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Caveat, October 1989

GOLDEN GATE UNIVERSITY

CAVEAT

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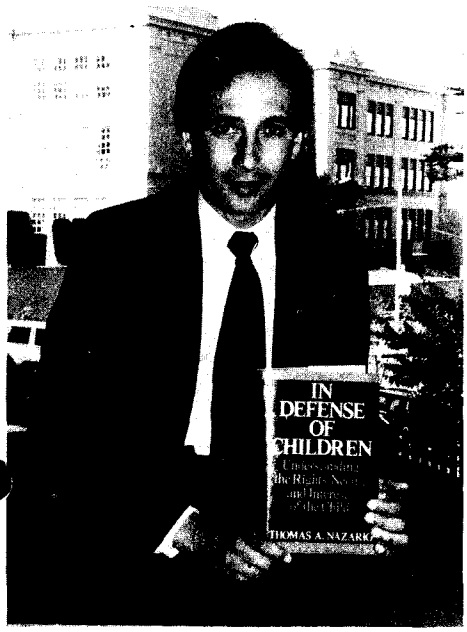
HONEST LAWYER



by MARY RANDOLPH
Reprint Courtesy of Nolo Press, Berkeley, CA.

Most of the kids Tom Nazario grew up with on the streets of Spanish Harlem and the South Bronx went straight from school to dead-end jobs. Or to crime. Nazario became a teacher and a lawyer--but he's never turned his back on the kids who need, as he did, someone to show them they have a future off the streets and out of jail.

Nazario now trains law students to teach Street Law to high school students, 80% of whom are poor or members of minority groups, in 41 high schools in the San Francisco area. The students learn practical information about housing law, consumer rights and other areas. But more important, many of these students never believed they

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PEOPLE DON'T LIKE YOU AND THEY NEVER HAVE

by ANDREW and JONATHAN ROTH
Reprinted Courtesy of Nolo Press, Berkeley, CA.

Lawyers are upset. They have discovered what they believe to be an alarming new trend: People don't like them. The American Bar Association recently appointed a special panel to investigate the legal profession's bad image. The California State Bar has commissioned a survey to find out why so many people dislike lawyers. Many legal conventions now regularly include sessions on the public's negative perception of lawyers.

We wish to reassure lawyers. This wave of anti-lawyer feeling is nothing new. People have always hated you.

The Ancient World

The great civilizations that sprang up in ancient times--in Mesopotamia, Egypt, India, China and elsewhere--all had law courts and plenty of laws. But in those happy times, there was not a single lawyer to be found on the globe. Those involved in lawsuits or accused of crimes represented themselves. The plaintiff stood and stated a case, and the defendant gave a reply. The judge, who might be a priest, a governor or sometimes even the King, would ask questions of each side to discover the truth--a concept difficult for the modern lawyer to grasp.

Lawyers Are Invented:
Rome Begins To Fall

During the rise of Rome, its citizens involved in lawsuits pleaded their own cases, as was true everywhere in the ancient world. But like the Greeks, the Romans could call on legal experts to assist in a case. These experts were called *advocati* --

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INSIDE

HOLLYWOOD LAW --- WHAT IS THE IMPACT ?

This year, the **Caveat** will not be reviewing movies, unless they have some relevancy to the legal profession. If the movie does meet this criterion, the movie should be critiqued not only for its ability to entertain, but also upon its accuracy in depicting those issues or people in the Law. Now back to the subject at hand. In the past year, I have twice heard someone say that they believe the increased attendance in law school can be attributed to the show "L.A. Law". This should raise a concern in the profession, because most shows dealing with the subject of legal professionals rarely show the public an accurate depiction of what an attorney's day is really like. Take as an example the movie "Physical Evidence": (Just released in video stores) This movie had essentially three areas of complaint for this viewer: One, it has the police conducting a search without a warrant and without illustrating probable cause based upon the idea that a police officer would always grant his consent to a fellow cop to search his place, no matter what the reason may be. Two, it gives the viewing audience the idea that attorneys go to law school for three years to learn the law, so that when they graduate and pass the bar, they can completely disregard what they have learned and act in a contrary manner. And finally, it gives people the impression that Public Defenders have only one client apiece, they do their own investigation work, and they develop personal relationships with their clients. While it may make for a good story, it provides a grave distortion of the truth. In an upcoming issue of the **Caveat**, I hope to present an article which demonstrates the average work experience of a public defender.

Lets start with my first complaint. "Physical Evidence" stars Burt Reynolds as a cop on suspension for putting his partner through a plate glass window as he was attempting to shoot an unarmed man. This in itself, should have put Burt's character on notice about granting consent to search his apartment if he gets suspended for preventing an unarmed person from being shot, instead of the officer who was attempting to do the act. After all, isn't shooting an unarmed man attempting to runaway an illegal use of deadly force? Anyway, in the beginning, Burt's character, Joe Paris wakes up one morning with a hangover to find his fellow cops searching his apartment without a warrant. They are looking for evidence in a murder case; which of course they find in his apartment. You are never given what probable cause they have for coming to his apartment either with or without a search warrant. There is no information given prior to the search that links Reynolds to the crime, except for the fact that the murdered victim was not well liked by Reynold's character. Later you learn, that most people did not like the murdered victim, so why was Reynold's character chosen as the guilty party? As I said before, you are never told what probable cause leads the police to suspect Reynold's character has committed the act.

Next enters Theresa Russell as the Public Defender. Throughout the movie, she is dressed in varying shades of gray. (Even her lounging clothes were gray.) I take it back, I think in one scene, she wore a black suit to break up the monotony. Again this illustrates Hollywood's stereotyping of legal professionals. In this instance, female attorneys as people who always wear the same color of suits as their male counterparts. However, if you were to interview female attorneys, you would find that their wardrobe is diverse in both color and style; it is not limited to grays and blacks. Or even browns and navy blue for that matter. Look at Gloria Allred. In one scene. towards the beginning of the movie, the P.D. receives an offer to plea bargain: The charge is first degree murder, the D.A. offers a plea of second degree murder (The character Reynolds plays has a quick temper, therefore, the D.A. is willing to believe the crime might have been committed in a fit of uncontrolled anger.) and he will have to serve three years and be out on good behavior. (With his temper?) A few scenes later, the Chief Public Defender is reading her the riot act, because she will not accept the D.A.'s deal. The client is the person who must accept or reject the D.A.'s deal, not his attorney, because it is his sixth amendment right to a trial by jury which are being waived, not an attorney's right to try a case and make a name for herself, as this movie implies. What disturbed me the most about this movie is that it pays lip service to the law, but does not understand the words the characters are mouthing. Hollywood fails to comprehend the true function of a defendant's attorney in a criminal case: In one scene Russell's character says: "I think he's guilty." It is not the lawyer's function to judge her client. The defendant is innocent until proven guilty. It is the prosecutor who must prove the defendant's guilt: It is not the function of the defendant's lawyer to prove him innocent. The defense attorney only has to show reasonable doubt to the jury regarding the prosecution's case against her client; not the guilt of an alternative party.

