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Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

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Introduction

How should a practicing attorney protect his fee for services rendered and to be rendered if the client has only one asset which is the subject of the dispute for which the attorney was hired? If the attorney is representing a defendant, a contingent fee would be inappropriate because if the defendant wins he is in the same position and the lawsuit has not produced a "res" out of which the contingent fee can be paid. Furthermore, except for Japan, the contingent fee historically has not been used for the defense of cases.[1] It must have seemed, to the attorney who was representing the record title holder of twenty acres soon to be in dispute, that the only alternative was to take an interest in the property itself when told that his client had no money to pay for his services. After all, this is precisely what the Honorable Huey P. Long had done in the 1921 case of *McClung v. Atlas Oil Company*,[2] which was affirmed later by *Gautreaux v. Harang*.[3] Both of these decisions concluded that Civil Code article 2447 was not violated if the attorney took an interest in the soon to be disputed property prior to the filing of a suit and an answer.[4] In addition to *McClung* and *Gautreaux*, the attorney had the public records doctrine[5] firmly in his corner. As we will see in further discussion on conflict of interest, the attorney was dead wrong.

Advertising and Solicitation

In the wake of *Shapero v. Kentucky Bar Association*,[6] the Louisiana State Bar Association recommended an amendment to Model Rules of

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1. Kreindler, The Contingent Fee: Whose Interests are Actually Being Saved?, 14 The Forum 406 (1979).

2. 148 La. 674, 87 So. 515 (1921).

3. 190 La. 1060, 183 So. 349 (1939).

4. La. Civ. Code art. 2653 states: "A right is said to be litigious whenever there exists a suit in contestation on the same."

5. La. R.S. 9:2721, 2756 (Supp. 1989).

6. 486 U.S. 466, 108 S. Ct. 1916 (1988).

Professional Responsibility 7.2 and 7.3. The amendments, approved by the Louisiana Supreme Court on June 15, 1989, are as follows:

Rule 7.2—Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3 a lawyer may advertise services through public media such as the telephone directory, legal directory, newspaper or other periodical, radio, or television, or through written or recorded communications not otherwise prohibited by Rule 7.3.

(b) A copy of recording of an advertisement or written communication shall be kept for two years after its last decimination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertisements or communications permitted by these rules and may pay the usual charges of a lawyer referral service or other legal services organization, provided that such service or organization complies with the requirements of Rules 7.1-7.4 inclusive.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

Rule 7.3—Direct Contact with Prospective Clients

(a) A lawyer shall not solicit professional employment, in person, by a person-to-person verbal telephone contact, or through others acting at his request, from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client through any means, even when not otherwise prohibited by these rules, if:

(1) The prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) The solicitation involves coercion, duress or harassment; or

(3) The prospective client is known to the lawyer to be represented by counsel, except where the client has initiated contact with the lawyer.

(c) Written or recorded communication not otherwise prohibited by these rules may be utilized provided:

(1) In the case of written communication, it is specifically identified as advertising material both on the first page containing any writing in the communication itself and on any envelope in which it is transmitted in typesize at least as large as the largest otherwise appearing on said page

> or said envelope;
> (2) In the case of recorded communication, it is specifically identified as advertising material at the beginning of the recording, at the end of the recording, and on any envelope on which it is transmitted in typesize at least as large as the largest type otherwise used in said recording or on said envelope;
> (3) The lawyer submits a copy of the written communication to the Association at its executive office prior to or at the time the material is first transmitted to any prospective client.

The amendments clarify and place some specific prohibitions on direct contact with prospective clients known to have need of legal services. Even before *Shapero*, the Louisiana rules permitted the contacting of persons known to need legal services through written communication provided the communication was identified as advertising material. The mechanics of identifying the communication as advertising are more fully set out under the new rule, including typesize. More important, however, are the prohibitions set forth in subparagraphs (b)(1), (b)(2) and (b)(3) of Rule 7.3 of the Model Rules. When used in the context of the recent decision of *9 to 5 Fashions, Inc. v. Spurney*,[7] subparagraph (b)(3) may result in both ethical complaints and civil suits against the offending attorney for tortious interference with the attorney/client contract. Insofar as the written communication is concerned, not only must it have the word advertising on it and on the envelope, but all of the contents of the communication must comply with Rules 7.1. In other words, there must be no material misrepresentation of fact or law in the communication and it generally must not be false or misleading. The same general rules apply to any recorded communication.

Abuse of Process

When Model Rules 3.1-3.4 are read together with articles 863 and 1420 of the Louisiana Code of Civil Procedure, it is clear that the justice system cannot be abused, even though the abuse may be helpful to the client. Many abusive tactics are easily detected and should result in swift sanction of the attorney guilty of the abuse. On the other hand, sometimes it is very difficult to distinguish an abusive tactic from one that is permitted by law, such as confirming a default against a defendant whose attorney has for some reason failed to file responsive pleadings. This was the situation in *Thibodeaux v. Burton*,[8] in which the Louisiana

7. 538 So. 2d 228 (La. 1989).
8. 538 So. 2d 1001 (La. 1989).

