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# Professional Responsibility

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## *Introduction*

The two great turning points resulting in greater power in the Louisiana Supreme Court were Act 54 of 1940 (usually referred to as the Integrated Bar Act) and *Saucier v. Hayes Dairy*.[1] In *Saucier* the Louisiana Supreme Court for the first time held that rules adopted by it pursuant to Article 5 Section 5B (now Section 5A) of the Louisiana Constitution of 1974, which included the Code of Professional Responsibility, override legislative acts with which they conflict. In dissent, Justice Summers called the court's pronouncement an irrational usurpation of legislative authority. The court did not back down from its pronouncement, however, and followed *Saucier* in *Singer Hutner Levine Seeman & Stuart v. LSBA*,[2] *Leenerts Farms Inc. v. Rogers*,[3] *Succession of Boyenga*,[4] *City of Baton Rouge v. Staufer Chemical Company*,[5] *Central Progressive Bank v. Bradley*,[6] *Succession of Jenkins*,[7] and *Succession of Cloud*.[8]

The Louisiana Legislature, however, has continued to enact laws which pertain to professional responsibility and conduct of lawyers. For example, Act 250 of 1986 (Louisiana Revised Statutes 9:2448) provides that an attorney appointed in a testament to represent the executor may not be replaced except for cause. A more recent illustration is Act 683 of 1990 (Louisiana Revised Statutes 9:5605) which fixes a one and three year prescriptive period for malpractice actions against attorneys whether the action is based on tort or contract. In 1991, the Louisiana Legislature enacted Act 602 (Louisiana Revised Statutes 6:1351-1354), which purports to limit the duty of professional responsibility of attorneys to certain financial institutions, its shareholders, depositors, customers, creditors,

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1. 373 So. 2d 102 (La. 1979).
2. 378 So. 2d 423 (La. 1979).
3. 421 So. 2d 216 (La. 1982).
4. 437 So. 2d 260 (La. 1983).
5. 500 So. 2d 397 (La. 1987).
6. 502 So. 2d 1017 (La. 1987).
7. 481 So. 2d 607 (La. 1986).
8. 530 So. 2d 1146 (La. 1988).

or insurers to the duties required of attorneys under the Rules of Professional Conduct. The act further provides that the attorneys should only be liable for actions or inactions based on traditional concepts of legal malpractice judged under accepted standards within the locality. The act specifically provides that the Rules of Professional Conduct should not be viewed as formulated malpractice rules, and failure to comply therewith should not be considered malpractice per se. Justice Summers in his dissent in *Saucier* said:

> The Court may not invest its rules with substantive authority inconsistent with legislative enactments. The enactment of substantive rules of laws is a legislative power not to be trenched upon by courts.[9]

In its most recent decision, the Louisiana Supreme Court stated that "a legislative act purporting to regulate the practice of law has commendatory effect only until it is approved by this court as a provision in aid of its inherent judicial power."[10]

*What is the Real Scope of the Court's Power?*

Charles Wrennon Wallace made a statutory will in which he appointed his wife, Ruth Pearl Wallace, executrix of his estate and named Jacqueline May Goldberg as the attorney to act for the executrix and the estate. After filing a petition to probate the will, Mrs. Wallace filed a rule to show cause why the provisions of Louisiana Revised Statutes 9:2448 should not be declared unconstitutional as being in conflict with rules of the Supreme Court and why she should not be able to discharge the attorney even though the legislature in Louisiana Revised Statutes 9:2448 had provided that such an attorney could be discharged only for cause. Prior to the enactment of Louisiana Revised Statutes 9:2448, the supreme court in *Succession of Jenkins*[11] had held that the appointment of an attorney to represent an executor or executrix in a testament was precatory only and that the succession representative and/or the heirs and legatees could terminate the appointment. It is clear that the Louisiana legislature intended to overrule *Succession of Jenkins* when it passed Act 250 of 1986. Mrs. Wallace contended that the provisions of Louisiana Revised Statutes 9:2448 were in direct contravention of Rule 1.16(a)(3), which provides that an attorney must withdraw if fired by the client. The appointed attorney, however, contended that the "client" was the testator and not the executrix. Justice Dennis, writing for the majority, after reviewing the Louisiana history of such appointments and the law

9. 373 So. 2d at 119.
10. Succession of Wallace, 574 So. 2d 348 (La. 1991).
11. 481 So. 2d 607 (La. 1986).

of our sister states, concluded that Louisiana Revised Statutes 9:2448 in so far as it conflicted with Rule 1.16(a)(3) was unconstitutional, null, void, and of no effect. Justice Lemmon concurred. Justice Watson joined the opinion and assigned additional reasons, and only Chief Justice Calogero dissented.

