclosure – see http://www.supreme.state.az.us/rules/ramd_pdf/R-04-0025.pdf.

California (www.calbar.ca.gov, www.courtinfo.ca.gov, and www.leginfo.ca.gov): In June 2006, the California State Bar’s Board Committee on Regulation, Admissions and Discipline Oversight circulated for public comment a proposed new Rule 3-410, entitled “Insurance Disclosure,” that would require lawyers who are not covered by professional liability insurance to inform clients in writing of their lack of coverage. The Committee simultaneously circulated a proposed new court rule, Rule 950.6, which would require all lawyers to certify to the State Bar whether they are covered by professional liability insurance and whether they represent clients. The public comment period ended on September 15, 2006. Apparently nothing new has happened since then.

Effective April 1, 2007, a revised notice of [Client’s Right to Arbitration](#) form took effect April 1. By statute, lawyers must send such a notice form to the client before filing a lawsuit against a client to collect unpaid attorney’s fees and/or costs. The form advises clients of their right to request mandatory fee arbitration to resolve a pending attorney fee dispute.

In March 2007, the State Bar circulated for public comment proposed bar admission requirements for foreign-educated lawyers. Nothing in California's current bar admission rules addresses applicants educated outside the United States. The comment period expires on June 11, 2007.

Also circulating for public comment are proposed Rules Regulating Registration of Unaccredited, Correspondence and Distance Learning Law Schools in California. Current law requires unaccredited and correspondence law schools to register with the Committee of Bar Examiners if their students wish to receive credit for their law study for purposes of qualifying to take the California Bar Examination, but the registration requirements are minimal – they mainly require that the law schools be approved by the Bureau for Private Postsecondary and Vocational Education. In 2006, however, the California Legislature passed a statute that ends the Bureau's role in approving law schools and shifts the oversight and regulation of unaccredited and correspondence law schools to the Committee of Bar Examiners effective January 1, 2008. The proposed rules will help implement the new statutory mandate. The deadline for public comments is June 11, 2007.

The State Bar of California's Commission for the Revision of the Rules of Professional Conduct, which has been comprehensively reviewing California's unique rules since 2001, has not issued any new drafts since last June, but the Commission expects to release additional proposed rules for public comment periodically through 2008. The proposals use the numbering and format of the ABA Model Rules of Professional Conduct.

Connecticut

(<http://www.jud.ct.gov/PB.htm>): Connecticut comprehensively amended its Rules of Professional Conduct effective January 1, 2007. The new rules are available in the official 2007 Connecticut Practice Book at the website of the Connecticut courts.

District of Columbia (www.dcbar.org):

Effective February 1, 2007, the District of Columbia has comprehensively amended its Rules of Professional Conduct. The changes were based on recommendations by the D.C. Bar's Rules of Professional Conduct Review Committee, chaired by Professor Leah Wortham of Catholic University School of Law.

Florida (www.flabar.org): Effective January 1, 2007 (as announced in a November 2, 2006 order), the Florida Supreme Court adopted extensive changes to its rules governing lawyer advertising, incorporating most of the recommendations made by the Florida Bar's Advertising Task Force. But the court declined to amend Rule 4-7.6 ("Computer-Accessed Communications") because the Bar's Special Committee on Website Advertising Rules was still studying Internet advertising issues. On March 30, 2007, the Florida Bar's Board of Governors approved a proposed version of Rule 4-7.6, which will be filed with the Florida Supreme Court when the Bar files its biannual rules petition.

Illinois (www.isba.org): Effective June 1, 2007, the Illinois Supreme Court has amended Rule 1.15 to require lawyers and law firms to deposit nominal or short-term funds of clients or third parties in accounts at "eligible financial

institutions.” Eligible institutions “shall maintain IOLTA accounts that pay the highest interest rate or dividend available ... to its non-IOLTA account customers when (they) meet or exceed the same minimum balance or other account eligibility guidelines.” Illinois thus becomes the eleventh state to adopt a “comparability rule.”