Supreme Court split 4 to 3 on whether to grant a new trial for a defendant against whom a default judgment in excess of $2,000,000 was awarded. The very size of the claim would seem to have prevented the entry of a default judgment. The Code of Civil Procedure, however, does not differentiate according to the amount sued for when a confirmation is sought. According to the majority opinion, counsel for plaintiffs seriously argued that he merely availed himself of the law on his clients' behalf when he confirmed the default judgment. The defendant had failed to timely answer the petition and had not presented a reasonable excuse for the failure. The dissenting justices considered the defendant's failure to provide an excuse for not filing responsive pleadings as the determinative factor. Neither the majority opinion nor the dissenting opinions found any ill practices nor any violations of the rules of professional conduct. The majority opinion simply stated that the interest of justice required a new trial.

Some courts of appeal in similar cases reached different results from *Thibodeaux v. Burton. Design Associates, Inc. v. Charpentier*[9] was a suit on an open account. Prior to the default judgment there had been negotiation between the two opposing attorneys and the plaintiff's attorney had set a deadline for filing of responsive pleadings. The defendant's attorney, though aware of the deadline, filed no pleadings and the default was routinely entered. The plaintiff's attorney then waited until the appeal time had expired before notifying the defendant's attorney of the signing of the judgment. The defendant contended that this was an ill practice under article 2004 of the Code of Civil Procedure. In deciding in favor of the plaintiff, the court stated that it was "reluctant to place an obligation on an attorney to advise his opposing attorney about matters which he should know and where such advice would infringe upon his own client's legal rights."[10]

In *Firmature v. Tommasi*,[11] the defendant argued that it would be inequitable and unconscionable to enforce the default judgment entered against him because his attorney simply neglected to file responsive pleadings. During the trial of the action to nullify the default judgement, the trial judge repeatedly expressed his personal opinion that a defendant against whom a default judgment was taken because his attorney neglected to file an answer to the suit should still be allowed his day in court. Predictably, the trial judge declared the default judgment a nullity. The court of appeal reversed, holding that there was no improper practice or procedure committed by plaintiff's counsel. There had been absolutely no communication between the parties' attorneys and therefore there

9. 537 So. 2d 1233 (La. App. 4th Cir.), writ denied, 540 So. 2d 340 (1989).
10. Id. at 1238.
11. 533 So. 2d 1326 (La. App. 3d Cir. 1988).

was nothing on which the defendant or his counsel could have reasonably relied as extending the courtesy of notice before taking a default judgment. The only "ill practice" which resulted in the judgment was the neglect of the defendant's attorney to file responsive pleadings. Article 2004 had no application in this instance.

In *Coleman E. Adler & Sons, Inc. v. Waggoner*,[12] the defendant filed an answer to the plaintiff's petition, but his attorney did not appear on the scheduled trial date. The court permitted the plaintiff to introduce evidence sufficient to prove its case and entered judgment. The defendant perfected a devolutive appeal and urged that there had been a deprivation of defendant's constitutional right to due process. It appears that defendant's counsel was replaced by a new counsel who mailed her motion to enroll to the clerk's office. For some unexplained reason, the judge never did receive the motion and the motion was never included in the record. As a result, defendant's second counsel was not notified of the trial date, although notification was made to the first attorney. The court nevertheless refused to set aside the judgment, pointing out that it is the attorney's obligation to have the court recognize him or her as the litigant's attorney of record and not the duty of the clerk of court.

Finally we get to a case of clear abuse of process—*Lusk v. Lusk*.[13] In *Lusk*, it appeared that the attorneys for both plaintiff and defendant were working together in order that an uncomplicated divorce might be obtained. Unknown to the husband's attorney, however, changes were made on supplemental and amended pleadings which were not reflected on the copies sent to the husband's attorney. The changes included that a demand of $5,940 in past due child support be made executory. That judgment remained in effect for some five years before an attempt to enforce it was made by the same attorney for the plaintiff. The husband's attorney obtained a temporary restraining order to prevent the execution of the judgment and also sought to have it set aside for fraud and ill practice. The court had no difficulty in deciding that court documents were forged to obtain an illegal judgment and set aside the judgment assessing all costs against the wife's attorney.

Older attorneys, who have long practiced under the assumption that duty to their client was first and foremost and confidentiality between the attorney and client inviolate, must now recognize that this emphasis has changed and that the attorney's duty to the system of justice and to others are now equally important and must be carefully considered before any action is taken. The amendment of article 863 and article

12. 538 So. 2d 1131 (La. App. 5th Cir. 1989).
13. 536 So. 2d 468 (La. App. 1st Cir. 1988).

