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## Public Law: Professional Responsibility

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## PROFESSIONAL RESPONSIBILITY

P. Michael Hebert\*

## CONTINGENT FEES

Decisions rendered in *Succession of Butler*<sup>1</sup> by the Louisiana supreme court, and in *Guilbeau v. Fireman's Fund Insurance Co.*<sup>2</sup> by the Third Circuit Court of Appeal involved disputes concerning lawyers' contingent fee contracts. *Butler* held that a contingent fee based on community assets recovered in a suit for separation from bed and board is contrary to public policy. *Guilbeau* held that under a contingent fee contract written pursuant to Louisiana R.S. 37:218<sup>3</sup> the client has the absolute right to discharge the attorney, with or without cause, and in the case of discharge for cause the attorney loses the protection of the statute and is entitled only to quantum meruit. Both cases raise questions with respect to current fee practices among the Louisiana bar and indicate a continuing trend among courts to closely scrutinize lawyers' fees.

The subject of contingent fees first confronted the Louisiana courts in 1812 and has received inconsistent treatment to the present. The cases often distinguish between fee contracts which give a present interest in the subject matter of the litigation and those which merely grant the attorney a contingent fee measured by a percentage of the amount recovered. The earliest case, *Livingston v. Cornell*,<sup>4</sup> held that even a contingent fee measured by a percentage of the amount recovered is unlawful, citing primarily European authority.<sup>5</sup>

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1. 294 So. 2d 512 (La. 1974).

2. 293 So. 2d 216 (La. App. 3d Cir. 1974).

3. LA. R.S. 37:218 (1950), as amended by La. Acts 1970, No. 595, provides: "By written contracts signed by the client, attorneys at law may acquire as their fee an interest in the subject matter of the suit, proposed suit, or claim in the prosecution or defense of which they are employed, whether the suit or claim be for money or for property. In such a contract for employment, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue or otherwise dispose of the suit or claim. Either party to the contract may, at any time, file it with the clerk of the district court in which the suit is pending or is to be brought and have an original or certified copy made and served by registered or certified mail on the opposing party. After such service, any settlement, compromise, discontinuance, or other disposition made of the suit or claim by either the attorney or the client without the written consent of the other is null and void and the suit or claim shall be proceeded with as if no such settlement or discontinuance had been made."

4. 2 Mart.(O.S.) 281 (La. 1812).

5. Even today contingent fee contracts are prohibited by law in England and France. This includes fee arrangements measured by a percentage of the amount

In that decision the Louisiana supreme court discussed an act of the territorial legislature of 1808 which declared null and void any attorney's "bargain or agreement, with a plaintiff or defendant, depending on the event of any suit, to receive any portion or part of the land, or any other property that may be in dispute, or sued for, as a compensation of [his] services."<sup>6</sup> Stating that the act of 1808 did nothing more than declare that which was already the law, the court went on to say that in its opinion money is "property" as used in the act, "[m]ost men considering money as the best kind of property."<sup>7</sup> In 1834 the court deviated from this ruling and declared that although attorneys were forbidden to stipulate for a part of the thing in controversy, "they are not inhibited from stipulating for a certain commission on collections to be made by them."<sup>8</sup> In 1855 the legislature repealed the act of 1808<sup>9</sup> and in 1880 the court again recognized the legality of contingent fee arrangements.<sup>10</sup> This development was consistent with developments in other states.<sup>11</sup>

Although the court during this period came to accept contingent fees measured by a percentage of the recovery, it does not appear that it ever sanctioned an attorney's taking a present interest in the subject matter as his fee. Louisiana Civil Code article 2447<sup>12</sup> prohibited the purchase of litigious rights by advocates and attorneys, and the rules of mandate and agency prohibited the attorney from having an interest conflicting with that of his client.<sup>13</sup> In 1906, however, the legislature passed an act amending the attorney's privilege section of the Louisiana Revised Statutes<sup>14</sup> to provide that under certain condi-

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recovered as well as those granting a present interest in the subject matter of litigation. See DALLOZ, *NOUVEAU REPERTOIRE DE DROIT Avocat* n° 90 (2d ed. 1962); Youngwood, *The Contingent Fee—A Reasonable Alternative?*, 28 MODERN L. REV. 330 (1965); Note, 41 CORNELL L.Q. 683 (1956).

