Report of Committee on Ethics

Since the last Annual Meeting of the Association, this Committee has been involved with the following:

1. *Program.* The Committee has planned a program for presentation during the Association's Annual Meeting in May 1986.

This program will concentrate on developments occurring after the American Bar Association's approval of the new ABA Model Rules of Professional Responsibility in 1983. Special attention will be devoted to current proposals within the District of Columbia Bar Association for revision of the Code of Professional Responsibility applicable in the District of Columbia, and to the effect the new model rules and current proposals will have on members of the Association. Attention also will be directed to recent cases involving authority of a federal agency to discipline an attorney and an attorney's obligation to the forum and the client in situations presenting apparent conflict in these obligations.

Participants will be Robert E. Jordan, III, Chairman of the D.C. Bar Association's Committee which prepared the recommended revisions of the D.C. Code and a member of this Association, and Lewis Carroll, former Vice President and General Counsel of Washington Gas Light Company and a member of this Association. Moderator will be Thomas G. Johnson, Chairman of the Association's Committee on Ethics.

2. *Monitoring of Developments.* The Committee has continued to monitor orders and actions of the FERC and DOE for developments within the scope of this Committee's functions. During the current Association year, no such orders or actions have been noted or brought to the Committee's attention.

We do, however, call attention to the following court decisions which will be of interest to the membership:

A. *Theodore Polydoroff, et al.* v. *Interstate Commerce Commission, et al., No. 84-1183, D.C. Circuit, September 24, 1985*

The court affirmed orders of the Interstate Commerce Commission imposing disciplinary sanctions on two attorneys who had represented trucking companies in administrative proceedings before that agency.

The complex facts had given rise to allegations of improper representation of companies in a dual and conflicting capacity in the agency's proceedings on competitive authorization applications. After civil litigation against the attorneys based on the attorneys' conduct was dismissed by a Maryland district court, disciplinary proceedings were initiated by Virginia state bar authorities but were dismissed on the ground that the evidence could not support an allegation of misconduct under Virginia's "clear and convincing" evidentiary standard.

Thereafter, the Interstate Commerce Commission initiated its own investigation which was followed by a hearing before an Administrative Law Judge. The ALJ ruled in favor of the attorneys, but the ICC reversed and issued a decision suspending and reprimanding one of the attorneys.

On appeal, the D.C. Circuit held that (i) the ICC, "like any other institution in which lawyers or other professionals participate, has authority to police the behavior of practitioners appearing before it"; (ii) this conclusion is supported by Section 500(d)(2) of the Administrative Procedure Act; (iii) the ICC properly applied its Canon 9 which addresses conflicts in representation; (iv) the ICC canon is consistent with and supported by the ABA Code and Rule 1.7 of the more recently adopted ABA Model Rules of Professional Conduct; and (v) the petitioners' objections as to procedures below and severity of the sanction were without merit.

B. *Nix v. Whiteside,* ___ *U.S.* ___, *54 U.S.L.W. 4194 (1986)*

The Supreme Court concluded that a lawyer who dissuaded his client from giving perjured testimony in a state criminal trial did not deprive his client of effective counsel in violation of the Sixth Amendment.

Prior to trial, the defendant advised his counsel of his intention to testify that he had seen "something metallic" in the victim's hand prior to a stabbing by the defendant. The attorney believed such testimony would be perjury and advised his client that if he so testified, the attorney would inform the court and seek to withdraw as counsel. The defendant did not testify as he had stated he would, was convicted, and thereafter raised the Sixth Amendment question in a federal *habeas corpus* proceeding. The 8th Circuit agreed with the defendant, but a unanimous Supreme Court reversed, dividing sharply as to grounds and reasoning.

The opinion by Chief Justice Burger found no error by the trial attorney and no prejudice to the defendant. The Court concluded that the attorney's conduct had been within accepted standards of professional conduct, and further that even a breach of an ethical standard may not give rise to a violation of the Sixth Amendment's protection of the right to effective counsel. The opinion cites and relies upon state code provisions applicable to an attorney's obligations to the client and to the forum and upon the ABA Code.

Three justices joined Justice Blackmun in concurring in the judgment on the ground that no prejudice had occurred, but criticizing the majority opinion for implied adoption or expression of statements of standards of professional conduct applicable to attorneys in state proceedings. Justice Brennan, in a separate opinion, stated that the Court has no authority to establish such standards applicable in state courts; and Justice Stevens, in a separate opinion, concluded that acceptable attorney actions in such cases could well be colored by the particular circumstances.

The Committee will continue its monitoring and reporting role in the new Association year.

Thomas G. Johnson, *Chairman*
Carroll L. Gilliam, *Vice Chairman*

George F. Bruder
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