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Professional Responsibility

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Introduction

For at least two decades there have been many complaints against the disciplinary procedure activated by the receipt by the State Bar Association of a complaint or grievance against a particular lawyer. Virtually all of the critics make one of the following complaints: it takes too long, it is too secretive, it is too protective of the lawyer, and punishment, if any, is too lenient. On Monday, July 2, 1990, the Wall Street Journal carried an article entitled "State Bar Groups Toughen Discipline for Lawyers Despite Their Objections." Six states were featured in the article: California, Florida, Illinois, New Jersey, New York, and Texas. Louisiana may now be added to the states which are attempting to streamline and improve the disciplinary procedures. The Louisiana Supreme Court, by court rule that took effect on April 1, 1990, adopted a set of regulations that closely follow the American Bar Association's 1989 Model Rules for Lawyer Disciplinary Enforcement. Some of the more important innovations and changes are discussed below.

Advertising and Solicitation

One of the few things a state can still ban is direct person-to-person solicitation for pecuniary gain. Louisiana rule 7.3 provides succinctly that a lawyer shall not solicit professional employment in person, by person-to-person telephone contact, or through others acting at his request from a prospective client to whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer doing so is the lawyer's pecuniary gain.[1] It is common knowledge, however, that a great deal of this type of solicitation goes on although usually the lawyer will use a third person as his "runner." Such was apparently the case in the Iberia Parish case of *Vidrine v. Abshire*.[2] The trial judge stated:

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1. La. R.S. 37 ch. 4 app. art. 16, rule 7.3 (Supp. 1990).
2. 558 So. 2d 288 (La. App. 3d Cir. 1990).

> This is a strange case indeed. Here we have an illiterate man who has a case handled by a law firm, and then he receives money in big figures for running cases, and apparently even borrows bigger amounts with the endorsement of the plaintiffs. None of these strange, fishy arrangements have been explained.[3]

The appellate court agreed that something was apparently rotten in South Louisiana and refused to enforce a debt owed by the runner to the law firm because it was inextricably bound to the "running" contract. The preliminary injunction of the executory proceedings granted by the trial court was upheld.

In the course of its opinion, the appellate court cited Louisiana Revised Statutes 37:213 and 37:219. In pertinent part these articles provide:

> 37:213. No person, partnership or corporation shall solicit employment for a legal practitioner.
> 37:219(A). It shall be unlawful for any attorney to pay money or give any other thing of value to any person for the purpose of obtaining representation of any client.

Both the trial court and the court of appeal cited the ethical rule that a lawyer should not enter into a business transaction with a client if they have differing interests therein. However, the more pertinent rule seems to be 7.3, which is cited above. It is no defense that the lawyer did not make contact himself, as a lawyer cannot circumvent this disciplinary rule through the action of another, such as an employee.[4]

The United States Supreme Court, in a five to four decision entitled *Peel v. Attorney Registration & Disciplinary Commission*,[5] cast considerable doubt on at least a portion of Louisiana's rule 7.4 which deals with communication of fields of practice. This rule prohibits a lawyer from stating or implying that a lawyer is a specialist unless he has been recognized as a specialist under a plan approved by the Louisiana State Bar Association. As most readers know, the only such plan that has been approved is the one for lawyers specializing in taxation.

In Illinois, Mr. Gary Peel included the following on his professional letterhead:

> Gary E. Peel
> Certified Civil Trial Specialist
> By The National Board of Trial Advocacy
> Licensed: "Illinois, Missouri, Arizona"

At the time, Illinois had no approved specialties other than Admiralty,

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3. Id. at 292.
4. Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437 (La. 1976).
5. 110 S. Ct. 2281 (1990).

Trademark, and Patent Law. The administrator of the Attorney Registration and Disciplinary Commission of Illinois filed a complaint against Mr. Peel and after a hearing recommended a censure. This recommendation was approved by the Illinois Supreme Court but a writ of certiorari was granted by the United States Supreme Court and the judgment from the Illinois Supreme Court was reversed and the case remanded.

