Louisiana Law Review

Volume 39 | Number 3
The Work of the Louisiana Appellate Courts for the 1977-1978 Term: A Faculty Symposium
Spring 1979

Public Law: Professional Responsibility

Henry A. Politz

PROFESSIONAL RESPONSIBILITY

*Henry A. Politz**

DISCIPLINE

The volume of disciplinary proceedings before the Louisiana Supreme Court continues unabated. During the 1977-1978 term, three attorneys were disbarred, six were suspended and two were given interim suspensions pending further action. At the close of the term, there were twenty-five docketed proceedings, involving twenty-two attorneys,[1] most awaiting action by or before the commissioners appointed for their evidentiary hearings.[2] It is apparent that in the next term there will be more terminations of disciplinary actions than in any prior term of court.[3]

One of the three disbarments included the last of the fraudulent accident ring cases.[4] The other two proceedings involved disbarment on consent.[5] One of the attorneys had been convicted of a felony in the United States District Court for the Northern District of Texas.[6] During the period of his incarceration he had been under an interim suspension order, and upon his release he surrendered his license pursuant to the disbarment by consent provision. The other attorney had been convicted of a felony in the United States District Court for the Eastern District of Louisiana.[7]

---

* Member, Louisiana State and Shreveport Bar Association; Member, Louisiana Judiciary Commission; Former member and Chairman, Committee on Professional Responsibility.

1. 26 LA. B.J. 79-80 (1978).

2. Articles of Incorporation, Louisiana State Bar Ass'n. LA. R.S. 37, ch. 4, art. XV, § 6 [hereinafter cited as ARTICLES OF INCORPORATION].

3. One cause of delay is the hearing before and report by the commissioners. The court has begun the practice of directing the time in which this is to be accomplished, but previously the commissioners had no time frame suggested to them.

4. Louisiana State Bar Ass'n. v. Tunis, 352 So. 2d 623 (La. 1977). The four previous proceedings also resulted in disbarments. *See The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Professional Responsibility*, 38 LA. L. REV. 453.

5. As provided in ARTICLES OF INCORPORATION, *supra* note 2, § 11.

6. Louisiana State Bar Ass'n. v. Schwartz, 355 So. 2d 543 (La. 1978).

7. Louisiana State Bar Ass'n. v. Watters, 355 So. 2d 544 (La. 1978).

Two attorneys received interim suspensions, *i.e.*, suspensions pending further disciplinary proceedings. One was convicted of possession of cocaine with intent to distribute,[8] and the other was convicted of theft of a client's funds.[9] Both convictions are now being appealed.

After full disciplinary hearings, two attorneys were suspended. The first had pled guilty to credit card fraud in violation of the Consumer Credit Protection Act,[10] based upon a two-count federal grand jury indictment.[11] One count was dismissed and the plea was entered as to the other. Subsequent to entry of the plea, the Louisiana Supreme Court ordered an interim suspension of the attorney's license, the commissioner recommended against suspension for a determinant period with automatic reinstatement at the conclusion of the period, and the Committee on Professional Responsibility concurred. Evidence adduced at the commissioner's hearing reflected the emotional difficulty experienced by the respondent attorney. The court, for the first time known to this writer, entered a suspension for a specified period (three years), but tailored the order consistent with the recommendation and the psychiatric evidence adduced and decreed that reinstatement of the attorney would not be automatic.[12]

The other proceeding which resulted in suspension, *Louisiana State Bar Association v. Batson*,[13] involved the commingling and conversion of a client's funds. The respondent had formerly been an attorney for the Louisiana Department of Revenue and in litigation on behalf of the Department had recovered the sum of $11,834.72, including $1,075.88 denoted as attorney's fees. This total sum was deposited in the registry of

8. Louisiana State Bar Ass'n. v. Bensabat, No. 60,456 (La. Sept. 1, 1977).
9. Louisiana State Bar Ass'n. v. Atkins, 352 So. 2d 605 (La. 1977).
10. 15 U.S.C. § 1644(a) (1974); 18 U.S.C. § 2 (1948).
11. Louisiana State Bar Ass'n. v. Stevenson, 356 So. 2d 408 (La. 1978).
12. *Id.* at 411. The court ordered:

> Respondent may apply for reinstatement after the lapse of the three-year period; and such application shall be granted by this court, after due proceedings, upon a clear showing by respondent that he is emotionally able to resume the practice of law. Absent reinstatement by this court, respondent's suspension to practice law shall continue in effect.