Meanwhile, the Illinois Supreme Court is still considering comprehensive amendments to the Illinois Rules of Professional Conduct, which were unanimously recommended by the Illinois State Bar Association in June 2004.

Maine

(www.mebaroverseers.org/ethicsweb/ethicsmain.html): On November 6, 2006, Maine’s Task Force on Ethics 2000, whose Reporter is Professor Lois Lupica of the University of Maine School of Law, issued a complete draft of comprehensive amendments to Maine’s current ethics rules. The proposed rules conform to the structure of the ABA Model Rules, and to the language of the ABA Model Rules except where established Maine law and practice warrant divergence or variation. The Task Force is studying public comments (which were due by January 15, 2007) and anticipates submitting final recommendations to the Maine Supreme Judicial Court this year. In the meantime, Maine remains one of only three states (along with California and New York) that have not adopted the format and numbering system of the ABA Model Rules.

Michigan (www.michbar.org): The Michigan Supreme Court is still considering comprehensive amendments to the Michigan Rules of

Professional Conduct that were circulated by the court for public comment in July 2004. (The comment deadline expired more than two years ago, in February 2005.) “Clean” and “redlined” versions of the proposed amendments are available at www.michbar.org (click on the home page on “admissions, ethics and regulation,” then click on “Ethics Rules, Opinions and Resources,” then scroll down to “Ethics Rules”).

Missouri (www.mobar.org): On March 1, 2007, the Missouri Supreme Court approved comprehensive amendments to the Missouri Rules of Professional Conduct that will take effect on July 1, 2007. The rules generally bring the Missouri rules into line with the ABA Model Rules, except that Missouri did not adopt the 2003 versions of Rule 1.6 or Rule 1.13.

New York (www.nysba.org and www.courts.state.ny.us): Effective February 1, 2007, the New York Appellate Division adopted wholesale amendments to the New York Disciplinary Rules governing lawyer advertising. The new rules were written mainly by a special court-appointed committee that operated behind closed doors. Because the courts wrote the rules themselves in secret, legislative history is sparse. The courts did not hold public hearings and did not write any explanatory Ethical Considerations (ECs are adopted only by the voluntary New York State Bar Association, not by the courts); nor are the courts willing to release to the public the many comments submitted during the lengthy public comment period. However, a subcommittee of the State Bar’s Committee on Standards of Attorney

Conduct (COSAC) is drafting ECs to provide guidance on interpreting the new rules.

Also effective February 1, 2007, the courts amended DR 5-103(B) of the New York Code of Professional Responsibility to allow lawyers to advance litigation expenses “contingent on the outcome of the matter.” Until the amendment, New York was one of a handful of states sticking to the old Model Code formulation that permitted such advances only if “the client remains ultimately liable for expenses.” The amendment to DR 5-103(B) was inspired by an August 2006 amendment to New York Judiciary Law § 488 that expressly allows lawyers to advance litigation costs and expenses contingent on the outcome of a matter.

Meanwhile, proposals for comprehensive amendments to the New York Code of Professional Responsibility are moving ahead on schedule. The State Bar House of Delegates expects to forward the complete set of proposals to the courts late in 2007 or early in 2008. The proposals follow the format, numbering system, and much of the language of the ABA Model Rules of Professional Conduct.

Ohio (www.sconet.state.oh.us): Effective February 1, 2007, Ohio has adopted comprehensive new ethics rules using the format, numbering system, and much of the language of the ABA Model Rules of Professional Conduct. The new rules blend the ABA Model Rules, Ohio’s old Disciplinary Rules, and thoughtful improvements on both. A wealth of useful information about the amendments and their history is available at

www.sconet.state.oh.us/Atty-Svcs/ProfConduct/default.asp.