The Court, speaking through Justice Stevens, formulated the issue as whether a lawyer has a constitutional right, under the standards applicable to commercial speech, to advertise his or her certification as a trial specialist by the National Board of Trial Advocacy (NBTA). To resolve the issue, the Court had to determine whether Mr. Peel's statement was misleading and even if it was not, whether the *potentially* misleading character of such statements creates a state interest sufficiently substantial to justify a categorical ban on their use. Louisiana, like many other states, has this categorical ban unless the specialty plan is approved by the Louisiana State Bar Association. The Illinois Supreme Court had not focused on the accuracy or inaccuracy of the statement on Mr. Peel's letterhead, but rather that it amounted to and implied a claim of the quality of Mr. Peel's legal services and was therefore likely to mislead. This likelihood of misleading had then justified the categorical ban for the Illinois court.

The Supreme Court, on the other hand, focused on the accuracy of Mr. Peel's statement. It concluded:

> A lawyer's certification by NBTA is a verifiable fact, as are the predicate requirements for that certification. Measures of trial experience and hours of continuing education, like information about what schools the lawyer attended or his or her bar activities, are facts about a lawyer's training and practice. A claim of certification is not an unverifiable opinion of the ultimate quality of a lawyer's work or a promise of success, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney's work in a given area of practice.[6]

Interestingly enough, a majority of the Court, through concurrences and dissenting opinions, concluded the statement was in fact potentially misleading and, therefore, the state could actually require Mr. Peel to furnish additional information or in lieu thereof forbid the use of the statement.

Justice O'Connor, dissenting, concluded that the state is in a better position to determine whether or not a statement is inherently or po-

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6. Id. at 2288 (citations omitted).

tentially misleading and, therefore, the United States Supreme Court should be more deferential to the state's experience with such statements. It is not likely that the Supreme Court of the United States will do anything but give lip service to this idea that the states should control the ethical behavior of lawyers while continuing to expand the first amendment rights of lawyers in connection with commercial speech.

Malpractice

The Louisiana Supreme Court, in *Penalber v. Blount*,[7] clarified to some extent the various issues in malpractice litigation. First and foremost, the court unequivocally held that ordinarily a lawyer owes no legal duty to his client's adversary when acting in his client's behalf. Not even the rules of professional conduct create actual duties for negligent injury of a client's adversary or negligent breach of professional obligations which might run in favor of his client's adversary. To some extent this holding limits the fourth circuit's unreported opinion in *Shaw v. Everett*.[8] For a complete discussion of the *Shaw* case, the reader is referred to last year's faculty symposium.[9] If, however, the action of the attorney is intentionally tortious, even though ostensibly performed for a client's benefit, the attorney may be held personally accountable by the injured adversary.

In *Leonard v. Smith*,[10] the plaintiff coupled malpractice with defamation. He contended that his brother's attorney had failed to carry out an agreement which was agreed to by both brothers and their attorneys. The failure to carry out this agreement, said the plaintiff, damaged the plaintiff to the extent of a much harsher sentence. In addition, the plaintiff contended that a letter which had been written by his brother's attorney to the district attorney had defamed the plaintiff. The second circuit first concluded that nowhere had plaintiff alleged any type of attorney-client relationship between him and the attorney sued, who was actually his brother's attorney. The court then concluded, in perfect harmony with *Penalber*, that no cause of action for malpractice had been stated.

As to the defamation, the court discussed the qualified privilege enjoyed by attorneys regarding the pleadings and briefs which they filed in judicial proceedings. Without holding that the defendant attorney was guilty of defamation, the court concluded that, in any event, he would

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7. 550 So. 2d 577 (La. 1989).

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

9. Mengis, Developments in the Law, 1988-1989, Professional Responsibility, 50 La. L. Rev. 335, 342 (1989).

10. 550 So. 2d 729 (La. App. 2d Cir. 1989).

be protected by the qualified privilege. "A free exchange of views under these circumstances serves the social interests of the public and the courts."[11]

The fourth circuit in *Miskell v. Ciervo*,[12] in discussing the same subject, reiterated the necessity for the qualified privilege but reminded attorneys that they did not have the right to make outlandish and unwarranted statements nor deliberate false statements. In addition, they may be held liable for statements if those statements are not pertinent to the case or are made maliciously or without reasonable basis.

