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Public Law: Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

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Attorneys and clients are more often in court at odds with one another. A reading of the appellate decisions during the last term reveals a growing trend of litigation by and between attorneys and their clients. This is evidenced by the growing number of cases involving the reasonableness of attorney's fees, the validity of liens to protect an attorney's right to a fee and, in some instances, attorneys' attempts to intervene in their client's litigation in order to protect their claimed fees. Actions by clients against their attorneys for malpractice also appear on the rise. Such actions are a regrettable but predictable consequence of the changing role and image of attorneys in our society. With the advent of advertising, price competition, and other commercial practices of the market place, the relationship between attorney and client has suffered.

In matters of discipline, the supreme court continues to seek that delicate balance needed to protect the public from the actions of irresponsible or careless attorneys while, at the same time, not unduly penalizing or punishing an attorney who has demonstrated an understanding of his prior wrongdoing and has taken those measures that convince the court that his future conduct will be consistent with the high standards of his profession.

DISCIPLINE

Conviction of a crime involving moral turpitude again serves as a basis for disbarment. This is particularly true in cases directly connected with the practice of law. In *Louisiana State Bar Association v. Russell*,[1] the attorney was conspiring with others to obstruct justice by corruptly influencing a witness to give false testimony. This, the court said, reflected upon his moral fitness to practice law and tended to undermine "the American justice system and is particularly reprehensible in a member of the Bar."[2] Disbarment was ordered retroactive to the date of initial suspension. Several new and interesting questions were raised before the court in *Louisiana State Bar Association v. Edwards*.[3] Discipline was sought by the

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* Member, Louisiana State Bar Association.

1. 388 So. 2d 788 (La. 1980).
2. *Id.* at 790.
3. 387 So. 2d 1137 (La. 1980).

Committee on Professional Responsibility of the bar association based upon the respondent's alleged misconduct in filing a suit "merely to harass or maliciously injure another" and for counseling his client in "conduct that the lawyer knows to be illegal or fraudulent."[4] The supreme court found that the attorney's conduct involved dishonesty, deceit, misrepresentation, and was prejudicial to the administration of justice. The respondent moved to dismiss the proceedings contending that the disciplinary action had prescribed and that the committee had been guilty of laches. The court observed that it had not promulgated any rules on prescription applicable to disciplinary proceedings and rejected the motion. The facts revealed that there had been a delay of some seven years between the filing of the complaint and the action of the Committee on Professional Responsibility. The committee responded that this delay was occasioned by the fact that other proceedings were instituted against the respondent and that during a great portion of that time the respondent was actually under suspension from the practice of law. The committee further contended that it should not be required to proceed against a suspended attorney for additional violations until he resumes the practice of law. The court found this contention to be without merit and found the committee's delay unwarranted. In light of these facts, the court concluded that further suspension or disbarment would be inappropriate and, instead, imposed a public reprimand.

In *Louisiana State Bar Association v. Causey*,[5] the respondent had taken a cash fee from a client, who was in the custody of the Department of Corrections, and was to seek a pardon for him. The court found that no action of any consequence was taken by the attorney for a period of eight and one-half months and that he was guilty of neglecting a legal matter entrusted to him.[6] In this case the court found that this matter involved inattention and procrastination rather than corrupt motives or moral turpitude. The court was quick, however, to point out that their decision in the instant case does not mean that they condone such behavior or that the court will not impose harsher sanctions in the future. In the words of the court, "[p]rocrastination and inattention can have effects upon the client that are just as disastrous as if dishonesty were involved."[7] The attorney was suspended for ninety days; however, the court made an exception to this suspension so that the attorney could complete the services which he was obligated to perform on behalf of his incarcerated client.

4. *Id.* at 1138.
5. 393 So. 2d 88 (La. 1981).
6. *Id.* at 91.
7. *Id.* at 93.