6. La. Acts 1808, Ch. 30, §4.

7. 2 Mart.(O.S.) 281, 290 (La. 1812).

8. *Flower v. O'Conner*, 7 La. 198, 207 (1834).

9. La. Acts 1855, No. 115, §12.

10. *Martinez v. Succession of Vives*, 32 La. Ann. 305 (1880); *but see Mazureau & Hennen v. Morgan*, 25 La. Ann. 281 (1873). See also *Andirac v. Richardson*, 125 La. 883, 51 So. 1024 (1910).

11. See F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* (1964); LA. CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-20 (found in ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS'N art. XVI; LA. R.S. 37, ch. 4; app.) [hereinafter cited as CODE OF PROFESSIONAL RESPONSIBILITY].

12. See La. Civ. Code art. 2422 (1825). See also *McClung v. Atlas Oil Co.*, 148 La. 674, 87 So. 515 (1921); *D'Albora v. Roussel*, 182 So. 2d 124 (La. App. 4th Cir. 1966); Comment, 1 LA. L. REV. 593 (1939).

13. See LA. CIV. CODE art. 3003; *McMichael v. Davidson*, 7 Rob. 53 (La. 1844).

14. LA. R.S. § 2897 (1870), as amended by La. Acts 1906, No. 124.

tions attorneys may acquire as their fee "an interest in the subject matter" of the suit, proposed suit or claim, whether for money or property. This legislation exists today as R.S. 37:218 and is the subject of the *Guilbeau* decision. *Guilbeau* raises issues of the right of a client to discharge his attorney and the meaning of an "interest in the subject matter" of a suit or claim.

The modern cases indicate that 37:218 permits an attorney to take a present interest in the suit or claim, but the decisions are unclear as to whether the mere granting of a "contingent fee" or a fee based on a percentage of the amount recovered under a contract purporting to comply with the statute bestows a sufficient interest in the subject matter to bring the attorney under the statute.<sup>15</sup> The better opinion is that a contract granting the attorney a "contingent fee" and nothing more does not create an "interest in the subject matter" within the meaning of 37:218.<sup>16</sup> Furthermore, there is an increasing tendency among the courts of appeal to treat the interest protected by the statute as being in the nature of a lien rather than as a vested interest.<sup>17</sup>

In *Guilbeau* an attorney sought to recover his percentage fee from a client who retained him for representation in a personal injury claim but who subsequently discharged him and retained other counsel. The second attorney successfully negotiated a settlement, and the court found that the client had good cause to discharge the first attorney. The court assumed that the contract with the first attorney granted an interest sufficient to bring 37:218 into operation, and described it as a "contingent legal retainer."<sup>18</sup> The statute provides that the contract may stipulate that "neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue or otherwise dispose of the suit or claim,"<sup>19</sup> and

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15. See *Stiles v. Bruton* 134 La. 523, 64 So. 399 (1914); *Succession of Carbajal*, 139 La. 481, 71 So. 774 (1916); *Succession of Rice*, 147 La. 834, 86 So. 282 (1920); *Hope v. Madison*, 194 La. 337, 193 So. 666 (1940); *Robinson v. Hunt*, 211 La. 1019, 31 So. 2d 197 (1946); *Tennant v. Russell*, 214 La. 1046, 39 So. 2d 726 (1949); *Acadian Prod. Corp. v. Savanna Corp.*, 226 La. 849, 77 So. 2d 417 (1954); *Succession of Vlaho*, 140 So. 2d 226 (La. App. 4th Cir. 1962); *Palmer & Palmer v. Stire*, 195 So. 2d 706 (La. App. 1st Cir. 1967). See also *Deshotels v. United States*, 450 F.2d 961 (5th Cir. 1972).

16. See *Tennant v. Russell*, 214 La. 1046, 39 So. 2d 726 (1949); *Louque v. Dejan*, 129 La. 519, 56 So. 427 (1911); *Succession of Carbajal*, 139 La. 481, 71 So. 774 (1916). See also CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103.

17. See *Sanders v. Rowan Drilling Co.*, 247 So. 2d 665 (La. App. 3d Cir. 1971); *Palmer & Palmer v. Stire*, 195 So. 2d 706 (La. App. 1st Cir. 1967); *Succession of Vlaho*, 140 So. 2d 226 (La. App. 4th Cir. 1962).