Two malpractice decisions dealt with proving whether an attorney has fallen below the standard, enunciated in *Ramp v. St. Paul Fire and Marine Insurance Co.*,[13] that an attorney is obligated to exercise at least that degree of care, skill, and diligence exercised by prudent attorneys practicing in his community or locality. In *Morgan v. Campbell, Campbell & Johnson*,[14] the court was confronted with whether or not an attorney was negligent when he did not make certain that the mortgage which covered both immovables and movables was recorded in the chattel mortgage records as well as the regular mortgage records. Since neither side had introduced any testimony concerning the standard of care of attorneys in the defendant's locality when filing an instrument containing two different types of property, the court concluded that a summary judgment in favor of the attorney was inappropriate and remanded the case. In *Richards v. Cousins*,[15] the attorney had been asked to prepare a sale from parents to daughter and a counter letter indicating that the sale was a simulation. Later, the daughter mortgaged the property which eventually led to a sale to avoid foreclosure. The malpractice question was whether or not the attorney had sufficiently explained to the parents, one of whom had died in the interim between the transfer and the sale to avoid foreclosure, the full impact of the simulation and the risk involved. Expert testimony by an expert in real estate law in the city of New Orleans was to the effect that Mr. Cousins had failed to explain properly the impact of what was being done and that constituted negligence.

The inadvisability of attorneys holding themselves out as partners when they are in fact only sharing office space is brought out in *Gravois v. New England Insurance Co.*[16] Apparently Mr. Longenecker, an attorney, had been guilty of some fraudulent conduct and the injured party was seeking to obtain redress from Mr. Wegmann, another attorney

11. Id. at 733.
12. 557 So. 2d 274 (La. App. 4th Cir. 1990).
13. 263 La. 774, 269 So. 2d 239 (1972).
14. 561 So. 2d 926 (La. App. 2d Cir. 1990).
15. 550 So. 2d 1273 (La. App. 4th Cir.), writ denied, 552 So. 2d 397 (1989).
16. 553 So. 2d 1034 (La. App. 4th Cir. 1989).

with whom Mr. Longenecker shared an office. For some time the two attorneys used office stationery which bore the heading "Wegmann and Longenecker." The same name was on their office door and in the telephone directory. In addition, Martindale-Hubbell carried the same firm name, and they had obtained professional malpractice insurance in that name. Both attorneys nevertheless gave sworn affidavits that they had never actually been in partnership and had never shared profits and losses, which is an essential element to any partnership.

Louisiana's rule 7.5(d) specifically prohibits lawyers from stating or implying that they practice in partnership or other organization unless that is the fact. Letterheads, office signs, and telephone directories tend to mislead prospective clients and others when the implied partnership does not in fact exist. The court concluded in *Gravois* that the evidence failed to establish a partnership.

In the *Gravois* case, as in *Montgomery v. Jack*,[17] the court again stated the prescriptive periods for malpractice. Normally malpractice sounds in tort and is subject to the one year prescriptive period from the date the injury occurs unless the attorney has guaranteed some particular result, in which case the prescriptive period is ten years. Act 683 of the 1990 regular legislative session, which will become Louisiana Revised Statutes 9:5605, now regulates the prescription which is applicable to actions for legal malpractice. The action must be brought within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered. However, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.

Finally, in *Delta Process Equipment Inc. v. New England Insurance Co.*,[18] the court concluded that a malpractice action based upon the failure to file timely a patent application could be brought in either the state or federal court as such action was not subject to exclusive federal jurisdiction.