Although Justice Calogero wrote a very cogent dissent, it is not the conclusion of the majority which worries the writer, but rather the broad scope of the language in the majority opinion. Unlike the opinion in *Saucier v. Hayes Dairy*, this opinion does not rely very heavily on the constitutional delegation of power to the court, but on the court's *inherent* power. Consider the following:

> This court has exclusive and plenary power to define and regulate all facets of the practice of law, including the admission of attorneys to the bar, the professional responsibility and conduct of lawyers, the discipline, suspension and disbarment of lawyers, and the client-attorney relationship . . . The sources of this power are this court's inherent judicial power emanating from the constitutional separation of powers . . . the traditional inherent and essential function of attorneys as officers of the courts . . . and this court's exclusive original jurisdiction of attorney disciplinary proceedings. The standards governing the conduct of attorneys by rules of this court unquestionably have the force and effect of substantive law . . .
>
> Conversely, the legislature cannot enact laws defining or regulating the practice of law in any aspect without this court's approval or acquiescence because that power properly belongs to this court and is reserved for it by the constitutional separation of powers . . . . Accordingly, a legislative act purporting to regulate the practice of law has commendatory effect only until it is approved by this court as a provision in aid of its inherent judicial power.[12]

It is interesting to note the reaction of the Louisiana First Circuit Court of Appeal to the above quoted language in *Chaffin v. Chambers*[13] and *Thibaut, Thibaut, Garrett and Bacot v. Smith & Loveless Inc.*[14] In *Chaffin*, the plaintiff was seeking damages in tort, alleging wrongful interference with a contract between a plaintiff attorney and his former client. The court of appeal sustained an exception of no cause of action filed by the defendant on the basis that only the supreme court could recognize a tort action based on a violation of the Model Rules of

12. 574 So. 2d at 350.
13. 577 So. 2d 1125 (La. App. 1st Cir. 1991).
14. 576 So. 2d 532 (La. App. 1st Cir. 1991).

Professional Conduct. This decision was reversed and remanded to the trial court by the supreme court on September 9, 1991.

In *Thibaut* the court refused to consider a claim by the defendant that it was entitled to penalties and attorneys fees under Louisiana Revised Statutes 51:1401 (Louisiana Unfair Trade Practices Act) because it concluded that the legislature had no power to set such fees, citing *Succession of Wallace*. It would seem clear from the reversal and remand of *Chaffin* that the supreme court does not intend to make itself a court of original jurisdiction for all matters involving attorneys, and yet that is what the above quoted language seems to indicate. The big question, therefore, is whether the court intends to operate within the framework of laws passed by the legislature and use its inherent power only in exceptional circumstances or whether it intends to operate, at least when lawyers are involved, in a sphere totally its own.

The United States Supreme Court in *Chambers v. Nasco, Inc.*[15] recently wrestled with the same problem. The majority concluded that there was no basis for holding that the sanctioning scheme of the statutes and the rules displaced the inherent power to impose sanctions for the bad faith conduct of attorneys and their clients.

> These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions.[16]

The dissent, however, concluded that inherent powers are the exception, not the rule, and their assertion requires special justification in each case. Further, inherent powers can be exercised only when necessary, and there is no necessity if a rule or statute provides a basis for sanctions.

> It follows that a district court should rely on text based authority derived from Congress rather than inherent power in every case where the text based authority applies.[17]

The discussion of the scope of the court's power will be considered further in the section on malpractice which follows.

*Malpractice*

Most of the malpractice cases during the past year turned on the question of prescription, with perhaps the most important case being *Braud v. New England Insurance Co.*[18] As pointed out in this case, in the absence of an expressed warranty of result, a claim for legal mal-

15. 111 S. Ct. 2123 (1991).
16. Id. at 2134.
17. Id. at 2143.
18. 576 So. 2d 466 (La. 1991).

practice is a delictual action subject to a liberative prescription of one year. This period begins when there is a combination of the attorney client relationship, negligence of the attorney, and the client suffers appreciable harm as a consequence of his attorney's negligence. Still to be decided is the effect of Act 683 of 1990, which is now Louisiana Revised Statutes 9:5605. This act declares a peremptive period of one and three years no matter whether the cause is based on tort or breach of contract. The initial period of one year is from the date the alleged act, omission or neglect is discovered or should have been discovered, but in all events such actions shall be filed within at least three years from the date of the alleged act, omission or neglect.