However, I have digressed, to return to my original concern, which has prompted this editorial: **What is the effect of the media upon those who choose to enter the legal profession?** How does the media's constant distortion of this profession lead people to perhaps make this choice in error? And how many are truly surprised by what attorneys actually do in their profession? Will we at some point began to see life imitating art? Please write to me and tell me your thoughts on these questions. I will look forward to reading them, and will attempt to print as many as possible in an upcoming issue of the **Caveat**.

Thank you
Ruth G. Holloway-Garcia
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PEOPLE DON'T LIKE LAWYERS.....

FROM PAGE 1

literally, "men called to one's side." In the Second Century BC, a fateful step was taken. In some cases, an *avocatus* could speak on another's behalf in court in exchange for a fee. This was the birth of the paid mouthpiece, the tongue for hire, the juridical mercenary, the lawyer *qua* lawyer.

"When you have no basis for an argument, abuse the plaintiff." --Cicero (106-43 BC) Roman Consul

The Middle Ages
Friendly Representation

Anglo-Saxon law was based on trial by ordeal, in which the accused were exposed to physical dangers supposed to be harmless to the innocent. Not surprisingly, there were few lawyers to be found when question of guilt or innocence depended upon being thrown into a lake, plunging a hand into boiling water, or carrying a red-hot iron bar in the palm. But these early Germanic legal procedures came in two parts: Before the actual ordeal, there was a proceeding to hear the two sides, decide if there was need for a trial and pinpoint the actual issues involved. Defendants or plaintiffs could bring along friends to verify their oaths. Eventually, it seems, these people began not only to attest to an oath, but to speak in favor of their friends. From here it was just a short step to the ancestor of the modern attorney, the professional "friend" for hire.

Hurry Up and Die

Meanwhile, on the Continent, Roman law and the causidici and *advocati* that lurked upon it survived the fall of the Roman Empire. Standing above these courts, however, there were now "barbarian" kings who did not often hesitate to intervene to oil the slow grinding wheels of the law. An anecdote told by a Byzantine historian took place in the days of King Theodoric (c. 454-526), who founded the Ostrogothic Kingdom in Italy:

Juvenalia was a woman of senatorial rank who for thirty long years had been involved in a lawsuit with a patrician named Firmus. Finally Juvenalia petitioned the King for a speedy settlement of the case. Theodoric summoned the lawyers for each side and gave them two days to settle the case, under penalty of death. Thus motivated, the lawyers worked out a judgment within the time limit. Afterwards when Juvenalia came to thank the King, he summoned the lawyers. "Why," he asked, "did you not do in thirty years what you have done in two days?" When they were unable to answer, he had them executed.

Call Me Irresponsalis

Norman civil courts required plaintiff and defendant to plead their own cases, but on rare occasions, granted only by royal writ, substitutes could appear. By the Thirteenth Century, the idea that people with disputes had direct access to the tribunals established to resolve them was all over. Lawyers had come to dominate the courts.

The headaches started immediately. In 1240, the Abbot of Ramsey declared that none of his tenants was to bring a pleader into his courts to impede or delay justice. A revealing pronouncement of 1275 threatened imprisonment for the attorney guilty of collusive or deceitful practice. In 1280, the mayor and aldermen of London lamented the ignorance and ill manners of the lawyers who practiced in the civic courts, and promised suspension for any who took money with both hands or reviled an antagonist.

The Sixteenth and Seventeenth Centuries
Too Much of a Bad Thing

For many tortuous centuries, the law and the courts of England grew unrestrained--a hodgepodge of historical accident, capricious whim, political maneuvering and archaic tradition raveled together without rhyme or rationale. By the Sixteenth Century, the British citizen staggered amidst a sprawling, lumbering and confusing legal system. Myriad courts functioned simultaneously with ill-defined and overlapping jurisdictions, different procedures and independent court personnel.

And of course, to guide the guileless through this Chinese puzzle, there were lawyers. Lawyers in bewildering, stunning variety: attorneys, serjeants-at-law, apprentices, prothonotaries, pleaders, filazers, solicitors,

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.....AND THEY NEVER HAVE!

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utter-barristers, and inner-barristers. And still more. Some could practice in all courts, some could practice in some but not others, some only one, some never saw a courtroom inside or out; some had training, others none; some only wrote, some only pleaded; some considered it unseemly to have contact with a client, others were out groping for business at every fair and market. Scholars are still rummaging about in the dusty writs left behind, trying to make sense of it all.

"I wish the law written in one vulgar language; for now it is an old mixt and corrupt language only understood by lawyers." --James I (1566-1625), King of England and Scotland.

Unsloppy Copying

Most legal proceedings of this time involved no oral arguments, but were instead exchanges of written pleadings. Legal proceedings generated mountains--verily, mountain ranges--of complaints, pleas, answers, demurrers, briefs, exceptions, replies and other such documents. No problem--lawyers charged by the page. Complained a writer in 1647: "I did see an answer...of forty sheets which [recopied in normal writing] was brought down to six sheets."

The Eighteenth Century
Storms of Forms

Never a model of efficiency, by the Eighteenth Century, the English legal system had become ossified and perverse. Form had completely overrun content. Before any legal action began, there was an elaborate and unbending ritual called "special pleading." This consisted of each side presenting specific pre-fab forms and then in turn attesting to a certain argument or defense.

Litigants lost in this paperstorm of Declarations, Avoidances, Pleas in Confessions, Replications, Rejoinders, Surrejoinders, Rubutters, and Surrebutters could seek shelter only in the arms of a lawyer, the very character who raised the wind in the first place.