18. *Guilbeau v. Fireman's Fund Ins. Co.*, 293 So. 2d 216, 217 (La. App. 3d Cir. 1974).

19. LA. R.S. 37:218 (1950), as amended by La. Acts 1970, No. 595, §1.

it is assumed that the contract in *Guilbeau* so provided. The court held that in spite of such a clause, the client has the absolute right to terminate the attorney-client relationship,<sup>20</sup> with or without cause, and in the case of discharge for cause the attorney loses whatever rights he might have under 37:218. Therefore the client was free to settle the case without the consent of the attorney, and the attorney lost his right to the contractual fee.

The court apparently assumed that the contract between the first attorney and client was no longer in force because it made no mention of the necessity of dissolving it. This is consistent with the attitude that 37:218 grants protection to the attorney only in the nature of a lien. In previous cases, however, where the client expressly granted a present ownership interest in specific property, the courts were more inclined to treat the attorney's interest as in full ownership.<sup>21</sup> Regardless of whether the attorney's interest is considered as a lien or a present interest, it appears that even under the present interest contract the client has the absolute right to discharge the attorney, with or without cause, and in the event of discharge for cause, the client is entitled to have the contract dissolved in an action for rescission. With respect to the attorney's rights in the case of discharge for no cause, however, confusion still abounds.

It appears that it is now time for the legislature to repeal 37:218. Although there is merit in permitting an attorney to receive an interest in property as his fee after the matter has been completed (as in the case of a petitory action for land), there is little or no merit in permitting the transfer of a present interest in anything, whether it be land or a personal injury claim. The conflict of interest created by such an interest offends not only traditional rules of law, but also basic rules of due process.

*Succession of Butler*<sup>22</sup> presents another aspect of contingent fee contracts. The Louisiana supreme court held that a contingent fee based on community assets recovered in a suit for separation from bed and board is contrary to public policy. It cited as authority dic-

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20. See *Louque v. Dejan*, 129 La. 519, 56 So. 427 (1911); *Marchand v. Gulf Ref. Co.*, 187 La. 1002, 175 So. 647 (1937); *Gravity Drainage Dist. No. 2 v. Edwards*, 207 La. 1, 20 So. 2d 405 (1944); *Kramer v. Graham*, 272 So. 2d 716 (La. App. 3d Cir. 1973). See also Opinion No. 320 of the Committee on Professional Responsibility (1968) in LOUISIANA STATE BAR ASS'N ATTORNEY'S DESK BOOK.

21. See *Stiles v. Bruton*, 134 La. 523, 64 So. 399 (1914); *United Gas Pub. Serv. Co. v. Christian*, 186 La. 689, 173 So. 174 (1937); *Hope v. Madison*, 194 La. 337, 193 So. 666 (1940); *Robinson v. Hunt*, 211 La. 1019, 31 So. 2d 197 (1946); *Acadian Prod. Corp. v. Savanna Corp.*, 226 La. 849, 77 So. 2d 417 (1954).

22. 294 So. 2d 512 (La. 1974). *Butler* was followed in *Aucoin v. Williams*, 291 So. 2d 504 (La. App. 3d Cir. 1974).

tum from an early Louisiana appellate decision<sup>23</sup> and the general rule in most jurisdictions. It is the first time the issue has been decided in Louisiana, and it is quite consistent with the standards suggested by the Code of Professional Responsibility.<sup>24</sup> The court stated that every attempt should be made to reconcile estranged couples, and that any fee arrangement with an attorney which is in derogation of the marriage relation is for that reason void. Although the decision does not raise the question, if it were decided that other family relationships are equally as important as the marriage relationship, application of the logic of the *Butler* decision should result in the nullity of contingent fee contracts in will contests and contested succession proceedings as well. Although such a decision is unlikely, the logic might be more readily accepted in the case where the attorney attempts to protect his contingent fee pursuant to R.S. 37:218.<sup>25</sup>

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23. See *McMahon v. Hardin*, 10 La. App. 416, 121 So. 678 (La. App. Orl. Cir. 1929).

24. See CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20.

25. Note that the contract in *Butler* provided for a contingent fee and also attempted to limit the client's right to settle or compromise without the attorney's consent.