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Public Law: Professional Responsibility

Richard F. Knight

PROFESSIONAL RESPONSIBILITY

*Richard F. Knight**

Apparent from a reading of the decisions handed down by the supreme court during the last term is the clear message from the court that it is placing increasing importance on its role as the ultimate and proper authority in the regulation of the practice of law. The court's traditional role in disciplinary matters is well known. During the last term, however, in cases involving bar admission, the unauthorized practice of law, and matters involving transactions by attorneys with their clients and the public, when confronted with apparent conflict between statutes and rules of the supreme court, the court left no doubt that all aspects of the regulation of the practice of law are vested exclusively with the supreme court. The court has struck down as unconstitutional acts of the legislature which "tend to impede or frustrate its authority,"[1] has refused to apply its own rules literally when to do so would "prevent qualified applicants from taking the bar examination and gaining admission to practice law in Louisiana,"[2] and has refused to apply literally a statute[3] which would permit a discharged attorney with a recorded contingent fee contract to nullify a client's later settlement or to proceed with the litigation as if the settlement had not occurred.[4]

In its traditional role as disciplinarian, the court continues to order disbarment in the interest of protecting the public and to show compassion and perhaps some leniency where mitigating circumstances are shown or where it appears to the court that there is the reasonable probability that the attorney's future conduct will be consistent with the standards of the profession and not a further threat to the public.

BAR ADMISSION

The matter of application for admission to the bar of Louisiana, and the attendant bar examination prior thereto, has apparently

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*Member, Louisiana State Bar Association.

1. Singer Hutner Levine Seeman & Stuart v. Louisiana State Bar Association, 378 So. 2d 423, 426 (La. 1979).
2. Application of Faylona, 381 So. 2d 1203, 1204 (La. 1980).
3. LA. R.S. 37:218 (Supp. 1975).
4. Scott v. Kemper Ins. Co., 377 So. 2d 66 (La. 1979).

caused the court some difficulty in its most recent term. In the matter of *Application of Anderson*,[5] the applicant had been denied permission to take the bar examination by the Committee on Bar Admissions of the Louisiana State Bar Association. Her application was rejected on the ground that she failed to fulfill the requirements of article 14, section 7 (B)(d) of the Articles of Incorporation of the Louisiana State Bar Association that she be a graduate of a law school that is approved by the American Bar Association. The court ordered that the applicant be allowed to take the bar examination and that the Committee on Bar Admissions hold a hearing at which applicant would be afforded the opportunity to demonstrate that her legal education in England satisfied the standard for approval by the American Bar Association. The hearing was held, and the commissioner appointed by the court concluded that the applicant's legal education was not in fact "substantially equivalent to a legal education in an A. B. A. approved law school."[6]

On appeal, the supreme court agreed that the applicant's legal education in England does not satisfy the letter of the standards. The court pointed out, however, that "differences between her education and an American Bar Association approved education must be viewed in light of the differing nature of the English system of legal education. When so viewed, the educational differences are not significant."[7] Finding that the applicant's education substantially satisfied the standards for approval, the court ordered that she be admitted to practice law and suggested to the prior rulemaking committee of the Louisiana State Bar Association that it make a study of the rule as then constituted.

In the following month, in *Application of Tucker*,[8] the court denied an application to take the bar examination. No reason was given for the denial. Three justices dissented and would have applied the rationale of the *Anderson* decision. In the following month, a divided court in *Application of Faylona*[9] ordered that the applicant, who had passed the bar examination, be admitted to practice law in Louisiana. Chief Justice Dixon, in his concurring reasons, stated that "the rules of this court (Rule 14) were not designed to prevent qualified applicants from taking the bar examination and gaining admission to practice law in Louisiana. Their object was to prevent unqualified persons from taking the bar examination."

5. 377 So. 2d 1185 (La. 1980).
6. *Id.* at 1186.
7. *Id.* at 1187.
8. 381 So. 2d 1203 (La. 1980).
9. *Id.* at 1203.