Hard Times for Crimes

While many people consider the Eighteenth Century to be the Age of Reason, in many respects British legal procedure had not changed since the Middle Ages. Those accused of crimes were confined along with convicts in primitive filthy cells and compounds. Everyone was thrown together regardless of sex, age or charge. The jailors rarely fed the inmates, and the accused who had no money or relatives willing to bring them food were liable to starve. Various methods of torture were still used both to obtain confessions and to punish. The number of capital offenses had grown from about fifty in 1688 to over 160 in 1765. The death penalty was imposed, for example, for stealing five shillings, for fortune-telling and for destroying a fishpond.

"I do not care to speak ill of a man behind his back, but I believe the gentleman is an attorney." --Samuel Johnson (1709-1784), English lexicographer

American Freedom a Setback for Lawyers

The American Revolution, which introduced an era of previously unknown freedom for the common person, was the beginning of a period of decline for the legal profession. This is partly because most of the lawyers sided with the King rather than the Continental Congress. Thomas Jefferson wrote to James Madison: "Our lawyers are all Tories." Many lawyers left for England or Canada after Yorktown. There are no reports of sorrow at this exodus.

Another reason for the decline was that Americans viewed the English legal system, with its formal rules and emphasis on technical procedure, as fundamentally undemocratic. They were right. There was tremendous opposition to the adoption of English law, and particularly an English-style bar in America.

Many people felt that individuals should represent themselves in their legal disputes. A self-help law book entitled *Every Man His Own Lawyer* was a bestseller in the young United States, going into a ninth edition by 1784.

The Nineteenth Century
The Age of Brass

The first half or so of the Nineteenth Century has always been considered by legal scholars to be the Formative Era of American law. The names of

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PEOPLE DON'T LIKE LAWYERS

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John Marshall, Daniel Webster, Lemuel Shaw and other "heroes of the law" echo through unctuous legal histories. Lawyers at the time smugly congratulated themselves on the progress of the profession, but the country as a whole remained unimpressed.

"Lawyers, I suppose, were children once."
-- Charles Lamb (1775-1834), English essayist and critic

Lawyers Manifest Their Destiny

The appearance of the great railroad ventures in the late Nineteenth Century provided American lawyers with the first taste of the gravy train called corporate law. But the new corporate lawyer was on a long-term retainer and got paid whether working or not. Free at last. No more scratching about for business or enduring lean times. No more time and energy devoted to the courtroom. The new lawyer became less a hired gun and more a hired hand -- someone who scoured the dusty tomes of the law to find the exceptions, qualifications, refutations, and misprints that would allow a corporate sponsor to exploit and monopolize.

From the Turn of the Century to World War II
Great Advancements in the Legal Profession

As the century turned, American lawyers were finding personal injury cases increasingly lucrative. Their usual cut had risen from the 15 to 20 percent common in the Nineteenth Century to 40, 50 and even 60 percent. Still, since the bar association banned advertising by lawyers, they had trouble hooking up with profitable injured parties.

A young man named Abraham Gatner -- who interestingly enough, was not a lawyer -- solved the problem. In 1907, he persuaded a Manhattan law firm to hire him to track down accident victims. Gatner's method was to go through a list of accidents he received each morning from a police reporter, who was tipped a dollar. To describe this new professional advancement, Gatner coined the term "ambulance chasing." Soon attorneys started to eliminate the middleperson by working directly with ambulance drivers, hospital attendants and doctors.

"Litigation: A form of hell whereby money is transferred from the pockets of the proletariat to that of lawyers." --Frank McKinney Hubbard (1868-1930), author and journalist

From World War II To the Present
The Briefly Popular Lawyer

The 1940s through the '60s were extraordinarily successful years for the legal profession. In stature, in income and in numbers, lawyers did increasingly well. Indeed, it was something of a Golden Age for the bar--a time when an attorney could be admired for a razor-sharp intellect, faultless deduction and professionalism, as well as for being a member of the best country club.

But while it was a Golden Age for many lawyers, not everyone was taken in by the glitter. By the late '60s, a public backlash had begun. To a great extent, lawyers were victims of their own success. They began to make too much money, pricing themselves beyond the reach of their greatest boosters--the middle class--and providing little or no service to the working class or poor. Although most trial lawyers believed, and many still believe, that they stood shoulder to shoulder with their victimized clients against the big guys and fat cats, most poor and increasingly the middle class began to see lawyers as big guys and fat cats themselves.

Justice For All, Except...

A dual refrain of the bar is that lawyers are always ready to defend a client no matter how unpopular--and that they deserve admiration for this principled stand. This of course, is nonsense; the great majority of established lawyers will not go near any but the most respectable clients and cases. Even the country's biggest bar association does not live up to its own bombast. In 1950, the American Bar Association's House of Delegates, the group's parliament, decided to expel from the ABA any lawyer "who is a member of the Communist Party of the United States or who advocates Marxism-Leninism." Three years later, the ABA carried its inquisition even further and urged the profession to disbar Communist lawyers.

HONEST LAWYER: TOM NAZARIO

FROM PAGE 1

could escape the poverty that has trapped their families. The program helps give them the confidence to try for college and a better life.

Nazario, a soft-spoken man of Cuban and Puerto Rican descent, got his first help from a teacher in his New York City high school, who noticed his promise and encouraged him. Another, albeit unintentional push came from a girl Nazario had a crush on. When she asked him where he was going to go to college, he didn't want to admit he hadn't planned on continuing his education. He enrolled in the City University of New York.

Nazario stayed at City University for graduate school, where he studied political science and began working for a commission that investigated corrupt police. His job was to gather evidence. "I took pictures of cops sleeping or reading the newspaper in patrol cars," he recalls. Sometimes the goldbricking cops were alert enough to catch him; his camera was smashed and he was roughed up on several occasions.

Nazario went west for law school, graduating from the University of San Francisco in 1975. After graduating, he did criminal defense work as a public defender for two years. He also served as a consultant for the NAACP and MALDEF (the Mexican American Legal Defense and Education Fund) on the problems of delinquency and the lack of quality education available to minority students.

The private sector--working in a big law firm for a big salary--never seriously tempted Nazario. "The money was fascinating because I'd never had any," he admits. "But pushing paper around for big companies wasn't what I wanted to do."

The Street Law Program began in 1977, when Nazario and Ray Shonholtz (who also started San Francisco's neighborhood mediation service, Community Boards) talked the University of San Francisco Law School into sponsoring it and got funding from a foundation grant. Their model was Georgetown University's Street Law Program, the first in the country. There are now about 32 such programs nationwide; the San Francisco program is the largest.