1420 of the Code of Civil Procedure, as interpreted in *Thomas v. Capital Security Services, Inc.*,[14] make it clear that there are no longer any "free passes" for attorneys and litigants who violate Rule 11. Once a violation is established the rule mandates the application of sanctions. The *Thomas* case is perhaps the most comprehensive explanation of the workings of Rule 11 handed down by the Fifth Circuit. In the opinion of this writer it is "must reading" for every practicing attorney.

Conflict of Interest

Many of the conflict of interests cases in the past year have arisen in the criminal context. It would seem obvious that an attorney who has represented a defendant accused of a crime could not thereafter terminate that representation, assume the mantel of assistant district attorney, and appear on behalf of the state against the same defendant. Louisiana Code of Criminal Procedure article 680 clearly forbids such a switching of sides, as do the ethical standards set forth in Rule 1.9 and 1.11. In *State v. Devereaux*,[15] the criminal defendant's first attorney participated in the sentencing hearing against his former client after becoming an assistant district attorney. The state contended that there was no actual prejudice; however, the court concluded that it was not necessary to show actual prejudice when there was such a clear switching of sides in an identical matter. In *State v. Chavez*,[16] the *Devereaux* case was cited with approval although the court found that the defendant knowingly and intelligently waived his right to request a recusal of his first attorney. Were it not for the waiver, the matter would have been remanded to the trial court for resentencing. The appellate court pointed out that the most effective means of avoiding the type of problems presented in the *Chavez* and *Devereaux* cases was simply for a state attorney to decline to represent the state against a criminal defendant who was a former client.

Finally, in *State v. Allen*,[17] the supreme court was faced with a similar matter. In *Allen* the accused's first attorney had not participated in a criminal action against his former client. However, that attorney had represented the accused in bankruptcy proceedings that the court found to be substantially related to the later criminal prosecution. The court cited with approval the substantial relationship test adopted by the federal courts in cases such as *Arkansas v. Dean Foods Products Company*,[18] finding that the lower court erred in refusing to recuse the

14. 836 F.2d 866 (5th Cir. 1988) (en banc).
15. 537 So. 2d 804 (La. App. 2d Cir. 1989).
16. 540 So. 2d 992 (La. App. 2d Cir. 1989).
17. 539 So. 2d 1232 (La. 1989).
18. 605 F.2d 380 (8th Cir. 1979).

assistant district attorney who had formerly represented the defendant in the bankruptcy proceedings. The conviction and sentences were reversed and the case remanded for a new trial.

Sometimes overlooked by attorneys is the imputed disqualification rule, set forth in Rule 1.10, which provides that while lawyers are associated in a firm, none of them shall knowingly represent a client when another member of the firm would be prohibited from doing so by the other rules concerning conflict of interests. The supreme court reviewed the imputation rules in *In re J.M.P.*,[19] which was an adoption case occurring prior to the amendment of Louisiana Revised Statutes 9:422.7. The majority, over a vigorous dissent by Justice Calogero, found that if any conflict existed, it did not influence or induce any error on the surrendering mother. Justice Calogero concluded that even prior to the amendment the law required completely independent counsel, excluding any member of the same firm in which the attorney for the adopting parents was a member.

A case which created some shock waves among the members of the bar during the past year was *Succession of Cloud*,[20] which involved a conflict of interest between the attorney's personal interest and the interest of his client, a situation controlled by Rule 1.8. The arrangement in *Cloud* was similar to that of Huey P. Long and his client in the *McClung v. Atlas Oil Company*[21] case which had been affirmed in *Gautreaux v. Harang*.[22] Article 2447 of the Louisiana Civil Code, which prohibits an attorney from purchasing litigious rights, did not prevent an attorney from acquiring an interest in his client's genuinely disputed claim to immovable property when no suit was pending at the time of the acquisition. In *Cloud*, the client had no money to pay his attorney and, consequently, it was agreed that the client would transfer an interest in the immovable property to the attorney in return for services previously performed and to be performed. The transfer was accomplished and recorded prior to any lawsuit being filed by the siblings of the client.[23] The opinion stated that several members of the court were inclined to reconsider *Gautreaux v. Harang*, but a unanimous court, with Justice Cole concurring, decided to rely on the provisions of the Code of Professional Responsibility, particularly Disciplinary Rule 5-103 (A), to nullify the contract rather than seek to redefine "litigious right" under article 2447. Disciplinary Rule 5-103 provided that a lawyer shall not acquire a proprietary interest in the cause of action or subject matter

19. 528 So. 2d 1002 (La. 1988).
20. 530 So. 2d 1146 (La. 1988).
21. 148 La. 674, 87 So. 515 (1921).
22. 190 La. 1060, 183 So. 349 (1939).
23. Consequently, the attorney now had the public records doctrine on his side also. La. R.S. 9:2721 & 9:2756 (Supp. 1989).

of litigation he is conducting for his client. The same rule is set forth in Model Rule 1.8 (J). The only exceptions to the rule are the right of the attorney to acquire a lien granted by law to secure his fees or expenses, or enter into a reasonable contingent fee with his client in a civil case. What may disturb attorneys the most was the conclusion by the court that the siblings of the client had a cause of action to seek the nullity of the contract between their sibling and her attorney. These siblings could not be injured by the contract because had they won, the attorney's interest would have come from the sister's own forced interest. It is extremely difficult to understand how the siblings had any cause of action, whether under article 2447 or the ethical rules.

