

## RECENT SIGNIFICANT ETHICS CASES AND ARTICLES

This is a continuation of *The Journal of the Legal Profession's* yearly survey and report of recent legal ethics opinions and cases. The purpose of this series is to point out important and noteworthy cases involving questions of legal ethics which have been decided within the past year. Although regulation of legal ethics is traditionally a matter of state concern, through these opinions, a practitioner can get some feeling for how various jurisdictions have interpreted ethical rules in certain case situations.

I. This is the only formal opinion since December 31, 1984.

ABA Comm. on Ethics & Professional Responsibility, Formal Op. 85-352 (1985) (Tax Return Advice; Reconsideration of Formal Op. 314).

II. Vicarious Liability - Partnership

*Roach v. Mead*, No. 532368 (Or. Sup. Ct. filed July 29, 1986) (The law partner borrowed \$20,000 from a client without advising the client about the legal effects of an unsecured loan and a usurious interest rate. The client believed that investment advice was part of the partnership's legal services. The court held that the partner was not acting outside the scope of the partnership and that an attorney may be held vicariously liable for the negligence of a law partner in providing services that the client believes to be part of the business of the law partnership).

III. Client Perjury

*U.S. v. Henkel*, No. 85-2008 (7th Cir. filed Aug. 26, 1986) (An attorney may seek to withdraw for undisclosed "professional" reasons prior to a client testifying. The request for withdrawal indicated, due to the particular circumstances, that the defendant intended to commit perjury. The court held that the attorney-client privilege was not violated where the reason for withdrawal became devious and that the withdrawal did not violate the defendant's

right to counsel).

#### IV. Where Representation Would be Adverse to Former Client

*Behunin v. Dow Chemical Co.*, No. 86-R-281 (D. Colo. filed Aug. 21, 1986) (A law firm that had to withdraw from a products liability suit as the plaintiff's counsel because it had formerly represented the defendant in a totally unrelated situation, may properly turn over its work product to new counsel. Whether the harm to the adverse party is mitigated by allowing the work product to be turned over should be determined by a case to case analysis).

#### V. Where Attorney's Interest is Adverse to the Client

*U.S. v. Ellison*, No. 85-1930 (7th Cir. filed Aug. 21, 1986) (The attorney had advised the criminal defendant to plead guilty in order to avoid causing trouble with the federal prosecutors with whom the attorney would have a continuing relationship. At the hearing on defendant's motion to withdraw his guilty plea, the attorney's representation was a conflict of interest and ineffective assistance of counsel under the sixth amendment).

#### VI. Suspension for Lawyer Misconduct

*Gershenfeld v. Sup. Ct. of Pa.*, No. 86-3473 (E.D. Pa. filed Aug. 19, 1986) (The Pennsylvania Supreme Court had emergency power to suspend an attorney without an adversarial hearing while full disposition of the issues might not be resolved for up to two years. The Court held that the due process clause of the fourteenth amendment was violated and that an attorney is deprived of a property right when he is not given a hearing prior to suspension. Due process also requires that a prompt postsuspension hearing be given with a final decree following soon thereafter).

#### VII. Attorney's Authority to Settle

*Edwards v. Born, Inc.*, No. 85-3312 (3d Cir. filed June 11, 1986) (An attorney may have the power to settle a client's case without the client's presence on grounds of express actual authority, implied actual authority or apparent authority).

#### Recent Informal Opinions

These titles come out of ABA/BNA Lawyer's Manual on Pro-

fessional Conduct.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1520 (1986) (Assertion of Attorney Lien Pending Fee Payment; Informal Op. 1461 Reconsidered and Withdrawn).

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1519 (1986) (Fee Sharing With Business Corporation for Legal Research and Analysis Service).

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 86-1515 (1986) (Operation of Booth for Preparation of Simple Wills at State Fair).

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 85-1514 (1985) (Use of Preferred Stock Dividend or Limited Partner Distribution for Division of Fees Between Lawyers not in the Same Firm).

#### Recent Law Review Articles

Abbott, *Proposed Changes in Rules Governing Professional Conduct in Kansas*, 54 J. KAN. B.A. 8 (Spring 1985).