Justice Dixon explained that "when a well qualified applicant is denied the right to take the bar examination, because of a literal interpretation of our rules, we should set about, either to make exceptions in the rare cases, or change the rules in problem areas which are likely to occur. Our rules should not be interpreted as a shield for injustice."[10] The chief justice concluded by stating that "until the articles are amended, or until the court enacts a rule, we are relegated, in order to prevent rank injustice, to the expediency of examining the qualifications of every applicant who seeks relief from the committee's denial."[11]

PRACTICE OF LAW

In *Singer Hutner Levine Seeman & Stuart v. Louisiana Bar Association*,[12] the supreme court was faced with reconciling the apparent conflict between Disciplinary Rule 2-102 (D) of the Code of Professional Responsibility and Louisiana Revised Statutes 37:213, which defines and regulates the practice of law in Louisiana. The applicant law firm is a partnership organized under the laws of New York. Two Louisiana attorneys were associated with the firm, one as a partner and one as an associate, and they maintained an office for the partnership within the state of Louisiana. Other members of the firm were licensed and practicing either in New York or California, where the firm maintained offices.[13] The question presented to the court was "whether the Bar Association should be restrained from taking any action against the plaintiffs because of their activities, which the Bar Association believes violate or aid in violation of R.S. 37:213."[14] After considering the court's role in the regulation of the practice of law, the majority concluded that the disciplinary rules adopted by the court allow partnerships to be formed by the lawyers licensed in different jurisdictions as long as the firm's letterhead and other listings set out the jurisdictional limitations of the members. To the extent that R.S. 37:213 conflicts with that rule, the court held that the statute is unconstitutional because it is an "impermissible infringement on the judicial authority."[15] The court pointed out that it will "uphold legislative acts passed in aid of its inherent power, but will strike down statutes which tend to impede or frustrate its authority."[16] The decision is certainly consistent with

10. *Id.* at 1204.
11. *Id.* at 1205.
12. 378 So. 2d 423 (La. 1979).
13. *Id.* at 424.
14. *Id.* at 425.
15. *Id.* at 427.
16. *Id.* at 426.

the court's unquestioned responsibility to regulate the practice of law. If there is to be any consistency, uniformity, and continuity in this area, there must be unity of purpose as defined by a single regulatory body. The decision would appear further to be totally consistent with fundamental notions of separation of powers. In another matter interpreting R.S. 37:213, the court held that two individuals would not be allowed to represent a plaintiff in association with that plaintiff proceeding in proper person, absent evidence that either individual was licensed to practice law in Louisiana or in any state.[17]

In *Scott v. Kemper Insurance Co.*,[18] a divided supreme court held that a discharged attorney may not nullify a settlement entered into by and between the client and the defendant at a time when the client was represented by new counsel, nor may the discharged attorney proceed with the pending suit as if no settlement had been made.[19] The principal issue presented to the court was whether it should apply literally the provisions of R.S. 37:218. That statute provides in part that after the filing of a contingent fee contract, "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 the disposition had been made."[20] The court, reiterating its exclusive and paramount authority to regulate the practice of law, found that under its rules[21] the client has the absolute right to discharge his attorney. Having so found, the court stated that "an attorney can neither force his continued representation of a client who wishes to discharge him, nor obtain by any means a propriety or ownership interest in the client's claim."[22] Having so found, the court then had to come to grips with the question of what rights the discharged attorney had with respect to his fee. The court easily recognized the privilege that the attorney has on the proceeds of the settlement. The court found that an attorney who has in fact properly filed his fee contract will be protected since "a defendant who disburses the settlement proceeds without ascertaining and paying the fee to which the attorney is due will do so to his pre-

17. Begg v. Roman Catholic Church of the Archdiocese of New Orleans, 380 So. 2d 666 (La. App. 4th Cir. 1980).

18. 377 So. 2d 66 (La. 1979).

19. *Id.* at 68.

20. LA. R.S. 37:218 (Supp. 1975).

21. LA. CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 2-110 (B)(4) (found in ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS'N art. XVI; LA. R.S. 37 ch. 4, app.).

22. 377 So. 2d at 70.

judice."[23] As to the amount of the fee, the supreme court rejected the trial court's notion that it should be limited to quantum meruit, citing *Saucier*.[24] The court held that the highest of the contingent fee percentages contracted for by the client should be determined by the trial judge, who will then "divide that fee appropriately among the attorneys."[25] The fee is to be apportioned according to the respective services and contribution of the attorneys for work performed and "other relevant factors."[26] The decision appropriately recognizes the right of an attorney who has performed valuable services to be compensated. It clearly recognizes the client's paramount right to be represented by counsel of his choosing. A decision literally applying the statute would certainly thwart this right.