Attorney Fees

Attorney fees are subject to review and control by the court. Nothing is more firmly settled in Louisiana. It makes no difference that the fee was set in a contract[19] or by statute,[20] whether the fee is contingent upon recovery[21] or is an hourly charge. The bottom line has got to be

17. 556 So. 2d 267 (La. App. 2d Cir.), writ denied, 559 So. 2d 1377 (1990).
18. 560 So. 2d 923 (La. App. 1st Cir. 1990).
19. Leenerts Farms, Inc. v. Rogers, 421 So. 2d 216 (La. 1982).
20. City of Baton Rouge v. Stauffer Chemical Co., 500 So. 2d 397 (La. 1987).
21. Saucier v. Hayes Dairy Products, Inc., 373 So. 2d 102 (La. 1979); Skidmore v. Bengal Flyers, Inc., 546 So. 2d 568 (La. App. 1st Cir. 1989).

in accord with Louisiana's rule 1.5 which begins with the sentence, "A lawyer's fee shall be reasonable."[22]

The evolution of judicial scrutiny of attorney fees is explained in *Esteve v. Longo*.[23] The question in *Esteve* was whether a second mortgage holder who intervened in the first mortgage holder's executory process with its own petition for executory process could contest the reasonableness of the fee stipulated in the promissory note held by the first mortgagee. The court concluded that the second mortgagee could in fact contest the reasonableness of the fee since a variance in that item would certainly affect the amount of recovery that the second mortgagee could expect. The matter was remanded to the trial court for a hearing to determine the reasonableness of the fee.

The remand brings up a practical problem. Should the courts be in the business of setting legal fees? For many years the Louisiana State Bar Association refused to accept fee complaints because of the many factors which went into the setting of a reasonable fee. It was only those situations where the fee was obviously excessive that a complaint would be accepted. Both the fourth circuit[24] and the third circuit[25] have stated an intention to limit their review to those situations where there is a "clearly excessive fee" involved. A fee is clearly excessive when it is so grossly out of proportion with fees charged for similar services by other attorneys in the locale as to constitute an unquestionable abuse of the attorney's professional responsibility to the public.[26]

In 1979, the Louisiana Supreme Court, in *Saucier v. Hayes Dairy Products, Inc.*,[27] held that the contingent fee statute, Louisiana Revised Statutes 37:218, could only be constitutional if construed so as to give a privilege to attorneys for their fees rather than to permit them to take an interest in their clients' causes of action. In *Calk v. Highland Construction & Manufacturing*,[28] the court held that the statute grants the attorney a privilege only to the extent of his fee. Consequently, advances which are in the nature of a loan, payment of the client's medical bills, and other out-of-pocket expenses are not covered by the privilege. Act 78 of 1989 amended Louisiana Revised Statutes 9:5001 and 37:218, both of which relate to the privilege securing attorney fees by defining "professional fees," which is used in Louisiana Revised

22. La. R.S. 37 ch. 4 app. art. 16, rule 1.5 (1988).
23. 549 So. 2d 316 (La. App. 5th Cir. 1989).
24. Gibson v. Burns, 505 So. 2d 66 (La. App. 4th Cir. 1987).
25. Desselle v. Moreauville State Bank, 553 So. 2d 1067 (La. App. 3d Cir. 1989), writ denied, 558 So. 2d 584 (1990).
26. *Gibson*, 505 So. 2d at 69.
27. 373 So. 2d 102 (La. 1979).
28. 376 So. 2d 495 (La. 1979).

Statutes 9:5001, and "fee," which is used in Louisiana Revised Statutes 37:218.

> 9:5001(B). The term "professional fees," as used in this Section, means the agreed upon fee, whether fixed or contingent, and any and all other amounts advanced by the attorney to or on behalf of the client, as permitted by the Rules of Professional Conduct of the Louisiana State Bar Association.
> 37:218(B). The term "fee," as used in this Section, means the agreed upon fee, whether fixed or contingent, and any and all other amounts advanced by the attorney to or on behalf of the client, as permitted by the Rules of Professional Conduct of the Louisiana State Bar Association.

Apparently, advances for humanitarian expenses approved in *Louisiana State Bar Association v. Edwins*[29] now can be included as a part of the "fee" for privilege purposes. It will be interesting to see whether or not the courts permit the legislature to define professional fees in such a way as to include those things which are clearly not.