Suspension for three and one-half months was imposed against an attorney who had been convicted in federal court of transferring checks in interstate commerce with knowledge that the money represented by the checks had been secured from an interim lending agency by fraud.[8] This charge, under federal law, constituted a felony. Under state law, the charge would have been a misdemeanor. Facts revealed that the conduct of the attorney did not involve misuse of his license to practice law. In mitigation, the court further found that the federal trial judge characterized the circumstantial evidence of intent as "weak." The attorney received no benefit from the transfer of funds. No one suffered any loss. The transfer merely involved the moving of corporate funds from one corporate bank account to another. The most mitigating circumstance was respondent's voluntary withdrawal from the practice of law during the disciplinary proceedings. After considering all of these facts, the court found a three and one-half month suspension to be the appropriate discipline.

A divided court concluded that a six month suspension from the practice of law was the appropriate sanction against an attorney whose conduct constituted "at least gross and wanton negligence reflecting an absolute disregard of his duty competently and professionally to handle a legal matter intrusted to him, if not a contrivance to cause inconvenience to a client."[9] The attorney had rendered a title opinion to a bank, certifying that its mortgage was a good first mortgage. The court found that at the time the attorney knew of two other mortgages which primed the bank's mortgage, but did not disclose this fact nor take any steps to secure their cancellation. After reviewing the facts, the court found that the respondent did not act with ill motive or dishonest intent and concluded that a six month suspension from the practice of law would be appropriate. Justice Blanche dissented, indicating that a reprimand would be the appropriate sanction. Justice Dennis dissented also, being of the opinion that a suspension of six months was too lenient.

In *Louisiana State Bar Association v. Miller*,[10] the respondent had been convicted of a crime not directly connected with the practice of law. The court found that the attorney had properly rehabilitated himself since the crime and that his conduct subsequent to that date had been "without any further discredit to himself or to his profession."[11] The court ordered an eighteen month

8. Louisiana State Bar Ass'n v. Levy, 389 So. 2d 51 (La. 1980).
9. Louisiana State Bar Ass'n v. Core, 384 So. 2d 754, 758 (La. 1980).
10. 382 So. 2d 911 (La. 1980).
11. *Id.* at 912.

suspension, believing that the respondent was sincerely contrite and repentent, had made restitution, and had demeaned himself since the one isolated incident of wrongful conduct.

FEES—CONTRACTS—LIENS

In the matter of *Kelly v. National Life and Accident Insurance Co.*,[12] the first circuit considered a dispute between a surviving spouse and a named beneficiary over the proceeds of a life insurance policy. An attorney intervened in the proceedings on his own behalf, seeking a portion of the policy proceeds, based on his contention that his efforts alone were responsible for the discovery of the policy and that, therefore, he was entitled to receive a portion thereof under the "fund doctrine." The court held, citing *Sizeler v. Sizeler*,[13] that life insurance proceeds, unless so designated, form no part of the estate of the deceased, but inure directly to the named beneficiary. As to the attorney's contention, the court denied him any relief. It found that "his talents and efforts were both employed and deployed to disqualify"[14] the named beneficiary under the policy. Since she prevailed, the court reasoned, the lawyer "may not now be heard and supported in any assertion that he is entitled to one-third of the proceeds."[15]

In *Succession of Marcel*[16] the court recognized the right of attorneys to collect under their contingent fee contract, which was entered into by them with the provisional tutor of minors. The contingent fee contract had been approved by the court at the time of its confection, which occured two and one-half years prior to settlement of the minors' claims. Shortly prior to the settlement of the claims, a new tutor was appointed and at her insistence the employment of the attorneys was terminated. The court found that the original attorneys were primarily responsible for the minors' recovery. Since their contract had been approved by the court, they were entitled to their contingent fee.