Rhode Island (www.courts.ri.gov): Effective April 15, 2007, the Rhode Island Supreme Court has comprehensively amended the Rhode Island Rules of Professional Conduct. The changes generally follow the recommendations of the ABA Ethics 2000 Commission, except that Rhode Island did not adopt the 2003 amendments to ABA Model Rule 1.6, and it adopted a significantly modified version of ABA Model Rule 5.4(a)(4), which permits fee sharing with non-profit groups. Rhode Island’s version of Rule 5.4(a)(4) provides:

[A] lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such an award, with an organization that referred the matter to the lawyer or law firm if: (i) the organization is one that is not for profit; (ii) the organization is tax-exempt under federal law; (iii) the fee award or settlement is made in connection with a proceeding to advance one or more of the purposes by virtue of which the organization is tax-exempt; and (iv) the tribunal approves the fee-sharing arrangement.

Also effective on April 15th is a new court rule requiring lawyers to disclose whether or not they carry legal malpractice insurance.

Utah (www.utahbar.org): On March 22, 2007, the Utah Supreme Court approved a proposal by the Utah State Bar to include questions about mandatory professional liability insurance questions on the annual licensing form for the next two years. Attorneys must respond to the

malpractice insurance questions “as a condition of licensure.” The court added: “The Court is considering possible future imposition of a rule requiring malpractice insurance. The data from the malpractice insurance questions is being collected to assist the Court in its consideration of this issue.” Also on the insurance front, Utah is apparently still considering a July 2005 proposal to amend Rule 1.4 (“Communication”). The amendment would require a lawyer who does not have professional liability insurance with limits of at least \$100,000 to “disclose this in writing to clients in the written fee disclosure provided to the client pursuant to Rule 1.5 and to the Utah State Bar in the annual licensing form.” If a lawyer has \$100,000 or more in coverage at the outset but the policy lapses or is terminated during the course of the representation, the lawyer “shall promptly notify clients and the Utah State Bar in writing.” On March 2, 2007, the Utah State Bar circulated for public comment a proposed amendment to USB 14-802(c)(3) in the Utah State Bar’s interesting unauthorized practice rule. The amendment would permit a non-lawyer to provide “clerical assistance to another to complete a form provided by a court when no fee is charged to do so.” Under the current rule, such assistance is permitted only regarding forms “for protection from harassment or domestic violence or abuse.” The proposed effective date is November 1, 2007. The proposal and comments are posted at <http://www.utcourts.gov/resources/rules/comments>.

Vermont (www.vtbar.org): On December 28, 2006 the Vermont Bar’s

Civil Rules Committee proposed that the Vermont Supreme Court, as part of the Rules for Licensing of Attorneys, adopt a rule requiring insurance disclosure. The Committee asked the court to consider requiring disclosure of both liability limits and deductibles.

Virginia (www.vsb.org): On January 16, 2007, the Virginia Supreme Court delayed the effective date of its new *pro hac vice* rule from February 1, 2007 to July 1, 2007. The Virginia Supreme Court is still considering proposed amendments to Rule 4.2 and the Comment to Rule 8.4 of the Virginia Rules of Professional Conduct.

Washington State (www.wsba.org): Effective April 24, 2007, Washington has amended Rule 1.8 (“Conflict Of Interest: Current Clients: Specific Rules”). Unfortunately, the web site does not indicate how the rule was amended. Also, effective July 1, 2007, the Washington Supreme Court has adopted a mandatory new insurance disclosure rule. For both rules, see http://www.courts.wa.gov/court_rules/?fa=court_rules.adopted.

Wisconsin (www.wisbar.org): On January 5, 2007, the Wisconsin Supreme Court announced that revised Rules of Professional Conduct for Attorneys will take effect on July 1, 2007. The amended rules do not adopt ABA Model Rule 5.5 regarding multijurisdictional practice, but on April 12, 2007 the Wisconsin Supreme Court will hold a public hearing on the issue. The hearing will focus on whether Wisconsin should adopt the Bar’s proposal, which generally tracks ABA Model Rule 5.5 but does not recommend that the Supreme Court

adopt ABA Model Rule 5.5(d) (1), which addresses the issue of in-house counsel. A link to the proposal is available at www.wicourts.gov/news/archives/2007/srule032707.htm.