It has been the opinion of the writer that sooner or later the Louisiana Supreme Court will set maximum limits on contingent fees. Many other states have already done so. In *Saucier v. Hayes Dairy*, cited supra, the supreme court did hold that a fee of thirty-three and one third percent was reasonable where the personal injury action had been carried to completion. In *Williams v. NOPSI*,[30] the court was faced with a fifty percent contingent fee in a case where a young boy was seriously injured when struck by a New Orleans public service bus. His mother signed a fifty percent contingency fee agreement with the attorney and later, when a tutor was appointed by the court, the tutor also signed such an agreement. The matter was ultimately settled for $450,000 and the attorney then by an ex parte order had the fifty percent contingency fee agreement approved. The tutor by declaratory judgment then sought to set aside the contingent fee contract as he had not knowingly signed it. In addition, he contended that such a fee was basically unethical. The trial court, having approved the fee by ex parte order, held the matter was res judicata and dismissed the plaintiff's declaratory action. The court of appeal reversed and remanded the trial court's judgment holding that the matter had never been satisfactorily adjudicated and that a hearing was necessary to determine the validity and fairness of the contingency fee agreement. In many instances, where liability is not an issue, it would appear to the writer that the normal fees of twenty-five percent out of court and thirty-three and one third

29. 329 So. 2d 437 (La. 1976).
30. 544 So. 2d 11 (La. App. 4th Cir. 1989).

percent in court might be unreasonable. In addition, where the recovery is exceedingly large these normal, everyday contingent fees might also be unreasonable.

Effective Assistance of Counsel

As pointed out in *State v. Robinson*,[31] a claim of ineffective assistance of counsel necessarily requires an inquiry into mixed questions of law and fact. Usually a reviewing court will not review an issue of ineffective assistance of counsel on direct appeal unless the record discloses the necessary evidence to decide the issue and the alleged ineffectiveness is raised on appeal by assignment of error. When the record does not disclose the necessary evidence to decide the issue, the claim will be more properly raised in a post-conviction writ in the trial court where the district judge can order a full evidentiary hearing.

Where the record is complete enough or if it is in an evidentiary hearing, the test for effectiveness of counsel is two-pronged: first, the defendant must show that counsel's performance was deficient, that counsel made errors so serious that he was not functioning as counsel guaranteed by the sixth amendment, and, second, the defendant must show that the deficient performance prejudiced the defense by showing that the counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. This test, of course, springs from the decision of the United States Supreme Court in *Strickland v. Washington*.[32]

In *State v. Ball*,[33] counsel in the trial court failed to object to an erroneous jury charge, apparently because he was not sufficiently knowledgeable concerning the elements of the crime. In addition, in addressing the jury himself, he misstated the necessary elements of attempted second degree murder. The conviction was reversed and the matter remanded. Virtually the same mistake was made in *State v. Carter*,[34] wherein the defense counsel did not object to the prosecutor's repeated statements during closing arguments that defendant could be convicted of attempted second degree murder if he had intent to kill or to inflict great bodily harm. The inclusion of the phrase "or to inflict great bodily harm" in an instruction for attempted second degree murder is reversible error. Accordingly, the court found counsel ineffective and reversed and remanded.

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31. 549 So. 2d 1282 (La. App. 3d Cir. 1989).

32. 466 U.S. 668, 104 S. Ct. 2052, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562 (1984).

33. 554 So. 2d 114 (La. App. 2d Cir. 1989).

34. 559 So. 2d 539 (La. App. 2d Cir. 1990).

In *State v. Willie*,[35] the defendant contended he was denied effective counsel because of an actual conflict of interest that existed between him and his trial attorney. This conflict arose out of the fact that his trial attorney had been convicted of a federal offense and had received a three-year suspended sentence, one of the conditions of probation being performance of 416 hours of community service. The attorney's appointment to represent the defendant was in partial fulfillment of the community service; however, neither the attorney nor the trial court ever advised the defendant of these facts. The defendant contended that only conflict-free counsel could have properly questioned the jurors on voir dire whether their attitude toward the defendant would be affected by their knowledge that the person who had confessed to the murder was being represented by a convicted felon who was appointed by the court as part of his obligation to perform community service.