Id.
13. 359 So. 2d 70 (La. 1978).

the court and routinely paid out to the respondent as attorney of record for the Department. He deposited the funds in his personal bank account and maintained possession of them from September, 1968, until November, 1971. At that time, he secured a bank money order which he caused to be back-dated to September, 1968.[14]

The attorney was charged with misappropriation of the funds. The trial ended with a dismissal at the close of the State's case. Disciplinary proceedings based on misconduct were then instituted. Two issues of note were raised: (1) the effect of the acquittal of the criminal charges based on the same transaction, and (2) the extent of disciplinary action appropriate under the circumstances.

The attorney argued that since section 8 of article XV of the Articles of Incorporation of the Louisiana State Bar Association makes a criminal conviction conclusive proof of misconduct, an acquittal should constitute conclusive proof that there has been no misconduct. The court found this argument to be without merit, ruling that "the acquittal does not preclude disciplinary action for professional misconduct."[15] The court went on to declare that it is the responsibility of the Committee to determine whether the respondent has violated any rule of the Code of Professional Responsibility of sufficient gravity as to evidence a moral unfitness for the practice of law. The standard for determining this is the same whether one has been convicted or acquitted of a criminal charge. After citing Ethical Consideration 9-6 of the Code of Professional Responsibility,[16] the court underscored the charge to Louisiana attorneys in these unmistakable terms: "Attorneys in this State are held to a very high standard of conduct. An attorney must avoid the appearance of impropriety as well as impropriety itself."[17]

The court found that the attorney had retained the funds after termination of his employment, failed to return them until an investigation was begun, and then did so surrepti-

14. This money order was subsequently "found" in the Department's files. *Id.* at 72.

15. *Id.*

16. ARTICLES OF INCORPORATION, *supra* note 2, art. XVI.

17. 359 So. 2d at 72.

tiously. However, in mitigation the court found that there was a legitimate question concerning the method of handling the funds, that there was some approval for retaining the funds for an indeterminate period, that the funds were returned, albeit in an irregular fashion, and that in almost twenty years of practice this was the first and only complaint against the attorney. A six-month suspension was imposed.

Four suspensions were "on consent." By that is meant the respondent attorney suggested a stated period of suspension as appropriate discipline for the misconduct charged, the Committee on Professional Responsibility offered no objection, and the court concurred. In *Louisiana State Bar Association v. Orrett,*[18] the attorney had been convicted of a misdemeanor in the United States District Court for the Eastern District of Louisiana on a plea to a charge of violating federal and state corrupt influences statutes.[19] A petition to the Louisiana Supreme Court that he be allowed to surrender his license for a period of ninety days was granted upon an order signed by five Justices, but Justice Dennis concluded that upon the record before the court, a more severe penalty would have been appropriate. The "no objection" position by the Committee had been based on what a consensus of the Committee felt to be compelling considerations in mitigation.

The second suspension "on consent" was for a three-year period, granted by an order signed by five justices.[20] Justices Dixon and Dennis did not dissent as such but stated that they would remand for amplification of the record on mitigation. The attorney had commingled funds from a succession and put them to his own use. Again, the Committee concluded that the evidence in mitigation compelled its position of non-objection, and a majority of the court concurred that the suggested extent of discipline was appropriate under the circumstances.

In *Louisiana State Bar Association v. Ungar,*[21] a six-month suspension was petitioned for by the attorney in a case in which

18. 355 So. 2d 253 (La. 1978).