INTERESTING CASE LAW DEVELOPMENTS

Fall/Winter, 2006-07

By Susan Carle (American University Washington College of Law)

GOVERNMENT LAWYERS' ATTORNEY CLIENT PRIVILEGE

In re Erie County, 473 F.3d 413 (2d Cir. 2007)

In a class action challenging the constitutionality of a county sheriff's office policy that subjected detainees to invasive strip searches without individualized suspicion, the county asserted attorney client privilege for certain email communications between government lawyers and public officials. The communications assessed the constitutionality of the county's strip search policies and proposed modifications in it. The court of appeals granted interlocutory appeal of the

district court's order directing the county to produce the documents on the grounds that the issue presented an important issue of first impression. The Second Circuit held that in civil litigation between a government agency and private litigants, the government is entitled to the protections of the attorney client communications privilege, and that such communications are protected to the extent that they are for the primary purpose of legal advice, even if other considerations are also discussed in them. The court remanded for consideration of whether privilege had been waived by distribution of the communications within the sheriff's department.

ATTORNEY ARBITRATORS

Positive Software Solutions, Inc v. New Century Mortgage Corp., 2007 WL 111343 (5th Cir. 2007)

The fact that an attorney serving as an arbitrator had failed to disclose that he had tangential involvement in a case in which a lawyer for one of the parties to the arbitration had been involved was not grounds for vacating the arbitrator's award. The court held that "in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding."

ATTORNEY SPEECH

Cadle Co. v. Schlichtmann, 448 Mass. 242 (2007)

Attorney Jan Schlichtmann (of *A Civil Action* fame) became involved in litigation with a debt collection company

over claims of debts he allegedly owed the company. Schlichtmann posted derogatory claims about the company on a web site he created, including a statement that the company employed “fraudulent practices to intimate” Massachusetts residents. The company sued Schlichtmann for defamation, tortious interference with contract and other claims. Schlichtmann filed a motion to dismiss under Massachusetts’ anti-SLAPP statute, which prohibits the filing of lawsuits solely to discourage a party’s exercise of its right to petition for redress of grievances. The Massachusetts Supreme Court denied Schlichtmann’s motion on the ground that he had failed to show that the claims filed against him had no substantial basis other than petitioning activities.

Alexander v. Cahill (N.D.N.Y.)

In a case that has not yet resulted in a reported decision, a New York law firm and the nonprofit group Public Citizen have challenged the constitutionality of New York’s recently amended rules on advertising and solicitation. The lawsuits allege that the rules discriminate against personal injury lawyers by prohibiting the use of comic devices such as jingles, special effects and jokes, and by imposing a 90-day waiting period on unsolicited communications to potential clients in personal injury cases.

ATTORNEY MALPRACTICE STANDARDS

Chapman v. Bearfield, 207 S.W.2d 736 (Tenn. 2006)

Following the holdings and rationales of other states, the Supreme Court of

Tennessee held that experts testifying in legal malpractice cases must be familiar with the statewide professional standard. The Court rejected the defendant’s claim that the plaintiff’s expert witness was not qualified because he did not demonstrate familiarity with the professional standard of care of attorneys in a particular region of Tennessee.

ATTORNEY ETHICAL MISCONDUCT

United States v. Nolen, 472 F.3d 362 (5th Cir. 2006)

In this tax protestor case, the defendant claimed that he did not owe federal taxes and was “domiciled in the sovereign Republic of Texas.” In the course of making a motion to dismiss the IRS’s charges, the defendant’s attorney made disparaging comments about the presiding judge. The judge revoked the attorney’s pro hac vice admission for violating a disciplinary rule that forbids lawyers from making false statements concerning the integrity of a judge. The Fifth Circuit remanded to the district court to conduct a balancing between the defendant’s Sixth Amendment right to counsel of his choice and the public interest in maintaining the integrity of and respect for the judicial process.