Greater Expections

One key to the program's success is that it does not just send well-meaning but untrained law students into the high schools. Nazario, a certified teacher who has also taught in elementary and secondary schools, carefully prepares the law students and works with them throughout the semester they teach. The subject matter comes from the textbook Nazario wrote, *Street Law*, which is put out by a major legal publisher. It contains information on family, housing, consumer, constitutional and criminal law.

Although the law students who teach them serve as role models for the high school students, Nazario believes that those who have never been challenged can do more than they ever thought they could--and the confidence that instills may change their lives.

Reaching students while they are in high school is crucial, says Nazario, because that's when they have to make major decisions about college and career. He estimates that of 2,800 students who take the course every year, 10% are inspired to opt for school and jobs.

The program is now reaching a group of youngsters who are most in need of both legal information and positive reinforcement. Taking Street Law has been made a condition of probation for juvenile offenders in the city of Oakland, across the bay from San Francisco.

Teaching the Teachers

The student teachers, according to Nazario, also learn the nuts and bolts of several areas of law which are rarely taught in the theory-oriented law schools. "Law students are too busy learning about things like copyright theory," says Nazario. "But they're told that as lawyers, it's important to pretend they know what they're talking about when people ask them questions."

Another benefit of teaching Street Law is that for once, these aspiring lawyers get to talk to people outside the cloistered world of the law student. "It's ironic," Nazario says, "you can go all through law school and never talk to anybody--and yet lawyers call themselves counselors."

Although students eagerly sign up to teach Street Law and to take the courses Nazario teaches on Children's Rights, Education Policy and other subjects, he sees a trend away from a commitment to public service. "In the early seventies, students were very different; maybe 30% cared a lot about making money. Now, it's more like 60 or 70%," he says.

Beyond Street Law

Nazario's efforts to bring the law to people don't stop with high school students. He has just finished an eight-year labor of love--researching and writing *In Defense of Children: Understanding the Rights, Needs and Interests of the Child.* The book is an exhaustive guide to the law that affects children, including the right to parental leave, a child's right to an education and the rights of terminally ill children.

Between talk show appearances touting his recently published book, Nazario is thinking about what projects to tackle next. His ideal job, he says, would be to run a foundation that funds money for projects benefiting children. Another dream is to originate a public television series based on children and the law, along the lines of the "Cosmos" series about space. "I'd like to be the Carl Sagan of children." he says.

CALIFORNIA SUPREME COURT WATCH

by MARK C. DRESSLER
Special to the **Caveat**

Non-union Teachers Win; Dance Club Cannot Stay Open;Law School Must Follow Civil Rights Guidelines

In September, the California Supreme Court determined that non-union teachers in King City (50 Miles south of Salinas) could legitimately object to a labor union's use of mandatory fees. Also in September, a California Court of Appeal ruled that a San Diego cabaret could not prevent the city from enforcing the cabaret's closing from 2 am to 6 am. Finally, in September, the Ninth Circuit U.S. Court of Appeals held that a Los Angeles law school must follow anti-discriminatory guidelines if one or more of its students receives federal assistance.

Non-Union Teacher May Object to Improper Use of Mandatory Fees.

A divided California Supreme Court reversed a Court of Appeal ruling which allowed the teacher's union to use non-members' fees for lobbying and ballot-proposition campaigns. The appeal to the state high court attracted attention from pro- and anti-union forces. For instance, both the National Right to Work Legal defense Foundation and the AFL-CIO filed amicus briefs, and the conservative Pacific Legal Foundation represented the non-union teachers.

The union, which is the real party in interest in this case, justified its use of non-members' fees for lobbying and ballot-proposition campaigns with three arguments. First, the legislature in Sacramento confers powers to local school districts, argued the union, so lobbying can increase local power. Second, argued the union, ballot propositions to amend the state Education Code affect all teachers' employment, salary and benefit options. Finally, claimed the union, non-member's fees could not be used, and were not used to support or oppose political parties or candidates for public office.

The majority opinion, written by Justice Kaufman, received concurrences by Chief Justice Lucas and Justices Panelli and Eagleson. Justice Mosk dissented and scored the majority's "unjustifiable narrow view of a union's representational obligations." Justice Arguelles, with concurrence by Justice Broussard, authored a separate dissent. The case is *Cumero v. Public Employment Relations Bd.*, 89 Dly Journal DAR 11363.

Cabaret May Not Enjoin City Limit on Operating Hours

A California Court of Appeal denied a San Diego dance club permission to enjoin the City of San Diego from enforcing a section of the city's Municipal Code which limits cabarets from being open between 2 am to 6 am.

The cabaret claimed that the city restriction violated section 1983 (of 42 U.S.C.) in which a municipality, under color of law, abridges constitutional rights. The cabaret alleged that the city restriction on operating hours abridges the cabaret's free-speech rights.

The appeals court affirmed the trial court's denial of the cabaret's proposed injunction, finding that the city restriction had a "minimal" effect on free-speech abridgement. The Court of Appeal found, however, that San Diego had an overriding interest in regulating noise and disorderly conduct in residential and business communities surrounding cabarets. The case is *Sundance Saloon, Inc. v. City of San Diego*, 89 Dly Journal DAR 11078.

Law School Must Follow Title VI Guidelines

The Ninth Circuit U.S. Court of Appeals reversed a district court's dismissal of a black law student's grievance. The student complained the he was dismissed from the University of West Los Angeles Law School because of his race and his active involvement in the Black "American Law Students Association, or BALSA.

The student, Arthur Radcliff, represented himself, and originally filed with a federal district court, claiming that his constitutional rights were violated by a law professor under color of law in Section 1983 (of 42 U.S.C). This district court found no "color of law" in the student's dismissal, and since no federal jurisdiction existed, the district court dismissed Radcliff's complaint.

The Ninth Circuit agreed the Section 1983 was inappropriate. However, the Ninth Circuit allowed Radcliff to obtain federal jurisdiction by invoking Title VI of the 1964 Civil Rights Act, which prohibits racial discrimination in any program which receives federal assistance.

The appeals court noted the U.S. Supreme Court, in its 1984 case, *Grove City College v. Bell*, 465 U.S. 555, subjected a school to Title VI coverage if any of its students received federal grants or loans. The case is *Radcliff v. Landau*, 89 Dly. Journal DAR 11044

LAW SCHOOL WELCOMES FOUR NEW PROFESSORS

Golden Gate University School of Law Welcomes Four New Professors to its Faculty:

Mark Hartman
Assistant Professor of Law and Director of Advanced Writing Program.
B.A., University of Louisville; B.A., University of East Anglia, Norwich, England; Ph.D., Cambridge, England; J.D., University of California, Berkeley.