The majority of the court held that the ineffective assistance claim warranted an evidentiary hearing and therefore the court conditionally affirmed both the conviction and the sentence but remanded the case to the district court on the ineffective assistance claim. Justices Cole and Marcus dissented, contending that the record disclosed sufficient evidence to decide the ineffective assistance of counsel question. They would have decided it against the defendant because in their opinion there was no basis for an ineffective assistance claim simply because an attorney was convicted of an unrelated crime in a separate court system.

In *Faretta v. California*,[36] the Court said:

> There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions most [sic] inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant.
>
> But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want.[37]

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35. 559 So. 2d 1321 (La. 1990).
36. 422 U.S. 806, 95 S. Ct. 2525 (1975).
37. Id. at 832-33, 95 S. Ct. at 2540 (citations omitted).

In *State v. Thompson*,[38] the defendant contended that the appointment of a standby counsel interfered with his right to represent himself and therefore his conviction should be reversed. The court found, however, from the record that the defendant had been allowed to control the organization and content of his own defense, make motions, argue points of law, question witnesses, and address the court and jury at appropriate points in the trial. Further, the record revealed the defense counsel did not interrupt or give uninvited involvement while the defendant was presenting his case. Accordingly, the court found no interference with the defendant's right to defend himself pro se.

Discipline

Louisiana now has 15,000 lawyers. Prior to the recent changes in disciplinary procedures which will be discussed below, the Louisiana State Bar Association was receiving approximately 2,000 complaints annually. This may be only the tip of the iceberg, as many disgruntled clients never take the trouble to make a formal complaint. The cases which are reported in the Southern Reporter represent only a small portion of the complaints received and usually concern the most serious complaints. A look at the decisions during the past year, shows that commingling and conversion of clients' funds, neglecting the legal affairs of clients, and failure to account properly to them are predominant causes for suspension and disbarment of Louisiana attorneys.[39] Failing to refund unearned fees,[40] improper solicitation,[41] entering into business transaction with a client to the client's disadvantage,[42] and lying to clients concerning their legal affairs[43] were some of the other charges made against attorneys and sustained.

It is known that alcohol and drug abuse by attorneys has contributed to some of the acts of professional misconduct which occur year after year. In *Louisiana State Bar Association v. Dumaine*,[44] the Louisiana Supreme Court endorsed the work of the Louisiana State Bar Association

38. 544 So. 2d 421 (La. App. 3d Cir.), writ denied, 550 So. 2d 626 (1989).

39. Louisiana State Bar Ass'n v. Martin, 559 So. 2d 483 (La. 1990); Louisiana State Bar Ass'n v. Jones, 555 So. 2d 1375 (La. 1990); Louisiana State Bar Ass'n v. Riley, 555 So. 2d 984 (La. 1990); Louisiana State Bar Ass'n v. Lindsay, 553 So. 2d 807 (La. 1989); Louisiana State Bar Ass'n v. Kilgarlin, 550 So. 2d 600 (La. 1989); Louisiana State Bar Ass'n v. Perez, 550 So. 2d 188 (La. 1989); Louisiana State Bar Ass'n v. Young, 545 So. 2d 1018 (La. 1989); Louisiana State Bar Ass'n v. Pasquier, 545 So. 2d 1014 (La. 1989); Louisiana State Bar Ass'n v. Chatelain, 545 So. 2d 1000 (La. 1989).

40. Louisiana State Bar Ass'n v. Carpenter, 553 So. 2d 855 (La. 1989).

41. Louisiana State Bar Ass'n v. St. Romain, 560 So. 2d 820 (La. 1990).

42. Louisiana State Bar Ass'n v. Dickens, 550 So. 2d 180 (La. 1989).

43. Louisiana State Bar Ass'n v. Roussel, 545 So. 2d 989 (La. 1989).

44. 550 So. 2d 1197 (La. 1989).

and its Committee on Alcohol and Drug Abuse. Clearly, the court feels that solving the alcohol and drug abuse problem through a confidential assistance program would be a first step toward reducing the acts of professional misconduct which are directly related thereto.