Other matters of interest passed upon by the courts during the term include *LaCour v. Chatelain*,[27] in which it was held that since the workers' compensation claimant had died, presumably without the knowledge of the attorney, at the time a settlement agreement was reportedly entered into, such agreement was not binding. In *Marpco v. South States, Pipe and Supply*[28] the court of appeal held that a continuance should be granted where counsel withdraws on the date of trial, unless the court finds good reason not to grant such a continuance. In the instant case, the trial judge did not grant the continuance and rendered judgment against the defendant. The court of appeal found that reversing and vacating the trial court judgment and remanding to the trial court for further proceedings would not present a grave injustice nor cause irreparable injury to the plaintiff. On the other hand, to affirm the judgment would do a grave injustice to the defendant under the circumstances, since the trial judge did not give any reason for his decision.

In *Marshall v. Wells*,[29] the court of appeal was confronted with the question of whether an action seeking to annul and rescind a contract of employment contract entered into more than five years prior to the filing of suit was barred by prescription. The defendant relied upon the provisions of Civil Code article 3542, while the plaintiff alleged a number of grounds for setting aside the contract. The court did not address the plaintiff's allegations; however, it did indicate that there is "nothing *per se* illegal or in derogation of public order or morals about a contingent fee contract for professional ser-

23. *Id.*
24. Saucier v. Hayes, 373 So. 2d 102 (La. 1979).
25. 377 So. 2d at 71.
26. *Id.*
27. 380 So. 2d 663 (La. App. 4th Cir. 1980).
28. 377 So. 2d 525 (La. 1980).
29. 381 So. 2d 551 (La. App. 2d Cir. 1980).

vices."[30] The court, on its own motion, considered the possible applicability of article 2221, which provides a ten-year statute of limitations, but concluded that the five-year prescriptive period was applicable under the allegations of plaintiff's petition.

In *Succession of Buevens*,[31] the third circuit held that the prescription of three years under article 3538 begins to run as to an attorney when his professional relationship is terminated. Therefore, a claim for fees filed more than three years thereafter was barred by prescription. In *Calk v. Highland Construction & Manufacturing*,[32] the supreme court held that an attorney who has a written contract which affords him an "interest" in a claim has a statutory privilege on that claim whether the matter is terminated by judgment or settlement. That privilege, however, prevails only as to the fee and does not include advances in the nature of a loan or to cover medical bills and other necessities of the client which would constitute the client's special damages.[33] It is encouraging that the court did not extend the privilege to these "advances." As a matter of policy, it would seem that such advances should be discouraged. Whether the court was saying this or merely applying literally the statute is not clear from the decision.

DISCIPLINE

During the term, the supreme court decided five disciplinary cases which resulted in three disbarments, one suspension, and one reprimand. All of the decisions are consistent with the prior jurisprudence and reflect the court's continuing policy of taking action necessary and appropriate to protect the public interest. In *Louisiana State Bar Association v. Bensabat*,[34] the court held that disbarment may be invoked for crimes not directly connected with the practice of law and that, absent mitigating circumstances, an attorney's felony convictions for conspiracy to import cocaine, conspiracy to possess the drug with intent to distribute, and possession with intent to distribute manifest lack of fidelity to his duty to uphold the law and require disbarment.

In *Louisiana State Bar Association v. Jordan*,[35] the court was again faced with the recurring problem of commingling and conversion of clients' funds. In *Jordan*, the court found that the attorney

30. *Id.* at 552.
31. 373 So. 2d 750 (La. App. 3d Cir. 1979).
32. 376 So. 2d 495 (La. 1979).
33. *Id.* at 500.
34. 378 So. 2d 380 (La. 1979).
35. 375 So. 2d 89 (La. 1979).

had negotiated a settlement for his client, had concealed this fact from the client, and had retained the proceeds for his own use. The court also found a less than cooperative attitude on the part of the respondent, once the client had sought other counsel to seek recovery of the funds and during the course of the bar association's investigation. The court again reminded attorneys that the conversion of a client's funds is one of the most serious violations of an attorney's obligation and that disbarment is required in order to protect the public and the courts.[36]

In *Louisiana State Bar Association v. Summers*,[37] the court found that the respondent was guilty of a pattern of misconduct which was intentional, "that the only restitution that had been made was that achieved through the filing of suits," and that the only financial payments made were those by respondent's liability insurer.[38] The commissioner found that the respondent knowingly represented conflicting interests, prepared documents to the detriment of the clients and in favor of the undisclosed conflicting interest, and procured the signature of his clients on documents which were not what they were represented to be by the attorney. All of this resulted in great loss to the clients. In ordering disbarment, the court indicated that "given the circumstances of misconduct as shown in this case and the harm caused to his clients, as well as the adverse reflection cast upon the entire legal profession by respondent's conduct, we felt that only the disbarment of respondent can be the appropriate action imposed by our obligation to the public and to the profession."[39] The commissioner had recommended a suspension of six months. The Committee on Professional Responsibility sought a period of suspension greater than that recommended by the commissioner. As indicated, the court nevertheless disbarred.