The well established doctrine that a breach of contract does not generally give rise to an award of attorney's fees unless attorney's fees are authorized by the contract or by statute was reiterated in *Cobb v. Gallet*.[17] In *Cobb*, the court found that the defendant had

12. 393 So. 2d 130 (La. App. 1st Cir. 1980).
13. 170 La. 128, 127 So. 388 (1930).
14. 393 So. 2d at 132.
15. *Id.*
16. 395 So. 2d 394 (La. App. 1st Cir. 1981).
17. 392 So. 2d 134 (La. App. 1st Cir. 1980).

wrongfully terminated the contract of lease and had obtained possession of his property by "extra legal means." However, the court did not find this sufficient to constitute fraud or bad faith on the part of the contracting party against whom relief was sought.[18]

In *Cheatham v. City of New Orleans*,[19] the Fourth Circuit Court of Appeal was confronted with two applications for *certiorari* resulting from a conflict among a judgment creditor who had paid $619,000 in satisfaction of a judgment rendered against it, the attorneys who collected the judgment, and the attorney who contended that he was entitled to a portion of the fee pursuant to a contract. The attorney seeking the fee sought to intervene in the proceeding after the judgment became final and had been satisfied by the defendant. The attorney claimed an interest in the judgment pursuant to Louisiana Revised Statutes 37:218. The court held the statute inapplicable and the intervention improper since there was no "pending action."[20] The use of summary procedure, the court indicated, was improper. The parties, to the extent that they had a new cause of action, were relegated to a new ordinary proceeding.

In *O'Bryan v. O'Bryan*,[21] the court of appeal shed additional light on the duties of a court-appointed attorney in a divorce suit which is coupled with incidental matters of custody and child support. After review of the applicable articles of the Code of Civil Procedure[22] and the comments thereunder, the court concluded that the appointed attorney is limited to those matters specifically permitted by the Code. Therefore, it was found that he was "no longer advancing a defense for his absentee client, but was asserting additional relief on her behalf"[23] when he filed a reconventional demand for child support. This he had no right to do.

Distinguishing its earlier decision on the subject, a divided supreme court permitted an attorney to enter into a contingency fee contract to represent a wife in the partition of a community when the contract was entered into after the separation of the husband and wife but before divorce.[24] In the earlier case of *Succession of Butler*,[25] which involved a similar contingency fee contract executed prior to judgment of separation, the court held such a contract to be

18. *Id.* at 135, 136.
19. 391 So. 2d 1324 (La. App. 4th Cir. 1980).
20. *Id.* at 1326.
21. 391 So. 2d 1206 (La. App. 1st Cir. 1980).
22. LA. CODE CIV. P. arts. 5094 & 5095.
23. 391 So. 2d at 1209.
24. Olivier v. Doga, 384 So. 2d 330 (La. 1980).
25. 294 So. 2d 512 (La. 1974).

contrary to public policy and reprobated by law, since it could tend to hinder reconciliation. In the instant case, the supreme court, reversing the court of appeal, found that reliance on *Butler* was misplaced. The court stated that "there is no public policy against a wife protecting her share in the community of acquets and gains . . . inasmuch as the community has been terminated by the judgment of separation. . . ."[26] The court went on to say that if public policy were an issue, it would be in favor of protecting the wife's interest in the community. The court was further confronted with the applicability of Revised Statutes 9:5001, as it relates to the privilege on the proceeds of the judgment which the attorney claimed. It held that recordation of the contract in this instance was not required. Further, the court found that, in fact, the contract had been filed in the suit and was recorded in the mortgage records.