In re Lim, 210 S.W.3d 199 (Mo. 2007)

An immigration lawyer refused to give his clients a labor certificate he had obtained for them until they had fully paid the amount they purportedly owed him for legal services. The attorney also instructed a member of his firm to send a letter to his clients threatening to report them to the INS if they did not pay

his bill immediately, and sent a letter to the INS reporting that the clients lacked good moral character, had lied and deceived him and should not receive further immigration benefits. On these facts a majority of the Missouri Supreme Court held that the attorney had violated the state's disciplinary rules by withholding client property, but had not violated rules against disclosing client confidences or using information in a manner detrimental to a former client. The Court therefore rejected the disciplinary hearing panel's recommendation that the attorney be suspended for six months and imposed only a public reprimand instead. A concurring and dissenting opinion argued that the attorney had violated the prohibition against use of information to the disadvantage of a former client and should have been suspended from practice.

SHARING ATTORNEYS FEES WITH A NON-LAWYER PUBLIC INTEREST ORGANIZATION

Inmates of the Rhode Island Training School v. Martinez, 465 F. Supp.2d 131 (D.R.I. 2006)

The state legislature passed a statute permitting attorneys fees to be awarded to nonprofit organizations after a ruling of the Rhode Island Supreme Court concluded that attorneys fees could not be awarded to the Rhode Island ACLU because this would violate prohibitions against sharing attorneys fees with non-lawyers. The statute lacked a retroactivity provision, however, leaving unresolved the question of whether the ACLU, in a class action lawsuit it had won, could receive attorneys fees for the period between the state supreme

court's prior ruling and enactment of the new statute. The district court decided that the ACLU could receive such fees, reasoning that withholding such fees would frustrate the purposes of 42 U.S.C. §§1983 and 1988 and that these federal law provisions preempt state law under the Supremacy Clause.

UNAUTHORIZED PRACTICE

In re Reynoso, No. 04-17190 (9th Cir., Feb. 27, 2007)

The court held that the creator of a software program that produced bankruptcy petitions for consumers had both violated bankruptcy law and engaged in the unauthorized practice of law. The court pointed to several of the software creator's claims in reaching this conclusion, including his representations that the software program would provide legal expertise, offer advice on how to take advantage of "loopholes" in the bankruptcy law, and render services comparable to those of a "top notch bankruptcy lawyer." In addition, the software program selected exemptions for the debtor and supplied relevant legal citations, thus providing the kind of "personalized guidance" indicative of the practice of law.





RECENT SCHOLARSHIP
By Fred Zacharias
(University of San Diego)

Aldisert, Kirkpatrick, and Stevens, *Rat Race: Insider Advice on Landing Judicial Clerkships*, 110 PENN ST. L. REV. 835 (2006).

Anand, *Toward an Interpretive Theory of Legal Ethics*, 58 RUTGERS L. REV. 653 (2006).

Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: a "Foolish Consistency"?*, 111 PENN ST. L. REV. 1 (2006).

Berenson, *Creating Workplace Solutions for Women Attorneys: Report of the Lawyers Club of San Diego Balance Campaign*, 28 T. JEFFERSON L. REV. 449 (2006).

Brownie, *The Work of an International Lawyer*, 45 COLUM. J. TRANSNAT'L L. 1 (2006).

Calleros, *Patching Leaks in the Diversity Pipeline to Law School and the Bar*, 43 CAL W. L. REV. 131 (2006).

Choi and Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 765 (2006).

Craco, *"Carpe Diem": an Opportunity to Reclaim Lawyers' Independence*, 27 PACE L. REV. 1 (2006).

Daniels and Martin, *Plaintiffs' Lawyers, Specialization, and Medical Malpractice*, 59 VAND. L. REV. 1051 (2006).

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