It is interesting to note that an earlier disciplinary action involving the same respondent, which is commented upon hereinafter, resulted in a suspension of one year. In that case there were certainly strong mitigating circumstances in favor of the respondent. Although the court did not comment on this, it certainly raises a question as to whether it was a factor considered by the court in ordering disbarment. In light of the court's findings, disbarment seems appropriate.

In *Louisiana State Bar Association v. Beard* and *Louisiana State Bar Association v. Summers*, consolidated,[40] the court imposed a one-

36. *Id.* at 93.
37. 379 So. 2d 1065 (La. 1980).
38. *Id.* at 1069.
39. *Id.*
40. 374 So. 2d 1179 (La. 1979).

year suspension from the practice of law in a case involving alleged violations of Disciplinary Rules 1-102 and 2-103 of the Code of Professional Responsibility. It was contended that the respondents had accepted personal injury and wrongful death cases which had been referred to them by a non-lawyer who expected to be rewarded by payment of a portion of the fee.

The court found that certain cases were referred to the respondents by an individual who was later paid for "investigation."[41] Apparently no evidence was offered to prove that in fact "fee splitting" occurred. The Committee on Professional Responsibility recommended disbarment. After viewing the entire history of the instant matter and the involvement of the alleged investigator with the respondents and others in protracted litigation, the court concluded that the investigator's testimony was not worthy of belief. It also pointed out that he apparently had engaged in a protracted course of conduct against the respondents which caused these lawyers to "have suffered from their association with the investigator."[42] The justices made it very clear that they did not approve of the conduct chronicled in these proceedings. As the court pointed out, "the penalty which we impose in these cases must not be considered our measure of the serious nature of the offenses here involved. Accepting cases from non-lawyers, referred to a solicitor who expects to be and is rewarded, cannot be condoned; the professional character of the practice of law could not survive the hunting down and marketing of personal injury claims. Nevertheless, the penalty in disciplinary proceedings is not so much to punish the lawyer as to protect the public."[43] In explaining this suspension, the court went on to say that "if all of Dugas' testimony could be believed, respondent should be disbarred. It is not all believable; Dugas' testimony culminates years of threats to destroy two lawyers who would not be blackmailed into sharing a large fee with him. The interest of the public will be protected by a sentence less than disbarment."[44] However, the respondents were not disbarred in this case because of the strong mitigating factors found by the court. It appears that the court is again telling the bar, perhaps in stronger terms, that this type of conduct will not be condoned.

In *Louisiana State Bar Association v. Mitchell*,[45] the court found a "technical violation" of disciplinary rules respecting commingling

41. *Id.* at 1180.
42. *Id.* at 1181.
43. *Id.*
44. *Id.*
45. 375 So. 2d 1350 (La. 1979).

of funds and "possible appearance of impropriety" in accepting a civil representation of an inmate in the state penitentiary while serving as an assistant district attorney. A reprimand was ordered. With reference to the commingling allegation, the decision reveals that the respondent attorney had represented a group of plaintiffs in certain civil rights litigation. The court found that the respondent had deposited in his personal account a check representing interest on a judgment secured for the plaintiffs. The plaintiffs had received their awards, but not the interest. The court found that the respondent had performed valuable legal services for the plaintiffs, for which he had never billed, and that he expended considerable time and money in connection with his representation of the plaintiffs for which he was never compensated.[46] The court went on to say that if respondent "was entitled to the interest money in payment of his fee and expenses, he did not commingle his clients' money with his own by depositing the check in his personal account. Under the circumstances, we find, at most, only technical violations of disciplinary rules 1-102 and 9-102."[47] The court did recognize that respondent had a duty to account to his clients for the entire recovery under the judgment, including interest, whether or not he had a claim against them for services. Further, in mitigation, the court found that respondent did in fact pay over to plaintiffs the interest money they alleged was due. On the other count, the court found that the respondent did not engage in legal services for a fee in a criminal matter while serving as an assistant district attorney. The fee he charged the complaining client was found to be an investigative fee for work which the respondent considered "civil in nature."[48]

46. *Id.* at 1351.
47. *Id.*
48. *Id.*