19. The attorney was convicted of violating LA. R.S. 14:120 (1950) and 18 U.S.C. § 13 (1948).

20. Louisiana State Bar Ass'n. v. Hammill, 355 So. 2d 934 (La. 1978).

21. 355 So. 2d 936 (La. 1978).

he was charged with misconduct occasioned by his solicitation of a personal injury case. Five justices concurred. Justice Dixon noted his concern, voiced in prior instances,[22] that the mitigating circumstances should be more fully articulated in the record in such "consent" matters. It is the understanding of this writer that in future cases the Committee will make as a part of the record a more detailed explanation of the basis for its conclusion that the suggested extent of discipline is made appropriate by mitigating circumstances. It is to be noted that this six-month suspension for solicitation is twice the period imposed by the court in the only previous case on solicitation in which a suspension was imposed.[23]

Finally, an attorney was suspended on consent for a period of two years after he had pled guilty to being an accessory after the fact in an attempted possession of cocaine violation.[24] Walking the furrow plowed in the *Stevenson* case,[25] the court ordered that upon completion of the period of suspension the respondent would be readmitted to practice, but only upon application made and approved and a showing "that he is emotionally and morally able to resume the practice of law." Otherwise, his suspension would continue.

ADVERTISING—SOLICITATION

During this term, there were several other cases before the supreme court and intermediate appellate courts which may properly be considered germane to disciplinary and ethical matters. Of overriding interest and importance is a case argued during the final week of the term and decided immediately upon the court's return in September, the landmark decision of *Allison & Perrone v. Louisiana State Bar Association.*[26] This case may be considered one of the first progenies of the now famous *Bates* decision.[27]

22. *See* Louisiana State Bar Ass'n. v. Hammill, 355 So. 2d 934 (La. 1978), and Louisiana State Bar Ass'n v. Orrett, 355 So. 2d 253 (La. 1978).

23. Louisiana State Bar Ass'n. v. Edwins, 329 So. 2d 437 (La. 1976).

24. Louisiana State Bar Ass'n. v. Pastor, 362 So. 2d 486 (La. 1978).

25. *See* Louisiana State Bar Ass'n. v. Stevenson, 356 So. 2d 408 (La. 1978).

26. 362 So. 2d 489 (La. 1978).

27. Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

The attorneys, practicing in New Orleans, had made a mailing to a number of employers in the New Orleans area in which they sought to contract for the providing of legal services to their employees. Under the proposed plan, the employer would deduct ten dollars per month from each covered employee and remit this amount to the attorneys. In return, the attorneys would provide certain legal services for the employees as outlined in an enclosed brochure. The Committee on Professional Responsibility notified the attorneys that an investigation would be necessary to determine whether their activity was in violation of Disciplinary Rule 2-103.[28] The attorneys responded by petitioning the supreme court for an injunction against the Bar Association, seeking to proscribe its enforcement of the disciplinary rules on solicitation and advertising.

In a scholarly opinion by Justice Dixon, the court traced the development of the jurisprudence on prepaid and group legal services by the United States Supreme Court. This included the now famous decisions which have become popularly referred to as the *Button, Brotherhood, Mineworkers* and *UTU* cases.[29] The court's review and analysis included *Bates* and the most recent decisions of the United States Supreme Court in *Ohralik v. Ohio State Bar Association*[30] and *In re Primus.*[31] The court balanced and weighed the constitutionally protected right of free speech and the right and duty of the state to regulate, in the public interest, the practice of law. The court found the petitioners' solicitation to be primarily for pecuniary gain, citing *Ohralik,* and not as an expression of social or political views, as in *Primus,* and to be distinguished from the public advertisement dimension in *Bates.* The court then concluded that the Code of Professional Responsibility applicable to Louisiana lawyers appropriately proscribed direct solicitation.

28. LA. CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 2-103, which is entititled "Recommendation of Professional Employment," was amended on December 1, 1977, to provide for prepaid legal services.

29. UTU v. State Bar of Mich., 401 U.S. 576 (1971); UMW v. Illinois State Bar Association, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

30. 436 U.S. 447 (1978).

31. 436 U.S. 412 (1978).

The court specifically upheld the prohibition against an attorney's direct solicitation for pecuniary gain.