The court in *American General Investment Corp. v. St. Elmo Lands* held that a provision for attorneys' fees in a mortgage note does not create any right or cause of action in favor of the payee's attorney to intervene in or interfere with the client's litigation.[27] American General hired a law firm to institute two suits on promissory notes secured by mortgages. One suit was by executory process, the other proceeded *via ordinaria*. After service of the writ of seizure in the executory proceeding, the plaintiff and defendant began serious efforts to settle and compromise their differences. The attorneys were instructed to suspend further litigation. The law firm executed and recorded an affidavit asserting a privilege on the property. Thereafter, American General terminated the law firm's services and instructed it to withdraw as its counsel of record. The parties later settled their differences through a sale of the property. The sum of $300,000 was placed in escrow pending determination of the amount of attorney's fees that might be due. The parties to the litigation filed a motion to dismiss, with prejudice, the pending foreclosures. The law firm sought to intervene as a party plaintiff in the pending foreclosures and sought a contradictory hearing on the issue of fees. The trial court dismissed the law suits and ordered the mortgages cancelled, but retained jurisdiction to determine the issues as to attorney's fees. The court of appeal reversed. After reviewing the jurisprudence and the Code of Professional Responsibility, the court concluded that the law firm had no legal right to join as a party plaintiff in its client's action and could do nothing to interfere with or nullify the settlement which its former client had made.

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26. 384 So. 2d at 331.
27. 391 So. 2d 570 (La. App. 4th Cir. 1980).

In *Joiner v. Downing*[28] the court of appeal was called upon to apply the provisions of article 2315.1 of the Civil Code which provides that reasonable attorney's fees may be awarded to the defendant as an item of taxable cost if the court determines that plaintiff's action for defamation was frivolous. The court found that the suit was in fact frivolous.[29] The defendant lawyer had written two letters of demand on behalf of his client. The court found that these letters were written on behalf of the clients, were relevant, and were made with probable cause and without malice. The trial court had dismissed the plaintiff's suit on a motion for directed verdict. The court fixed fees at a rate it deemed reasonable and observed that courts are not bound by agreements between attorneys and their clients as to the amount of fees to be taxed as costs.

In *Lennon v. Burdon*, the plaintiff, a Mississippi lawyer, entered into a contingency fee contract with defendant whereby plaintiff would receive a one-third interest in any sums collected for claims against the administrator of the estate of defendant's father arising out of improper expenses and misappropriation of assets and funds of the succession. Subsequently, defendant personally negotiated a settlement with the attorney for the administrator for $10,000 cash and title to a yacht. In affirming the trial court's rejection of the plaintiff's claim for attorney's fees, the fourth circuit held that there was no indication that the cash and property received by defendant in connection with the settlement was anything other than defendant's rightful interest in the succession itself, nor was there any evidence showing that such money and property were connected with claims against the administrator.[30] Therefore the attorney was entitled to no fees.

In *Deutsch, Kerrigan and Stiles v. Rault*,[31] a law partnership sued for attorney's fees for services rendered to appellant in connection with earlier representation. Appellant and several other defendants had been sued for more than $5,000,000 in damages for alleged civil rights violations. At issue in the present suit was whether and to what extent appellant was liable for the attorney's fees incurred in the successful defense of the civil rights action. Appellees adduced evidence that appellant had agreed to pay 25 percent of the total attorney's fees. Appellant denied liability for any expenses. The court found that appellant never protested any of the six fee statements that were submitted to him over a five-year period and that he was

28. 383 So. 2d 93 (La. App. 3d Cir. 1980).
29. *Id.* at 97.
30. Lennon v. Burdon, 394 So. 2d 666 (La. App. 4th Cir. 1981).
31. 389 So. 2d 1373 (La. App. 4th Cir. 1980).

constantly informed of the status of the litigation as it progressed. Citing Civil Code article 1811, the court held that "consent to an agreement can be shown by action, inaction, or silence. There is ample evidentiary proof to conclude by a preponderance the existence of an implied contract."[32] The appellate court affirmed the judgment of the trial court awarding attorney's fees to the appellees.