Malpractice

In this area there are two burning questions: (1) may a third party with whom the attorney has no contract bring a malpractice action against him and (2) if so, what are the standards against which the conduct of the attorney is measured?

The "privity of contract" concept, which precluded suits by third parties against attorneys, has either abrogated or eroded in most states. In Louisiana, the court in *Woodfork v. Sanders*[24] relied on the contract theory of stipulation pour autrui in order to give the third party an action. In *Succession of Killingsworth*,[25] however, the court chose to hinge its decision on article 2315, the general negligence article of the civil code. In *Evans v. Evans*,[26] the court simply assumed that a legatee who lost his legacy because of the negligence of the attorney who drafted the will had a cause of action, without elaborating on whether it was in contract or in tort.

Woodfork, *Killingsworth*, and *Evans* all dealt with the rights of a legatee who would have inherited but for the negligence of the attorney who drafted the will for the decedent. But consider the situation where a third party is injured by an action taken by an attorney for his client which coincidentally happens to damage a third party. *Shaw v. Everett*,[27] an unpublished decision of the fourth circuit, is such a case. Not only did the court conclude that a cause of action existed, but also that the attorney's conduct should be measured against the Code of Professional Responsibility rather than the standard adopted in *Ramp v. St. Paul Fire and Marine Insurance Company*,[28] which was followed recently by *Houillon v. Powers and Nass*.[29]

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24. 248 So. 2d 419 (La. App. 4th Cir.), writ denied, 252 So. 2d 455 (1971).

25. 270 So. 2d 196 (La. App. 1st Cir. 1972).

26. 410 So. 2d 729 (La. 1982).

27. No. C.A.-8615 (La. App. 4th Cir. March 10, 1988), writ denied, 531 So. 2d 272, 275 (1988).

28. 269 So. 2d 239 (La. 1972).

29. 530 So. 2d 680 (La. App. 4th Cir. 1988).

The players in this action were Jill Shaw, former wife of Lloyd Azcona, who filed suit against W. Paul Anderson and Gary P. Rouse, both attorneys who had represented various parties to a promissory note. The note had originally been owned by Lloyd Azcona and his brother Rene Azcona and the makers of the note were Curtis Everett and Billy Ray Eubank. Defendant Rouse represented Rene Azcona and defendant Anderson represented Billy Eubank. The promissory note involved in the dispute between Jill Shaw and her former husband, Lloyd Azcona, was placed in the registry of the court pursuant to a concursus action filed by Jill Shaw. While the note was held in the registry of the court, the makers wanted to discharge the debt. Because the note was secured by a real estate mortgage, they wished to obtain it in order to present it to the clerk of court for cancellation of the mortgage. Henry Klein, also a defendant in the principle action though not involved in this exception, but who represented Lloyd Azcona, presented to a civil district court judge who was not the one allotted to the concursus proceeding a motion that would permit the withdrawal of the promissory note. According to the opinion, Klein assured the judge that there were no objections to the withdrawal. This was probably true because no one, not even Jill Shaw, wished to impede the payment of the note. The problem developed later when the proceeds from the payment were distributed rather than returned to the registry of the court. This damaged the plaintiff inasmuch as she was an alleged assignee of her husband's part of the note. The present litigation was instituted by Shaw seeking payment of her one-half interest as well as damages for the alleged acts of the various parties in depriving her of the proceeds and the security of the mortgage. Defendants Anderson and Rouse filed exceptions of no cause of action which were sustained in the trial court but reversed on appeal. The appellate court set forth the issue as whether a non-client can assert a claim for damages against an attorney for the negligent breach of a professional obligation he owes the court, his profession, and the public. The court referred to Model Rules 1.2, 1.15, and 3.3 and said those rules set forth an attorney's responsibilities to his client, the courts, and the public. The court further stated:

> [W]e know of no rule of law which mandates disciplinary action as a sole means of redress. The rules of professional conduct do not exist in a vacuum. Their intent is to provide the standard of conduct by which the legal profession is to conduct itself with relation to clients, the judicial system and the public. And, one may negligently or intentionally breach those rules. A party aggrieved by a breach should be able to seek redress through the courts.[30]

30. No. C.A.-8615 (La. App. 4th Cir. March 10, 1988), writ denied, 531 So. 2d 272, 275 (1988).

The court in *Shaw* did not mention or distinguish in any way the earlier case of *Reed v. Verwoerdt*,[31] where the court held that the proper standard for malpractice was that set forth in *Ramp v. St. Paul Fire and Marine Insurance Company*[32] and not the Code of Professional Responsibility.[33]