Justice Tate concurred "with very grave reservations."[32] Recognizing the value of prepaid legal plans, he urged the organized bar and the court to study modifications of the Code of Professional Responsibility which would permit approval of the offer of prepaid legal service plans, with prior bar approval, based on the reasonable regulation of the nature of services offered and the experience and competence of counsel.

This writer is convinced of the correctness of the decision. This conclusion is based on an analysis of the United States Supreme Court decisions cited, the Disciplinary Rules at issue, the facts in the instant case, and the personal knowledge of the writer of developments in the area of prepaid legal services in the past decade.[33] To have ruled otherwise would have required the court to strike down the 1975 amendments to the Code of Professional Responsibility which had been labored over for several years before adoption by the Louisiana State Bar Association House of Delegates after one of the most vigorous and extended debates in the history of that institution.[34] At the same time the observations of Justice Tate are thoughtful and reflect considerable foresight. The bar and the court must be about the business of refining the rules governing both the form and substance of prepaid legal plans. The 1975 amendments were a major step, but only a step, and the journey is far from complete. As experience is gained this major change in both the funding method and delivery system of legal services must be given every opportunity to blossom and grow. This is in the best interest of the public and, necessarily, the ultimate best interest of the bar.

32. 362 So. 2d at 496.

33. This experience includes six years on the American Bar Association Special Committee on Prepaid Legal Services, three years as a Director of the American Prepaid Legal Services Institute, and eight years of immediate involvement in the Shreveport Plan for prepaid legal services.

34. The 1975 amendments to the Disciplinary Rules accompanying Canon 2 deal specifically with solicitation and publicity.

BAR ADMISSIONS

In the case of *In Re Aleman,*[35] in a four-three decision, the court directed the Bar Admissions Committee to permit the applicant to take the bar examination upon his compliance with all requirements other than that dealing with citizenship or residence. The dissent noted that the applicant was neither a citizen nor a resident alien and therfore did not meet the requirements for admission to the bar. The problem the court will face if the applicant passes the bar examination apparently remains for another day.

CONTEMPT OF COURT

The decision in *City of Lake Charles v. Bell*[36] involved an attorney cited for contempt and sentenced to jail for refusing to proceed with the trial of a criminal case in city court. On the morning of the day of trial (the trial being set for 2:00 P.M.), the attorney, Parkerson, filed a petition for removal to federal court. He then advised the court and the prosecutor. At the trial he argued that the filing of the petition for removal resulted in an automatic stay, citing as his authority 28 U.S.C. § 1446.[37] The prosecutor disagreed with this interpretation, and Parkerson, who did not have the text of the United States Code with him, requested a short interval in which to secure the volume. The court refused the request and ordered him to proceed. The attorney declined. The court found him in contempt and sentenced him to twenty-four hours in jail.

The court reviewed the dispositive jurisprudence which mandates obedience of court orders, even orders improvidently or illegally entered. It noted, however, that there are three conditions which must be met before the rule of unquestioned obedience applies: (1) the court issuing the order must have subject matter and personal jurisdiction; (2) adequate and

35. 347 So. 2d 503 (La. 1977).

36. 347 So. 2d 494 (La. 1977). Bell was the defendant in the criminal case; Parkerson was his attorney.

37. 28 U.S.C. § 1446(e) (1948) provides in part: "Promptly after the filing of such petition . . . the State court shall proceed no further unless and until the case is remanded."

effective remedies must be available for orderly review of the challenged ruling; and (3) the order must not require an irretrievable surrender of constitutional guarantees. A simple reading of 28 U.S.C. § 1446(e) immediately satisfied the supreme court that the first requirement had not been met. There being no jurisdiction to proceed, the city court could not order the attorney to proceed with defense of his client. Consequently, the court had no authority to cite him for contempt.