In *Dumaine*, the court recognized that lawyers in general are more at risk for various types of impairments, particularly alcohol abuse, than the general population. Stress is certainly one of the causes for this imbalance. Lawyers are in an adversary business which subjects them to many deadlines and places great responsibilities on their shoulders. Another cause, which tends to aggravate the first, is lack of economic return. The writer believes that many of the unprofessional acts of attorneys are brought on more by what the lawyer considers economic necessity than by any blindness toward or misunderstanding of ethical rules.

Occasionally, however, the ethical rules are confusing. Take, for instance, a proper handling of fee advances. According to the ABA/BNA Lawyer's Manual on Professional Conduct, the majority view is that fee advances are the property of the client that must be deposited in a trust account until earned. The minority view is that the ownership of such funds passes to the attorney when he receives them and to put them into a trust account would be a violation of the prohibition of commingling of attorney and client funds. In three fairly recent cases the Louisiana Supreme Court clarified the rules for the Louisiana lawyers.[45] The court said:

> [t]he determination whether a fee paid in advance of services is classified as the client's funds or as the attorney's funds turns on the purpose of the payment. A retainer which secures the attorney's general availability to the client and which is not related to the fee for a particular representation constitutes the attorney's funds and need not be placed in a trust account. On the other hand, an advanced fee for particular services not yet performed constitutes funds of the client which should be placed in a trust account and not withdrawn or withheld without the consent of the client.[46]

In *Tucker*, Justice Dennis took issue with this conclusion because it tends to treat law firms differently depending on whether they usually charge general retainers or retainers for specific pieces of business. On rehearing in *Tucker*, Justice Lemmon stated that the court is in the process of implementing a committee study to recommend an amendment

45. Louisiana State Bar Ass'n v. Tucker, 560 So. 2d 435 (La. 1989); Louisiana State Bar Ass'n v. Williams, 512 So. 2d 404 (La. 1987), Louisiana State Bar Ass'n v. Fish, 562 So. 2d 892 (La. 1990).

46. *Williams*, 512 So. 2d at 408-09.

to the disciplinary rules regarding the handling of retainers in advance fees. In the meantime, it would seem advisable for attorneys to recognize that there is no such thing as a nonrefundable retainer, that general retainers to insure the attorney's availability may be put in the firm account, and that all other advance fees should be placed in a trust account until such time as they are fully earned.

The new Rules for Lawyer Disciplinary Enforcement which went into effect on April 1, 1990, very closely follow the format and language of the Model Rules for Lawyer Disciplinary Enforcement adopted by the ABA House of Delegates in August of 1989. First, the court repealed article 15 of the Articles of Incorporation of the Louisiana State Bar Association, thereby taking away from the bar all of the procedures for discipline except for the responsibility for a $350,000 annual payment to the clerk of the supreme court to defray partially the expenses of the agency which is created under the rules. The agency consists of a state-wide board to be composed of nine members, hearing committees, disciplinary counsel, and a staff.

Three of the board's members shall be public members, that is, not lawyers, and each hearing committee consisting of three persons shall consist of one public member. There is no limit on the number of hearing committees, although there must be at least three. The organization is much like the court system. The hearing committee is the trial court, the board acts as the intermediate appellate court, and the supreme court will still be the final arbiter. The proceeding in the hearing committee will be transcribed and the respondent attorney shall have all of his due process rights. The board will perform appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges, petitions for transfer to and from disability inactive status, and petitions for reinstatement. It will prepare and forward to the supreme court its own findings, if any, and recommendations together with the records of the proceedings before the hearing committee.

The types of sanctions have been increased with the addition of admonition and probation. One of the most important changes is that immediately upon the filing of formal charges with the board by the disciplinary counsel, the matter shall become public. The complete text of the rule may be found in West's Louisiana Session Law Service 1990, No. 1. It is estimated that the new system will cost $900,000 per year with the Louisiana State Bar Association paying $350,000 and the remainder of the money coming from an annual court assessment on attorneys. Lawyers who have practiced for three years will pay $45.00 a year and lawyers who have practiced less than three years will be assessed a $25.00 charge.