It is interesting to compare the above case with *Scott v. Thomas*[34] and *Evans v. Detweiler*,[35] which summarized the elements necessary to prove a claim for legal malpractice as follows: (1) that there was an attorney/client relationship; (2) that the attorney was negligent in his representation of the client; and (3) that this negligence caused plaintiff some loss.[36]

There were at least fifteen other reported legal malpractice cases during the past year. At least three of these were decided on the basis of prescription in favor of the attorney; the court in each instance applied the one year prescriptive period.[37] Several others were decided in favor of the attorney because the advice given by the particular attorney at the time was the result of the proper exercise of skill and professional judgment even though hindsight or subsequent judicial decisions cast doubt upon the advice.[38]

In *Kirsch v. New England Insurance Company*,[39] a motion for summary judgment in favor of the attorney was granted because at the time the relationship between the plaintiff and the defendant attorney had ended. There was still time within which the action could have been filed. Therefore, the court held that the ultimate prescription of the plaintiff's previous lawsuit was not the fault of the defendant attorney. The supreme court granted writs without a hearing, reversed the appellate court, and remanded to the district court for further proceedings.[40]

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31. 490 So. 2d 421 (La. App. 5th Cir. 1986).

32. 269 So. 2d 239 (La. 1972).

33. For a lengthy discussion of whether or not the model rules should be used as the basis for civil liability for attorneys, see Note, The Rules of Professional Conduct: Basis for Civil Liability of Attorneys, 39 U. Fla. L. Rev. 777 (1987) and the other articles and cases cited therein.

34. 543 So. 2d 494 (La. App. 4th Cir. 1989).

35. 466 So. 2d 800 (La. App. 4th Cir. 1985).

36. The decision in Penalber v. Blount, 550 So. 2d 577 (La. 1989), attempts to reconcile these decisions by distinguishing between malpractice (negligence) and intentional tort by an attorney who violates constitutional, statutory, or professional rules deliberately.

37. Bolton v. New England Ins. Co., 542 So. 2d 135 (La. App. 1st Cir. 1989); Norwood v. Fish, 537 So. 2d 783 (La. App. 2d Cir. 1989); Law v. Mayeux, 527 So. 2d 37 (La. App. 3d Cir. 1988).

38. Quarles Drilling v. General Accident Ins., 538 So. 2d 1029 (La. App. 4th Cir. 1989); Louisiana Bank and Trust Co. v. Anderson, 526 So. 2d 1386 (La. App. 3d Cir. 1988); Drury v. Fawer, 527 So. 2d 423 (La. App. 4th Cir. 1988).

39. 532 So. 2d 922 (La. App. 5th Cir.), rev'd, 534 So. 2d 439 (1988).

40. 534 So. 2d 439 (La. 1988).

Similarly, in *Dixon v. Perlman*,[41] a motion for summary judgment was reversed and the case remanded to the trial court because the appellate court found that the attorneys, for purposes of filing the action and interrupting prescription, relied on notes of unknown origin in the file pertaining to the accident date to the exclusion of further independent investigation. This, said the court, presented a genuine issue of material fact as to the reasonableness of this reliance.

The other reported cases involving actions against attorneys were either dismissed on no cause of action exceptions or decided in favor of the attorney on a motion for summary judgment.[42] Finally, in *Dale v. Carriere*,[43] it was held that the duties of a notary public are not that of an attorney and that there is no law in Louisiana which required a notary to give inspection for legal flaws and to guarantee the validity of every document which he notarizes when he is hired only in his capacity as a notary and not as a drafter or guarantor of the validity of such documents.

It is apparent from the above cases that malpractice actions are continuing to increase and that the areas of alleged malpractice have broadened. Obvious neglect by the attorney causing injury to the client is no longer required. All manner of perceived shortcomings on behalf of the attorney now appear actionable.

Attorneys' Fees

The contingent fee statute, Louisiana Revised Statutes 37:218, has been the subject of much litigation. It was adopted many years prior to the advent of the Code of Professional Responsibility and the later model rules. The statute appeared to give an attorney the right to acquire a proprietary interest in the subject matter of the suit and also seemed to prevent the termination of his services by his client. This result occurred because neither the attorney nor the client could settle, compromise, or discontinue the lawsuit without the consent of the other. After the adoption of the Code of Professional Responsibility in 1969, the Louisiana Supreme Court, in a trilogy of decisions, interpreted Louisiana Revised Statutes 37:218 in such a fashion as not to conflict with the ethical rules.[44] As interpreted, the attorney gained not a pro-

41. 528 So. 2d 637 (La. App. 2d Cir. 1988).

42. Lebleu v. Mitchell, 542 So. 2d 841 (La. App. 3d Cir. 1989); Olympia Roofing Co., Inc. v. Henican, 534 So. 2d 16 (La. App. 4th Cir. 1988); Executive Recruitment, Inc. v. Guste, Barnett and Shushan, 533 So. 2d 129 (La. App. 4th Cir. 1988).

43. 537 So. 2d 356 (La. App. 4th Cir. 1988).