ATTORNEY'S FEES

The case of *Saucier v. Hayes Dairy Products*[38] is a decision of substantial consequence in the area of enforcement of contingent fee contracts executed pursuant to Revised Statutes 37:218.[39] The Fourth Circuit enforced a contingent fee contract as written after finding that the attorney had been dismissed without cause and had properly and diligently represented his client. The court further found that the attorney's efforts were reflected in the ultimate settlement results achieved by successor counsel. Heretofore, such cases had been resolved upon application of the rules on quantum meruit. Concluding that these earlier decisions resulted from an erroneous understanding of the decision in *Succession of Carbajal,*[40] the court based

38. 353 So. 2d 732 (La. App. 4th Cir. 1978), *cert. granted,* 355 So. 2d 625 (La. 1978). *See also* Scott v. Kemper Ins. Co., 357 So. 2d 87 (La. App. 4th Cir. 1978).

39. LA. R.S. 37:218 (Supp. 1970 & 1975) provides:

> By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution or defense of which he is employed, whether the claim or suit be for money or for property. In such contract, 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 and record it with the clerk of court in the parish in which the suit is pending or is to be brought or with the clerk of court in the parish of the client's domicile. After such filing, 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, compromise, discontinuance, or other disposition had been made.

40. 139 La. 481, 71 So. 774 (1916). The decision in *Carbajal* concerned the effect of revocable attorney-client contracts; the court there held that in pre-1906 contracts the client could revoke the contract at will and the attorney could recover only on the basis of quantum meruit.

the award on the contract itself and not on quantum meruit.

Another Fourth Circuit decision dealt with attorney's fees and recovery of costs. The attorney in *Henican, James & Cleveland v. State*[41] had prepared extensively for trial and spent two days in trial in federal court, but the attorney-client relationship had reached a point where the attorney requested permission to withdraw as counsel. The request was denied. The client then dismissed the attorney, ostensibly because of the effort to withdraw, coupled with the client's negative reaction to a letter in which the attorney strongly recommended a settlement. Counsel sued for the many hours spent in preparation for and in trial at the agreed rate of fifty dollars per hour. However, the court denied any recovery for time spent in the aborted trial, and then made what it styled a "rough guess" of the value of the pretrial work of the attorney. On the basis of unjust enrichment, it granted judgment for one-half of the time spent. The decision was based on the court's attempt to gauge the value of the attorney's effort to the successor counsel and, thus, to the client. One may debate the wisdom of this theory as there is much which can be said on both sides. The supreme court will not take part in the discussion for it has denied writs on the matter. Of further interest is the court's ruling that copywork or reproduction (such as Xerox and IBM) done on an office copier by office staff was not an "out-of-pocket expense," reimbursable by the client. Had the work been hired out at the same cost with payment being made directly by the attorney (instead of indirectly as a part of office operation), the court of appeal apparently would have allowed recovery as an out-of-pocket expense. It is submitted that this legal legerdemain is most interesting but much removed from the realities of the financial operation of a modern-day law office.

Finally, a legal malpractice action is worthy of comment herein. The plaintiff in *Geddie v. St. Paul Fire & Marine Insurance Co.*[42] sued his former attorney for damages arising from unlawful confinement in the penitentiary. The plaintiff had been sentenced to a term of four years for an offense punishable

41. 348 So.2d 689 (La. App. 4th Cir. 1977).
42. 354 So. 2d 718 (La. App. 4th Cir. 1978).

by a maximum sentence of two years of confinement. The court found that the plaintiff had probably been illegally confined for eight months. This was arrived at by comparing the probable parole date under a two-year sentence with the probable parole date under a four-year sentence, taking into consideration certain extensions of the parole date because of disciplinary problems of plaintiff. Reviewing the records, the trial judge found that six of the "illegal" months were spent at Angola and two were spent at Camp Beauregard, a minimum security facility. The court then awarded $7,000 a month for each of the six months at Angola, "where conditions were poor," and $1,500 per month for each month at Camp Beauregard, "where the atmosphere was more bearable."[43]

The court of appeal reviewed the record and concluded that the six months spent at Angola rather than Camp Beauregard were a direct consequence of the plaintiff's disciplinary problems and did not result from any fault on the part of the attorney. It accordingly modified the trial court's award, deleting the "Angola-level" quantum and awarding $1,500 (the "Camp Beauregard" quantum) for each of the eight months. Defense counsel, retained or appointed, should take careful note.

43. *Id.* at 720.