A Woodrow Wilson Fellow graduating summa cum laude in 1970, Professor Hartman continued his studies in Philosophy and History in England. He taught philosophy at Millersville State College in Pennsylvania and served as Environmental Editor for PEDCo Environmental, Inc., before entering Boalt Hall Law School in 1981. He was a Robert P. Cowell Fellow at Boalt, where he also served as Editor-in-Chief of the Industrial Relations Law Journal. He has been an associate with Miller, Starr & Regalia of Oakland and Walnut Creek, working on environmental, real estate, corporate, and securities and partnership issues. He is a member of the California Bar. **Courses:** *Torts; Legal Drafting.*

Frederick Koyle
Visiting Assistant Professor of Law, B.A., J.D., Columbia University.

We regret to say that a proper photo of Professor Koyle was unavailable at press time. Ed.

While attending Columbia. Professor Koyle was -editor-in-Chief of the Law School News and served as the Director of Public Information for the NAACP Legal Defense Fund. He served as law clerk to Judge Gus J. Solomon, United States District Court. Professor Koyle directed the Writing and Research Program and taught Legal Drafting at Golden Gate from 1978 to 1981. He has also taught at John F. Kennedy Law School and has served as Judge Pro Tempore in Small Claims and Appeals Courts in the East Bay. He is a member of the California and Oregon Bars. **Courses:** *Contracts.*

Susan G. Kupfer
Visiting Professor of Law, A.B., Mount Holyoke College; J.D., Boston University

After serving as a clerk to Hon. Edmund V. Keville of the Massachusetts Appeals Court, Professor Kupfer was an associate with the law firm of Tyler and Reynolds of Boston. In 1975, she began a long association as a Cooperating Attorney and Board Member of the Civil Liberties Union of Massachusetts, litigating several major cases before the Supreme Judicial Court of that state. She was staff attorney for Greater Boston Legal Services, developing the seminar component for the clinical program at Harvard. In 1977, she was named Assistant Dean, Director of Clinical Programs and Lecturer on Law at Harvard University Law School, where she supervised all aspects of clinical legal practice and litigation in addition to teaching lawyering, litigation and legal ethics courses. Professor Kupfer has substantial experience training professionals to teach lawyering skills at the National Institute of Trial Advocacy and the Association of American Law Schools/United States Department of Education Clinical Law Teacher Training programs. Professor Kupfer is a member of the Massachusetts Bar. **Courses:** *Civil Procedure; Conflicts of Law; Federal Jurisdiction.*

Michael A. Zamperini
Assistant Professor and Director of Writing and Research A.B., J.D., (with honors) George Washington University.

Professor Zamperini joins the full time faculty of Golden Gate after having taught part time in the writing and research program. He has been a practicing attorney since 1973, most recently with the firm of David Barry and Associates, where he was responsible for case management for commercial and construction litigation. He is a member of the California and Virginia Bars. **Courses:** *Legal Drafting; Writing and Research.*

Dear Golden Gate Students:

Welcome back to school.

Those of you who already enrolled in California BAR/BRI may exchange your outlines for the current 1989 edition at the nearest BAR/BRI office or look for a bookmobile on campus within the next few weeks.

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Sincerely,

California BAR/BRI Staff

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TWO CHANGING TRENDS IN EMPLOYMENT LITIGATION

by SUZANNE KANE
Special to the **Caveat**

This article was written by a student in the GGU Business School. The CAVEAT encourages submission of articles from segments of the university outside the Law School provided they would be of general interest to law students.

There are two areas in employment litigation which are seeing a trend of change in the outcome of these cases. One is in the area of personal liability on the part of one employee to another. The other is in the area of post-employment references, where the cause of action is usually an interference with contractual relations.

Raquel Welch obtained a judgment against MGM and others totalling nearly five million dollars, for the wrongful termination of her starring-role contract in the movie "Cannery Row." The cause of action, in Ms. Welch's case, was an induced breach of an employment contract. She claimed that employees of MGM conspired to commit slander. What makes this case unique is that it illustrates a growing trend in litigation whereby individual managers and human resource professionals are also found to be liable for their improper actions in the workplace. The jury held the film's producer individually liable for $500,000 and jointly liable with MGM for $194,000. They also found an officer of MGM individually liable for $27,000.

Traditionally, the courts have held employers wholly liable under the doctrine of "respondeat superior." This doctrine assumes employers to be solely responsible for the actions of their employees, because employees act as agents of their employer. Today, employers who are facing litigation are receiving legal advice requiring them to determine as quickly as possible, whether or not the employee's behavior in question was strictly in keeping with his or her job function for the company. If it was not, the company may escape liability altogether. If this proves to be the case, there may be a conflict of interest if the company and the employee retain the same attorney. Now the employee is generally being advised to retain individual counsel to protect his or her interests.

Raquel Welch obtained a judgment against MGM and others totalling nearly five million dollars...the cause of action...was an induced breach of an employment contract.

Some other examples of cases where the courts have held the employee personally liable are the following: A two million dollar judgment was granted to a supermarket employee, when he proved racial bias on the part of his supervisor and dispatcher; a bad faith judgment was handed down against an insurance adjuster, who mishandled a claim; in a sexual harassment suit, the court found the defendant manager had created a "hostile work environment" by his improper comments, jokes and gestures; and another manager was found liable for negligently failing to enforce the employer's smoking policy. In each instance, there was an employee who was held individually liable for his actions.

Such cases as these indicate an erosion of the doctrine of "respondeat superior." Therefore, as employees, it is in the business professional's best interest to keep himself or herself apprised as to what constitutes acting outside of one's scope of employment. An employee can only eliminate the possibility of personal liability by taking those actions which truly

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reflect the role as agent of his or her employer.

On the flip side of this coin, business professionals who are employers, are now seeking legal counsel in regards to writing employee manuals, application forms, offer letters and letters of reference. With employers focusing their attention upon the question of liability in relationship to their employees, some business practices will be changed. New areas of legal concern for employers, not commonly seen in the past, include negligent hiring, wrongful termination, and liability for post-employment references.