An attorney sued to collect on a $20,000 promissory note given in connection with a contract for legal services.[33] The trial court rejected the attorney's contention that the only issue was whether or not he was a holder in due course and held that the promissory note was given in contemplation of legal services and that an attorney can only recover for legal fees actually earned. The attorney's representation continued for a period of approximately three months before his dismissal. The client had paid $5,500 prior to signing the promissory note. The trial court held that this payment of $5,500 was adequate compensation and dismissed the suit. The third circuit held that the Code of Profesional Responsibility overrides legislative acts to the contrary and that the attorney could not rely on the commercial laws to collect a fee that he had not entirely earned. The court recognized that, at the time of discharge, an attorney is entitled to compensation for services actually rendered on a *quantum meruit* basis. However, because of the serious nature of the criminal charge against the client, the time expended by the attorney, and the high degree of skill reflected in the work product of this particular attorney, the court set the minimum amount of compensation for his services at $10,000 and awarded the attorney an addititional $4,500.

Another contest over fees arose in *Horton v. Butler*.[34] In that case an attorney entered into a contingent fee contract for recovery of the proceeds of a fire insurance policy. Subsequently, the client died and $16,835.78 was paid the insurer for the fire loss. The heirs of the decedent filed suit to obtain the proceeds, and the attorney intervened seeking 25 percent under the contract. Although the trial court ruled in favor of the attorney, the court of appeal recognized the jurisprudential requirement that an attorney, even under a contingent fee arrangement, must earn his fee. The court noted that the only services rendered by the attorney consisted of contacting the insurance company and later accepting the check for the proceeds. A fee of over $4,000 for these minimal services was, the court found, clearly excessive. The case was remanded to the trial court to establish the value of the services rendered by the attorney.

32. *Id.* at 1374.
33. Simon v. Metoyer, 383 So. 2d 1321 (La. App. 3d Cir. 1980).
34. 387 So. 2d 1315 (La. App. 1st Cir. 1980).

In *Becnel v. Montz*[35] an attorney sued a client for $1,500 for legal services rendered. The attorney had previously billed the client several times beginning in June 1976 in the amount of $100, without specification. In October of 1977, after several such $100 statements were billed, apparently the statement was paid. In November 1978 the attorney billed the client for $1,500, which the client refused to pay. The attorney contended that the $100 statement was for office expenses and that the client had agreed to perform certain sewer installation work for the attorney in exchange for the professional services rendered. The $1,500 bill was sent when the attorney learned that the client did not intend to perform the sewerage services. The client testified that there was no agreement to perform sewerage work and that he believed that $100 was the total amount owed. The court of appeal affirmed the trial court's decision in favor of defendant, finding that the passage of two year's time without the plaintiff billing the defendant other than for the $100 supported defendant's position. Further, the $100 statement was not itemized as to the costs, nor was other evidence introduced to corroborate such costs. Finally, the court held that the evidence was insufficient to show any contract between plaintiff and defendant with regard to the sewerage services to be performed by defendant or what amount defendant might owe in lieu of performing such services.

Another controversy over contingent fees arose in *Ethridge v. Merchants Trust and Savings Bank*.[36] The trial court awarded the attorney $32,344.86 for legal services rendered to defendant bank in two matters involving executory proceedings on real estate. The bank appealed, contending that the agreement between the bank and the attorney was that the attorney's fee would be based on a time or *quantum meruit* basis rather than on a percentage basis. The attorney testified that his agreement with the bank was to handle all collections on a percentage fee basis as called for in the notes, with no distinction or exception being made for foreclosures. Bank officials did not contradict plaintiff's testimony. Additionally, the bank contended that the attorney should not recover the amount claimed because it was in excess of a reasonable fee and was therefore prohibited by the Code of Professional Responsibility and public policy. The court of appeal noted that there are several considerations concerning the reasonableness of a fee. In the instant case, the court noted that the attorney's claim was for two of many collections undertaken for the bank, for some of which plaintiff col-

35. 384 So. 2d 1015 (La. App. 4th Cir. 1980).
36. 389 So. 2d 865 (La. App. 4th Cir. 1980).

lected nothing and was paid accordingly. In the context of the overall relationship between the attorney and the bank, the percentage fee on the particular claim was not excessive. The court of appeal did, however, alter the amount of the judgment to correct an arithmetic error in computing the percentage fee.