44. Saucier v. Hayes Dairy Products, Inc., 373 So. 2d 102 (La. 1979); Calk v. Highland Const. & Mfg., 376 So. 2d 495 (La. 1979); Scott v. Kemper Ins. Co., 377 So. 2d 66 (La. 1979).

prietary interest in the subject matter of the suit, but a privilege on the fund which the satisfaction of the client's claim yields. In addition, the court recognized the client's absolute right to discharge his attorney despite the existence of a contingency fee contract and further held that the attorney could not prevent or void a client settlement made without that attorney's consent.

The above cases were reviewed in *Neeley v. Hollywood Marine, Inc.*,[45] a case which involved a young seaman who had suffered a maritime personal injury. In *Neeley*, the plaintiff himself negotiated a settlement with the defendant, Hollywood Marine, Inc., even though he had originally retained counsel. Subsequent to his settlement of the case, he dictated a letter to his former counsel dismissing him. The defendant then filed the signed motion for dismissal together with the compromise and release agreement, both of which had been executed by the plaintiff himself without benefit of counsel. The plaintiff's former counsel then intervened alleging the nullity of the settlement agreement because plaintiff was unrepresented and also alleging that the settlement was grossly inadequate. In addition, the attorneys sought reimbursement for the medical expenses paid on behalf of the plaintiff and sought to enforce their contingent fee contract concerning attorneys' fees. The majority ultimately decided that Louisiana Revised Statutes 37:218 and the jurisprudence interpreting the same were not determinative because of the special recognition of a seaman as a ward of the court and the fact that releases and compromises by such wards are subject to careful scrutiny. That scrutiny not having been given here, the judgment dismissing the plaintiff's suit and the order granting defendant's summary judgment dismissing the intervention were both reversed and the matter was remanded to the trial court.

In the regular legislative session of 1989, both Louisiana Revised Statutes 9:5001 and 37:218, relative to attorney fee privileges, were amended by Act No. 78. The purpose seems to have been to define the term "professional fees" contained in Louisiana Revised Statutes 9:5001 and the term "fee" contained in 37:218. No other changes were made although both provisions were amended and reenacted in toto. One can only surmise why the legislature did not amend 37:218 so as to conform with the supreme court's interpretation in *Saucier*, *Calk*, and *Kemper*. The first paragraph of Section 218 still appears to authorize the attorney to acquire as his fee an interest in the subject matter of the suit and protects him from being dismissed by giving him the right to void any settlement or compromise to which he did not consent.

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45. 530 So. 2d 1116 (La. 1988).

In *Jackson Parish Bank v. Durbin*,[46] the court followed *Central Progressive Bank v. Bradley*[47] and concluded that the court had the right to inquire into the reasonableness of an attorney fee stipulated in the promissory note. The court cited the provisions of Model Rule 1.5 concerning the factors which are used to determine a reasonable fee and then concluded that the fee awarded by the trial court was excessive for the amount of work performed by the plaintiff's attorney as revealed by the record. It further concluded that it was not necessary to remand, as the record reflected a sufficient basis for fixing the fee. A 25% attorney fee was reduced to 15%.

In *LeBlanc v. Theriot*,[48] a discharged attorney who had a contingent fee contract with his former client recorded his contract, apparently seeking to have his lien rights recognized against the property of his former client's separated husband, which the husband had obtained in a property settlement. The attorney's theory was that the proceeds of the settlement, on which he had a privilege under Louisiana Revised Statutes 37:218, were disbursed and divided in the property settlement. The separated husband filed a mandamus action to cancel the contract insofar as it might affect his property. The trial court denied the husband's action but the appellate court reversed, holding that the attorney was attempting to extend the protective mechanisms of Louisiana Revised Statutes 37:218 beyond the express language of the provision. Such lien rights could not be asserted in an action different from that to which his contract pertained; that is, he could not switch the enforcement of his lien rights from a tort action to a separation proceeding.

Another interesting decision is *First Security Bank & Trust Co. v. Dooley*.[49] This case considered a question which has arisen before concerning the attorney fee on a promissory note: who owns the attorney fees? In a judgment of separation, the court in *Dooley* set the amount of attorneys' fees which would be payable to certain law firms for the representation in a contested separation. In the meantime, First Security Bank & Trust Co. had obtained and recorded a judgment. Therefore, the primary issue presented to the court involved a question of the ranking of the attorney fee awards in the separation judgment with relation to a subsequently recorded judgment in favor of a community creditor. First Security argued that the attorney fee award belonged to the litigants rather than to the attorney and was consequently subject to compensation and set-off. The attorneys, on the other hand, argued that the attorney fee belonged to them and that under the provisions

46. 535 So. 2d 1074 (La. App. 2d Cir. 1988).
47. 502 So. 2d 1017 (La. 1987).
48. 542 So. 2d 808 (La. App. 3d Cir. 1989).
49. 535 So. 2d 898 (La. App. 2d Cir. 1988).