Post-employment references are now becoming a new source for employment litigation. As mentioned previously, the most common cause of action in this litigation is an interference with contractual relations. Cases most currently cited in this type of litigation are *Equal Employment Commission v. Academy of Sciences* and *Rutherford v. American Bank of Commerce.* In the first case, a job applicant was refused employment on the basis of a poor reference given by her previous employer. The plaintiff based her complaint upon a claim of racial discrimination. She lost because the court found she had suffered no adverse impact from her previous employer's references about her. However, the opposite was held to be true in the *Rutherford* case. In that case, the plaintiff was able to show that her previous employer's poor references were

Post-employment references are now becoming a new source for employment litigation.

sexually biased in nature, and had prevented her from obtaining employment. The court also held that the letter of recommendation had been so written as a retaliatory measure against the employee for exercising her Title VII rights. With the outcome of these two cases in mind, business professionals are advised to develop a consistent post-employment reference policy and to direct those in the organization responsible for such references to strictly adhere to the guidelines set down. One pitfall they are advised to avoid is the request for references over the phone.

In general, the employer can protect himself or herself from this kind of suit by adhering to the following guidelines: First, the party who is requesting post-employment references should be able to prove that he or she has a bona fide need to know and should submit the request in writing. Employers, to protect themselves, should only provide a verification of dates and title of last position held by the former employee. They should not volunteer or otherwise impart information regarding reasons for separation from the company. Giving too much information is a common fault.

Second, the former employee should be given the opportunity to consent to the reference check. If possible, a waiver and release from liability in connection with the reference check should be obtained from the former employee. The employer obtaining the reference check, should document the information given, and from whom it was received. All efforts to obtain information, should be documented, even when no usable reference is forthcoming.

For further information on employment litigation, contact the National Foundation for the Study of Equal Employment Policy. Another good source is a book written by Robert Williams called *Personal Liability of Managers and Supervisors for Employment Discrimination.*

SUGGESTED TOPICS FOR FUTURE CAVEAT ARTICLES

The following are some suggested topics. Please do not feel obligated to write upon any of them, unless you want to research and write an article on one or more of these topics. You may choose your own topic. Whatever you do, please clear it with one of the members of the editorial staff first. This is done to prevent duplication of effort.

1. Recent Supreme Court decisions:

The *Webster* decision.

The Flag burning decision (although someone has already volunteered to write an article on this topic.)

The Civil Rights decision rendered during the Summer.

Etc...

2. Gun Control: (Again someone has volunteered to do an article on this subject.)

3. Living Wills: Are they being honored?

4. Euthanasia: Is it always murder? (Check Sweden, I think it is permitted there if administered by a physician and done if the person is terminally ill and in great pain, which cannot be relieved.)

5. For an article under Legal Career Opportunities: Locate places to go to purchase the proper apparel at a reasonable price.

6. In Florida, an assistant District Attorney was fired for the way she was dressed. Her boss called her a BIMBO. She is suing for wrongful termination. Follow that case and write an article upon whether female attorneys are required to dress a certain way.

7. Interveiw people in the legal profession: What's it like to do _____ kind of legal work?

8. Stories on experiences in studying the law abroad. (Spring issue)

9. Capital Gains: Who really benefits?

10. The S & L bail out: An ethical solution?

11. Is Joint Custody of children a truly equitable solution?

12. The EXXON Valdez: Who has a legal right to sue?

13. Changes in the legal status of live-in lovers: Pros/Cons.

14 An article on immigration law: See Mark Silverman.

15. Ocean dumping

16. Does any country have an ethical right to destroy an natural resource which has a global effect. International legal problem

17. Global pollution: International legal problem

18. Prop 103: An illusory promise?

19. The *Salcido* defense.

20. The future of Daycare.

21. Do It Yourself legal manuals: (NOLO Press can give you information on this topic. They are located in Berkeley.) Is it a good idea? How successful is it?

22. Has the high cost of legal fees aced out most of society's access to adequate legal aid?

23. Are we a Sue Happy Nation? How do other countries resolve their legal disputes?

24. The importance of knowing and understanding Administrative Law.

25. Other alternatives, besides going to Court. (Alternative Dispute Resolution.)

26. Bios on Supreme Court Justices or anyone else you think would be of interest.

27. Can a city legally place a ceiling upon the price of housing?

28. Wenzel in Berkeley sued the property owner of a house being used to sell "Crack" in small claims court on the theory of nuisance and won.

29. Collecting on a Judgment.

30. Collecting on child support.

31. TRO's (Tempory Restraining Orders) for battered spouses. Are they any help?

32. There is a company in the Silicon Valley area called FTI - Forensic Technolgy Inc. (or something like that) which is using computers to image a recreation of events, like car accidents. Who gets to choose what information gets fed into the computer, and will the courts allow this imaging to be shown to a jury as a form of reconstruction?

33. In Alameda County, there is a nun who is also a practising attorney. A profile on her might be interesting? Is there a conflict when one serves both church and state?

34. Pre-embryonic material: Life or Property? Who is at liberty to decide?

CUTTING THE COMPETITIVE EDGE

LAW FIRMS DEMAND PRACTICAL SKILLS

by HERB LENEY
Staff Writer

What do law firms look for when they interview hopeful would-be associates? Numerous candidates vie for limited openings. The competition is stiff. This leaves most law students pondering the question: "How can I make myself more marketable?"

The "GGU Law School Bulletin 1989-90" responds to this issue by promoting a legal education which provides: "...a solid foundation in legal theory with the 'practical skills' necessary for the successful practice of law." But, what are these "practical skills?" How and why are they important?

Recently, Writing & Research Director Michael Zamperini, GGU Mock Trial Coach/Trial Advocacy Professor Bernie Segal, and Clinical Programs Director Marc Stickgold were interviewed. Below, they offer some insight into what these practical skills are and why they are valuable.

Professor Zamperini states: "One can have a brilliant idea or argument. However, if it isn't communicated in a clear, concise, and persuasive manner, the reader is lost and so is the argument." He stresses that it is critically important for all students to begin legal writing in their first semester of law school. Without satisfactory completion of this vital requirement, some students do not make an easy transition from the expository demands of some undergraduate writing to the law school requirement of legal analytical writing. Making this shift is crucial both to success on law school exams and in legal careers later on.

Professor Segal points to the need for effective oral communicative skills: "Even if a law student isn't going to be a litigator, he is going to have to communicate orally with clients and senior partners." Oral advocacy skills reinforce one's substantive law skills. Professor Segal states: "Trial Advocacy is like an Advanced Evidence course. One must acquire a more thorough knowledge of the rules of evidence to put them to work in an oral argument setting." If a student is going to make a hearsay objection, he or she has to know the rules.