Adler, *The Ethics of Perjury*, 71 A.B.A. J. 76 (Nov. 1985).

*An Equitable Alternative to the Discriminatory Imposition of Vicarious Firm Disqualification*, 31 WAYNE L. REV. 1031 (1985).

*Attorney Disqualification for a Conflict of Interest in Federal Civil Litigation: A Confusing Body of Law in Need of Organization*, 30 VILL. L. REV. 463 (1985).

*Bias and Interest: Should They Lead to Dissimilar Results in Judicial Qualification Practice?* 27 ARIZ. L. REV. 171 (1985).

Biernat, *Why not Model Rules of Conduct for Law Students?*, 12 FLA. ST. U.L. REV. 781 (Winter 1985).

Blank, *Conflicts and Ethics*, 6 PROB. L.J. 277 (1985).

Brooks, *Penalizing Judges Who Appeal Disciplinary Sanctions: The Unconstitutionality of "Upping the Ante,"* 69 JUDICATURE 95 (1985).

Bulmer, *The New Rules of Professional Conduct*, 39 WASH. ST. B. NEWS 14 (Oct. 1985); 40 WASH. ST. B. NEWS 13 (Feb. 1986).

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Chemersky, *Training the Ethical Lawyer: A Rejoinder to Schneyer*, 1985 A.B.F. RES. J. 959 (1985).

*Constitutional law—attorney advertising—targeted mailings—a blanket prohibition of direct mail solicitations to targeted*

*accident victims violates an attorney's right of expression under the first and fourteenth amendments of the United States Constitution: In re Wiegen*, 470 N.E.2d 838 (N.Y.), 51 J. AIR L. & COMM. 661 (1986).

Denniston, *When Your Client Lies*, 6 CAL. LAW. 55 (1986).

Dobris, *Ethical Problems for Lawyers upon Trust Terminations: Conflicts of Interest*, 38 U. MIAMI L. REV. 1 (Nov. 1985).

DR 1-103: *Lawyer's Duty to Report Ethical Violations*, 10 J. LEGAL PROF. 159 (1985).

Elkins, *Ethics: Professionalism, Craft, and Failure*, 73 KY. L.J. 937 (1984/1985).

Elkins, *The Pedagogy of Ethics*, 10 J. LEGAL PROF. 37 (1985).

*Ethical Considerations of Divorce Mediation: Formal Ethics Opinion No. 488*, 21 WILLAMETTE L. REV. 645 (1985).

Falk, *Tax Ethics, Legal Ethics and Real Ethics: A Critique of ABA Formal Opinion 85-352*, 39 TAX LAW. 643 (1986).

Fitzhugh, *To Win Your Case, Waive Your Fees*, 71 A.B.A. J. 44 (Dec. 1985).

Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 VAND. L. REV. 275 (1986).

Gaetke, *Why Kentucky Should Adopt the ABA's Model Rules of Professional Conduct*, 74 KY. L.J. 581 (1985/1986).

Gillers, *What We Talked About When We Talked About Ethics: A Critical Overview of the Model Rules*, 46 OHIO ST. L.J. 243 (1985).

Goldstein, *Becoming a Judge: Problems with Leaving a Law Practice*, 69 JUDICATURE 88 (Aug. 1985).

Gross, *Ethical Problems of Law Firm Associates*, 26 WM. & MARY L. REV. 259 (Winter 1985).

Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181 (1986).

Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13 (1986).

Hauser, *A Deal is a Deal is a Deal*, 74 ILL. B.J. 176 (Dec. 1986).

Haynsworth, *Disciplinary Actions by the South Carolina Supreme Court and the Board of Commissioners on Grievances and Discipline: Lawyers Beware*, 36 S.C. L.REV. 309 (Spring 1985).

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*In re Utah State Bar Petition* [647 P.2d 991 (Utah)]: *Pursuing a Chimeric and Ultimately Unconstitutional Goal*, 11 J. CONTEMP. L. 547 (1985).

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Johnston, *Estate Planners' Accountability in the Representation of Agricultural Clients*, 34 U. KAN. L. REV. 611 (1986).

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*Reality of Self-Regulation Under the ABA Code of Professional Responsibility*, 53 *INS. COUNSEL J.* 72 (Jan. 1986).

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