All members of the board shall be appointed by the supreme court, including the public members. Members of each hearing committee are

appointed by the board. It will be interesting to see if the new procedure will solve some of the complaints mentioned in the introduction to this article. The only difficulty which the writer can see at this moment will be the inability of the board to keep up with the decisions coming from the various hearing committees. It must be remembered that the board members are not compensated and six of them are practicing attorneys. In addition, it does not appear that the board can break into panels because it can act only with the concurrence of a majority, which would be five.

One other problem surfaced in the annual convention of the Louisiana State Bar Association. A resolution was submitted to reduce the annual dues of members from $100.00 to $55.00, thus the total outlay of the lawyer would be the same: $55.00 to the State Bar Association and $45.00 to the clerk of the supreme court. The resolution was tabled, but it is easy to anticipate that it will surface again.

There is some concern also that the "integrated bar" may be in danger. The latest decision of the United States Supreme Court, *Keller v. State Bar of California*,[47] held that a state bar may constitutionally use mandatory membership dues to fund activities germane to goals of regulating the legal profession and improving the quality of legal services, but it may not use dues to fund activities of ideological or political nature. One of the principal activities of the bar in the past has been discipline and although the direct expense of discipline is not broken down in the 1989 annual report of the Louisiana State Bar Association, one may assume it was fairly large. Of course, the bar still has its committee on admissions, its clients' security fund committee, its continuing legal education program, and many special committees which continually work for the betterment of the legal profession.

Conflict of Interests

Except for *State v. Willie*, discussed above, the only significant conflict of interests case is *La Nasa v. Fortier*.[48] In this case, a partner in an accounting firm and the accounting firm itself was sued by a former client of the partner. A law firm was retained by the accounting firm and facts indicated that the lawyer assigned to the case may have begun representing both the accounting firm and the partner. Later the attorney notified the partner that he was representing only the accounting firm and not the partner individually. The partner then sought to disqualify the attorney and his firm alleging that the attorney, in the course of representing him, had conducted extensive interviews with him, the

47. 110 S. Ct. 2228 (1990).

48. 553 So. 2d 1022 (La. App. 4th Cir. 1989), writ denied, 559 So. 2d 124 (1990).

partner, and obtained all of his personal documents which included documents having to do exclusively with his personal exposure predating his affiliation with the accounting firm.

After a full evidentiary hearing, the trial court granted the motion for disqualification finding that an attorney-client relationship did exist between the lawyer and the accounting partner but that no privileged information had been disclosed. The disqualification was based on the need to avoid even the appearance of impropriety.

The appellate court also found that an attorney-client relationship had existed, citing *Louisiana State Bar Association v. Bosworth*,[49] wherein it was held that the existence of such a relationship turns upon the client's subjective belief that the attorney-client relationship exists. The court went on to conclude, however, that the harsh remedy of disqualification was not called for in this case because there was no expectation by the accounting partner that the information which he gave to the attorney would not be imparted to the accounting firm. Apparently, all of the disclosures were made for the benefit of both parties, and consequently, no conflict of interest was present and the attorney will be permitted to continue his representation of the accounting firm itself.

The old "appearance of impropriety" which was formerly contained in Canon Nine of the Code of Professional Responsibility has not been carried over into the model rules. Most courts, particularly the federal courts, have abandoned it as a test and have adopted a less broad disqualification standard which would permit continued representation unless the attorney's conduct would "taint the *trial*" by disturbing the balance of representation in one of two ways: lessening the attorney's vigor or possessing privileged information from a prior representation.[50]

Conclusion

If the number of lawyers in Louisiana continues to increase, more and more of them predictably will suffer from an inability to keep up financially with "the Joneses." The stress which this brings on may very well lead to additional drug and alcohol abuse. Inevitably, the abuse leads to incompetent and unprofessional service. One can only hope that the Louisiana Supreme Court and the Louisiana State Bar Association working together will find a solution to this vexing problem.

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49. 481 So. 2d 567 (La. 1986).

50. Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979).