of Louisiana Revised Statutes 9:5001 the attorneys had a special privilege that outranked the bank. The bank quickly pointed out, however, that 9:5001 confers a privilege on property recovered by the efforts of the attorneys and in this case there was no recovery of property. The court also mentioned in passing the ethical dilemma of an attorney having to intervene in every case where attorneys' fees are stipulated by contract or statute in order to protect his interest. The court then concluded that the issue was one of first impression and because of strong policy reasons the attorney fee awards would be recognized as privileged debts of the community by a judgment recorded in the mortgage records prior to the bank's judgment and would, consequently, prime or outrank the bank's judgment. The writer is still of the opinion, expressed earlier,[50] that an award is in favor of the litigant whether awarded in a lump sum amount or divided into principal, interest, attorneys' fees, and costs.

Effective Assistance of Counsel

In two supreme court cases, decided on the same day, ineffective assistance of counsel was an issue. In *State ex rel Busbee v. Butler*,[51] the defendant contended that he received ineffective assistance of counsel in both the guilt and sentencing phase of his trial. In *State v. Messiah*,[52] it was the penalty phase which prompted the assignment of error. Both decisions refer to *Strickland v. Washington*,[53] which held that the accused must not only show that counsel's performance was deficient but also that the deficient performance prejudiced the defense. Insofar as the deficient performance is concerned, Louisiana has adopted the "reasonably competent assistance of an attorney acting as a diligent conscientious advocate" standard for evaluating an attorney's representation. The second part of the *Strickland* test requires that the prejudice be actual prejudice rather than presumed prejudice. As pointed out by Justice Calegoro in *Messiah*, representation is an art and an act of omission that is unprofessional in one case may be considered sound or even brilliant in another. Second-guessing, therefore, is not the function of the appellate court. In the *Butler* case, the attorney in his closing argument made no plea for the defendant's life and further stated that if the jury gave the death sentence they should do so with the appreciation that it would be carried out. The court found this to be constitutionally defective and then went on to find actual prejudice in not

50. Mengis, Professional Responsibility, Developments in the Law, 1987-1988, 48 La. L. Rev. 437 (1987).

51. 538 So. 2d 164 (La. 1988).

52. 538 So. 2d 175 (La. 1988).

53. 466 U.S. 668, 104 S. Ct. 2052 (1984).

presenting mitigating circumstances of mental impairment which might have persuaded the jury not to sentence the defendant to death. The closing argument in the *Messiah* case was also very brief and was primarily a plea for mercy with heavy reliance on biblical references. The court distinguished the *Butler* case, handed down the same day, because the record in *Messiah* did not indicate the existence of any witnesses who might have been helpful and no evidentiary hearing had been held. The court was unable to conclude that counsel's brief but passionate plea for mercy, without more, constituted ineffective representation. With this conclusion Chief Justice Dixon vigorously dissented, joined by Justice Dennis. It seems to be a close call and the majority opinion left the door open for presentation of additional evidence in a post-conviction hearing.

Discipline

It is suspected that the only contact most Louisiana lawyers have with the system of discipline is an occasional reading of an LSBA case in the advance sheets or a glance at the report of the Committee on Professional Responsibility which is published in the Louisiana Bar Journal. Many practitioners do not realize that approximately 2000 complaints are received annually at the State Bar Association's Headquarters and that thousands of files may be pending at any given time. This prompted the Supreme Court of Louisiana to invite the Standing Committee on Professional Discipline of the American Bar Association to conduct an onsite evaluation of Louisiana's disciplinary system. This visit was made on January 14-16, 1987 and in July of 1987. A final report of the evaluation of the committee was sent to the court. Thereafter, the court appointed a special committee of members of the Louisiana State Bar Association to evaluate the Association's disciplinary procedure in light of the report of the ABA.

The report and recommendations to the Louisiana Supreme Court by the committee to evaluate the Louisiana State Bar Association Disciplinary Procedures were filed with the court in June of 1989 and are presently being considered. The report is lengthy and only what the writer considers the most important recommendations will be mentioned.

First, both committees (ABA and LSBA) recommended that the functions of the executive counsel (presently Mr. Tom Collins) be divided and that a chief disciplinary counsel be hired to perform all prosecutorial functions and to generally oversee the disciplinary system. It was strongly recommended, however, that the disciplinary system remain an integral part of the Louisiana State Bar Association rather than have it severed as some state Bar Associations have done.

In addition, it was recommended by both committees that the function of the commissioner be abolished and that either the professional responsibility committee or a panel thereof, upon conclusion of the

investigatory hearing, make findings of fact and recommendations concerning sanctions which would be considered by the supreme court in the event a suit for suspension or disbarment was later filed.

The ABA Committee also recommended that at least one-third of the members of the professional responsibility committee, which now numbers twelve, be non lawyers. A majority of the state committee did not support this recommendation because service on the committee requires dedication to the practice of law, as well as considerable expertise.