Professor Stickgold emphasizes that GGU has more than 14 different clinical offerings: "Participating in these programs not only adds to one's legal experience by working on actual cases, it encourages a law student to establish valuable contacts for letters of recommendation and prospective employment." Even when a particular firm doesn't have an opening, many times that law office can help guide a candidate to other opportunities.

While various law schools have begun to offer skill-building courses and clinics, GGU has pursued this goal for a long time. GGU has operated these programs on a larger scale, and has employed more full-time faculty to run them. This has provided students with more circumstances where they can participate and gain practical experience.

Profs. Zamperini, Stickgold, and Segal all agree that these "practical skills" provide the foundation for building the actual attorney skills which are essential to obtain one's first job.

The message is clear. To gain a distinct competitive edge in the legal job market: 1) learn the substantive law, 2) participate in skill-building classes and clinical programs, 3) make contacts, and 4) interview!

MENTOR, THE LAW PROGRAM FOR NON-LAWYERS

by JOANNA LA SERA
Staff Writer

The Center for Community Legal Education, based at USF Law School, provides law-related educational programs for non-lawyers, under the direction of Professor Thomas A. Nazario. Law students are probably most familiar with the Street Law Program. This year, a new progam has come to San Francisco, The Mentor Law-Education Partnership Program.

Mentor was born in New York City in 1982 when Tom Evans, partner at Mudge, Rose, Guther, Alexander and Ferdon, saw that young people were developing negative attitudes about the law. Further, he saw a disrespect for the entire legal system that he thought stemmed from an overall misunderstanding of its workings. Evans set about to cure this ill in hopes that he and other legal professionals could teach both a knowledge of and an appreciation for the law, and thus make young people better able to shoulder the responsibilities of adult citizens.

He sought the assistance of other law firms and began to enter the classrooms of New York's inner city. At the time, few firms of any industry had any connection to public scools. (Now such links between nearly every industry and various schools are common, especially here in San Francisco.) The Mentor Program was a hit because its participants were genuinely interested in the students they were teaching. In many cases, they supplied the only truly positive reinforcement their students received. The program became very popular, and now operates in many states.

The typical Mentor format includes an orientation meeting, curriculum units, and field trips to a local court and the law firm's own offices. At the orientation, members of the law firm staff introduce themselves and their jobs. Since the idea is to show the overall workings of the firm, using just attorneys is too limited. So into the classrooms go representatives from the wordprocessing and secretarial staff, law clerks and researchers, librarians and paralegals. Presenting such a broad panoply of workers also shows the students the various career options the legal profession has to offer.

Most Mentor programs have included a visit to a courtroom to demonstrate just how cases are handled. In one instance, when the case had been settled before the students arrived, the judge asked the attorneys to present the facts, outline the issues, and then present their closing arguments. The students acted as jurors and decided the case. Afterwards a discussion was held and the actual settlement was discussed in light of the decision the students had reached.

When the law professionals enter the classrooms to teach units, they may cover one specific issue in depth or present the broad scope of particular legal procedures. For example, a mock arrest of the classroom teacher was done in a very degrading way. The later sessions showed his booking, arraignment, and then a mock trial was held by the students. The arrest created a basis for learning proper arrest procedures, while the other stages allowed a view of the criminal system in action.

Here in San Francisco, the Mentor Program is jointly offered by the Center for Community Legal Education and the San Francisco School Volunteers. This year the School Volunteers matched six law firms with schools:

Graham & James:
International Studies Academy

Thelen Marrin:
George Washington High School

Ropers Majeski:
Abraham Lincoln High School

McCutcheon Doyle:
Burton Academic High School

Howard Rice:
Galileo High School

Brobeck Phleger:
Mission High School

Professor Nazario and Joanna LaSera, GGU second year law student, created a Mentor Program teaching manual during the summer and will be presenting a training seminar for the Mentor participants on September 23. Law professionals will be entering the classrooms in late September or early October. While the program is set to operate on a semester basis, most of the San Francisco firms will be working with their classes throughout the 1989-90 school year.

STREET LAW UPDATE

Street Law, for those of you who are unfamiliar with it, is a clinical-type program in which law students go into Bay Area high schools to teach a set curriculum of practical law. Units on consumer, housing and family law, criminal and juvenile justice, and individual rights and liberties are presented. Through the use of short lectures, role-play, debates, games, guest speakers, and field trips, the high school students learn about their own rights and how to best protect and enforce those rights.

As in these past years, Professor Nazario has spent his summer reworking the programs and improving the teaching manuals. He coordinates the schedules of the law student-teachers with the school teachers' requests for their services. During the 1989-90 fall semester, 41 high schools are offering Street Law in at least one class, and several have three or four.

This year also marks the start of the Street Law program's being offered in three Bay Area Middle Schools. A new text book has been developed for use with these younger students.

As in years past, GGU students are participating in the Street Law Program. They are: Dan Predd[illegible] Joanna La Sera, Alan Cabache, Lenore

LAWYER JOKES

Reprint Courtesy of Nolo Press, Berkeley, CA.

Two lawyers were walking along negotiating a case. "Look," said one to the other, "let's be honest with each other." "Okay, you first," replied the other.

That was the end of the discussion.

The devil visited a young lawyer's office and made him an offer: "I can arrange some things for you," the devil said. "I'll increase your income five-fold. Your partners will love you; you'll have four months of vacation each year and live to be a hundred. All I require in return is that your wife's soul, your children's souls and their children's souls must rot in hell for eternity."

The lawyer thought for a moment and then said, "What's the catch?"

A lawyer charged a man $500 for legal services. The man paid her with crisp new $100 bills. After the client left, the lawyer discovered that two bills had stuck together -- she'd been overpaid by $100.

The ethical dilemma for the lawyer: Should she tell her partner?

A diminutive lawyer, appearing as a witness in one of the courts, was asked by the opposing attorney, who was a giant 6'8" what he did for a living. The witness replied that he was a lawyer.

"You? A lawyer?" said the huge attorney. "Why, I could put you in my pocket."

"Very likely you could," replied the other. "But if you did, you'd have more law in your pocket than you ever had in your head."

LEGAL FOLLIES

Reprint courtesy of Nolo Press, Berkeley, CA.

Low-Income Lawyers?

The California State Bar, which recently raised annual dues to $417, needn't have worried that the $141 hike would scare away lawyers who couldn't afford it. But just to make sure, the bar is allowing "low-income" attorneys to pay less. Lawyers who are scraping by on less than $23,500 qualify as low-income, but they had better not try to apply for food stamps. The federal poverty level for regular people is $12,100--for a family of four.