MALPRACTICE

In *Jenkins v. St. Paul Fire and Marine Insurance Co.*,[37] the second circuit reversed a lower court decision which had upheld a client's claim against his attorney for failure to timely institute the client's tort action. In the original action, suit was filed two days after the prescriptive period, and the alleged tortfeasor was dismissed on an exception of prescription. In the malpractice action, the jury found that the plaintiff client was not contributorily negligent, that the tortfeasor was guilty of negligence, and that the attorneys were guilty of negligence in failing to institute suit timely. On appeal, the second circuit reversed, holding that the jury's finding that the plaintiff was not contributorily negligent was manifestly erroneous. However, the second circuit did allow plaintiff to recover the sum of $5,000, the fee which was required by plaintiff's attorney in the malpractice action in addition to the normal contingency fee. The second circuit cited the supreme court case of *Ramp v. St. Paul Fire and Marine Insurance Co.*[38] in support of allowing compensation for the additional costs (attorney's fees in the malpractice action) incurred by the plaintiff in order to have his day in court, of which the negligence of the defendant attorneys deprived him.

The question of whether a malpractice action against an attorney sounds in tort or in contract, or both, was again raised in the case of *Ambrose v. Roberts*.[39] The third circuit in *Ambrose* held that such a claim may sound both in tort and in contract, citing the case of *Jackson v. Zito*,[40] in which writs were refused by the Louisiana Supreme Court. Judge Stoker, concurring, pointed out that while a more recent fourth circuit decision had held otherwise,[41] the writ denial[42] by the supreme court in that case did not necessarily imply approval of the reasoning of the Fourth Circuit Court of Appeal, but only the result. This remains an uncertain area of the law.

In *St. Pierre v. General Am. Transp. Corp.*, after successful trial

37. 393 So. 2d 851 (La. App. 2d Cir. 1981).
38. 263 La. 774, 269 So. 2d 239 (1972).
39. 393 So. 2d 132 (La. App. 3d Cir. 1980).
40. 314 So. 2d 401 (La. App. 1st Cir. 1975).
41. Coreceller v. Brooks, 347 So. 2d 274 (La. App. 4th Cir. 1977).
42. 350 So. 2d 1223 (La. 1977).

and appeal in a tort action, the plaintiff brought a malpractice action against his former attorney alleging, *inter alia*, that the attorney failed to sue the necessary parties and failed to make a timely objection to special interrogatories propounded to the jury. In the malpractice action,[43] the plaintiff incorporated by reference in the petition the court of appeal opinion affirming the judgment of the trial court in the original action. The defendant attorney and his insurer in the malpractice action moved for summary judgment on the grounds that the pleadings, including the court of appeal opinion, failed to state a cause of action. In the original court of appeal opinion, the court held that the plaintiff was barred from recovery by his own contributory negligence. Thus the allegations of negligence complained of by plaintiff in the malpractice action were insufficient to state a cause of action, since the court found that the plaintiff would have been precluded from recovery regardless of the attorney's alleged negligence, because of his contributory negligence.[44]

In the case of *Alfonso v. McIntyre*,[45] plaintiffs sued their original lawyer and his malpractice insurer for the attorney's failure to timely perfect an appeal from an adverse judgment in a petitory action. The first circuit, reviewing the written reasons for judgment and the transcript in the original petitory action, found that the trial court's findings of fact and conclusions of law were correct and that, therefore, the plaintiffs would not have obtained reversal even had the appeal been timely perfected. Thus, the trial court's dismissal of the malpractice action was affirmed.

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43. St. Pierre v. General Am. Transp. Corp., 360 So. 2d 595 (La. App. 4th Cir. 1978).

44. St. Pierre v. Washofsky, 391 So. 2d 78 (La. App. 4th Cir. 1980).

45. 387 So. 2d 1348 (La. App. 1st Cir. 1980).