Another recommendation made by the ABA Committee was that a case tracking system should be put in place so that at any given moment the status of an open file could be ascertained. Of course, this recommendation requires the installation of computers in the New Orleans Bar Association office. On August 26, 1989 the Board of Governors of the Louisiana State Bar Association authorized the expenditure of $55,000 for this purpose.

It is the opinion of this writer that these improvements will help to reduce the time lag from the opening of a file to the final disposition and thereby achieve greater fairness to the lawyers involved and greater confidence in the system by the parties complaining.

In addition to the above recommendations, the ABA Committee recommended that article 15 of the Louisiana State Bar Association Articles of Incorporation be amended to include probation as a sanction. Note that in *L.S.B.A. v. Longenecker*,[54] the Supreme Court of Louisiana, in recognizing that there were no provisions for probation in the disciplinary procedure, went on to impose a period of probation of two years, finding that probation is appropriate when there is very little likelihood that the lawyer will cause harm to the public during the period of rehabilitation and when the probation can be adequately supervised. In its opinion, the court referred to the Standards for Lawyers Sanction which were approved by the American Bar Association in February of 1986. In recent years, the supreme court has often relied on these sanctions to arrive at an appropriate punishment for the lawyers who have violated the Model Rules of Professional Responsibility.

A review of the published opinions in disciplinary cases over the past year indicates that the leading cause for suspension or disbarment is still a deliberate or negligent co-mingling of client funds with those of the attorney.[55]

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54. 538 So. 2d 156 (La. 1988).

55. L.S.B.A. v. White, 538 So. 2d 256 (La. 1989); L.S.B.A. v. Dumaine, 538 So. 2d 270 (La. 1989); L.S.B.A. v. Hayling, 529 So. 2d 1 (La. 1988); L.S.B.A. v. Alker, 530 So. 2d 1138 (La. 1988); L.S.B.A. v. Longenecker, 532 So. 2d 1143 (La. 1988); L.S.B.A. v. Boddie, 534 So. 2d 944 (La. 1988); L.S.B.A. v. Young, 534 So. 2d 948 (La. 1988), amended, 542 So. 2d 490 (La. 1989).

It is provided in Rule 8.4 (g) of the Model Rules of Professional Conduct that it is professional misconduct for a lawyer to fail to cooperate with the committee on professional responsibility in the committee's investigation of alleged misconduct, except upon the expressed assertion of a constitutional privilege. This puts the accused attorney in somewhat of a quandary because the United Stated Supreme Court in 1968 held that disciplinary procedures are quasi criminal[56] and a year earlier had held that an attorney could not be disbarred solely on the grounds that he had invoked the privilege against self incrimination.[57] On the other hand, the Louisiana Supreme Court has consistently held that disciplinary procedures are not criminal and that a lawyer charged with violation of professional ethics is not entitled to the "full panoply" of a criminal defendant's rights. In *L.S.B.A. v. Chatelain*,[58] the court held that an attorney's client account records could be seized because they were records required to be kept under Rule 1.15.[59]

The ABA Committee recommended, and the State Bar Committee concurred, that the Supreme Court of Louisiana should amend its rules to provide that upon application of counsel and with the approval of the appropriate prosecuting authority, the court may grant immunity from a criminal prosecution to a witness in a lawyer disciplinary proceeding. This would seem to be a just corollary to requiring an attorney accused of professional misconduct to assist in the investigation leading toward his own sanction.

Conclusion

Lawyers who have been disappointed by the continual erosion of what they consider to be their "profession" received another jolt in March of 1989 with the opinion in *Mire v. City of Lake Charles*.[60] In this matter, the Louisiana Supreme Court held that a municipality's occupational license tax on attorneys was neither unconstitutional nor a usurpation of the supreme court's exclusive authority to regulate the practice of law. The trial court had held that the municipal ordinance was unconstitutional as it imposed an income tax in violation of Article 7, § 4c of the Louisiana Constitution of 1974. The supreme court reversed, concluding that the tax or license imposed was an indirect tax whereas an income tax is a direct tax. The court went on to say that a license to practice law neither confers immunity from taxation nor does it exempt an attorney from his duties of citizenship such as sharing

56. In Re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222 (1968).
57. Spevack v. Klein, 385 U.S. 511, 87 S. Ct. 625 (1967).
58. 513 So. 2d 1178 (La. 1987).
59. Shapiro v. United States, 335 U.S. 1, 68 S. Ct. 1375 (1948).
60. 540 So. 2d 950 (La. 1989).

the expenses of government. Only Justice Watson dissented, holding the view that such ordinances could determine how, where, or whether an attorney can practice law, which is a definite encroachment on the supreme court's authority to regulate the practice of law in general.

From *United States v. Dillon*[61] we learn:

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services."[62]

So once again it seems that a lawyer is just a tradesman or businessman when it comes to license taxes, but is an "officer of the court" when it comes to representing the indigent.

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61. 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978, 86 S. Ct. 550 (1966).
62. Id. at 635.