Send Lawyers, Guns and Money... On Second Thought, Just Send the Money to the Lawyers.

California lawyers have successfully lobbied the lawyer-dominated state legislature for decades, but they're running scared now that the 120-member legislature has only 25 lawyers -- a mere 21%, which undoubtedly outnumbers other groups such as plumbers, doctors, teachers and farmers. A group of lawyers, many of them former state bar officials, has decided that talking to state legislators isn't enough; they're going to start giving them money. The lawyers have formed their own political action committee, or PAC, to pay a full-time lobbyist and funnel money to favored candidates and legislators.

So far, there has been little reaction from the legislators. But Assemblyman Phillip Isenberg's prediction seems right on the mark. He told the Los Angeles Daily Journal that "legislators who do not get [the PAC's] support would probably view the idea as improper. And those who do get its support would see this as an exercise of constitutional rights."

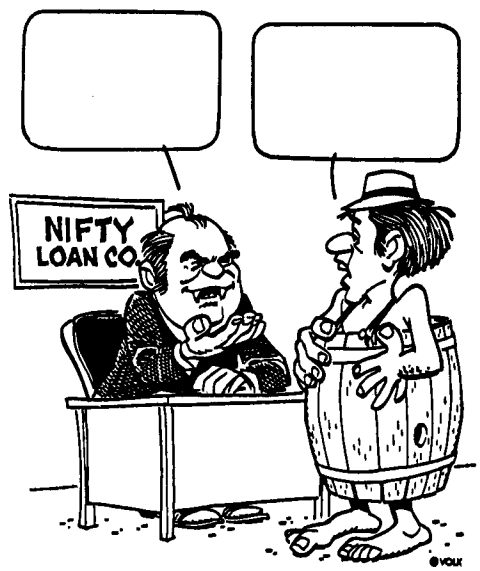
CARTOON CONTEST

WIN MILLIONS!!

(If you hit it big playing the lottery) But, you can win $10 cash if you write the funniest caption for this cartoon. (Or, what WE think is the funniest...)

To enter: fill out the following with your caption, name and phone number. Leave your submission in the **Caveat** envelope on the door of the SBA office in the law library basement. This contest is open to anyone except the judges. Enter as often as you wish. Winners will be notified by phone. ENTRIES DUE BY OCTOBER 16 (more or less). Thank you for your support. This contest void where prohibited by law. Please don't litter. One winner per contest...so be funnier than everyone else. That is all...go back to studying now.

Have a nice day!



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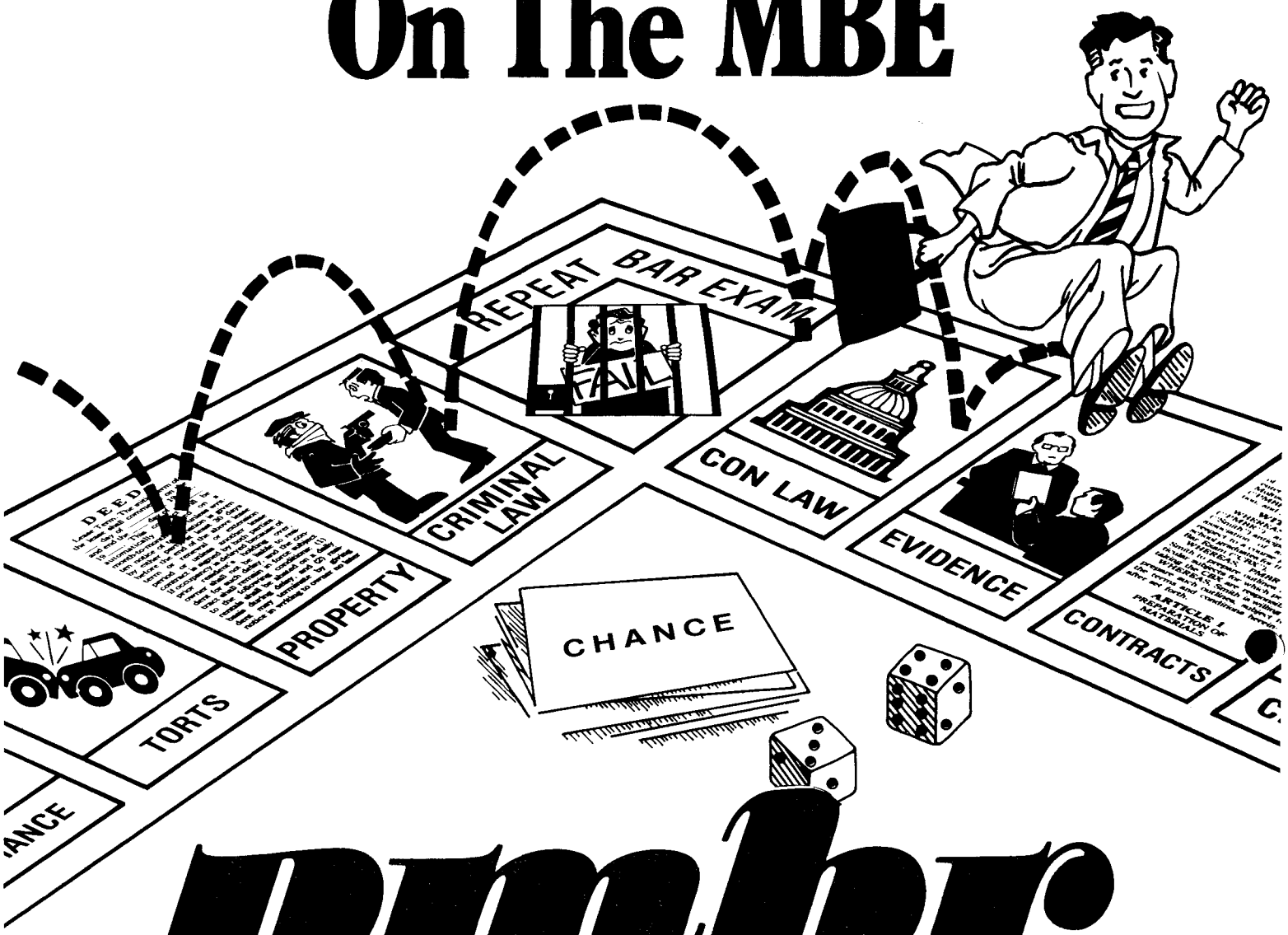
Don't Take Any Chances On The MBE



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