It is immediately apparent that in areas of will drafting and title examinations the damage may not occur until a much longer period than three years. The negligent act, however, would be in the preparation of the will or in the failure of the attorney to discover defects and encumbrances on the title. It is difficult for the writer to believe that our supreme court would simply say these people have no recourse, but this is precisely what has been done in the interpretation of Louisiana Revised Statutes 9:5628 concerning medical malpractice. The leading case is *Crier v. Whitecloud*,[19] in which the question was squarely presented on rehearing whether Louisiana Revised Statutes 9:5628 barred a claim of medical malpractice when the injury resulted not at the time of the patient's treatment but instead some three years after the date of alleged act, omission or neglect. After considering the constitutional argument against the loss of the right to sue, the court concluded that statutes of limitation are exclusively a legislative prerogative, and Louisiana Revised Statutes 9:5628 is a legislative determination that three years is a reasonable period of time in which to assert a medical malpractice claim. The passage of the statute was an attempt to alleviate a "medical malpractice insurance crisis." Therefore, according to the court, the statute was rationally related to the state's interest in reasonable medical costs and readily available health care. The Medical Malpractice Statute (Louisiana Revised Statutes 9:5628) does not mention the word peremption but the legal malpractice statute does, specifically stating in subsection (C) that the peremptive period provided in subsection (A) shall not apply in cases of fraud as defined in Civil Code article 1953. Articles 3458-61 of the Civil Code deal specifically with peremption. It is a period of time fixed by law for the existence of a right. Once the period of time expires, the right ceases to exist; further, peremption may not be renounced, interrupted or suspended.

In view of the decision in *Crier v. Whitecloud*, it would appear to the writer that the only way to get around the three year peremption

19. 496 So. 2d 305 (La. 1986).

for lawyers' malpractice actions would be to contend that this period is unreasonable when we consider that many things which lawyers do, such as wills and title examinations mentioned above, may not lend themselves to the discovery of any negligence for much greater lengths of time than would the actions of physicians and surgeons.

In *Braud*, the attorney had obtained a default judgment in the sum of four million dollars against Citicorp. At some later date, Citicorp filed a suit to annul the judgment based upon ill practices in obtaining the same and failure to produce sufficient proof to establish a prima facie case. While the suit to annul was pending, the matter was compromised, and as a result Braud received only some $72,000 in satisfaction of the four million dollar default judgment. Thereafter the client brought the malpractice action against his former attorney. The court of appeal[20] held that the suit was timely brought, as it was within one year of the settlement. The supreme court reversed, holding that the suit should have been brought within one year of the date that Citicorp filed the suit to annul the default judgment because it was at that time that the client was compelled to incur and pay attorney's fees, legal costs, and expenditures. The writer agrees with Justice Watson who dissented, concluding that Braud did not have a matured cause of action until the default judgment was either set aside or the settlement was reached. Under the majority's interpretation, Mr. Braud would have had to file a suit against his former attorney contending that the default judgment was no good and at the same time be involved in a suit with the other shareholders contending that the default judgment of four million dollars was in fact good. This is not just inconsistent pleading which can be brought in the alternative, but an absolutely contradictory position which probably could have been used against Mr. Braud by Citicorp.

In the 1991 regular session the legislature adopted another act which is significant in the malpractice area. It is Act 602 of 1991 which has become Louisiana Revised Statutes 6:1351-1354. Basically, this act provides that attorneys furnishing professional services to federally insured financial institutions shall have no greater duty of professional responsibility to the institution, its shareholders, depositors, customers, creditors, or insurers, than that required of attorneys under the Rules of Professional Conduct. But it further provides that those same rules of professional conduct shall not be viewed as formulated malpractice rules, and failure to comply with the requirement of those rules shall not be considered malpractice per se. Section 1352 specifically provides that an attorney shall only be liable for actions or inactions based upon traditional concepts of legal malpractice judged under accepted standards

20. Braud v. New England Ins. Co., 562 So. 2d 1116 (La. App. 4th Cir. 1990).

within the locality. This may put to an end, at least in Louisiana, the movement to make the model rules malpractice standards. The latest article espousing such a view concludes with the following:

> By using the model rules to create cognizable legal duties owed by attorneys to clients, and by recognizing some bar disciplinary findings as prima facie evidence of legal malpractice, the legal profession will be better able to respond to the charges that self regulation is not working and should come to an end. No matter how untenable the idea of increased accountability for their actions may seem to lawyers, such accountability is needed to insure public confidence in the profession's integrity and to promote the efficient administration of justice.[21]

The "Locality Rule" would obviously be in jeopardy if the Model Rules become malpractice standards. A majority of the states adhere to such a locality standard.[22]

It is the opinion of the writer that the locality rule makes sense and it should not be jettisoned for either the Model Code of Professional Responsibility or the Model Rules of Professional Responsibility, both of which specifically declare that they are not designed as malpractice rules.

*Sanctions Under Article 863, Code of Civil Procedure*

As pointed out in *Loyola v. A Touch of Class Transportation Service*,[23] Article 863 of the Louisiana Code of Civil Procedure is derived from Rule 11 of the Federal Rules, and because there is limited jurisprudence interpreting and applying Article 863, the courts of appeal of Louisiana have looked to the federal decisions applying Rule 11. Perhaps the most cited opinion in the Fifth Circuit concerning Rule 11 is *Thomas v. Capital Security Services, Inc.*,[24] which set forth the factors to be considered in determining whether reasonable factual inquiry had been made and also the factors in determining whether reasonable legal inquiry had been made. The court also cited various federal decisions concerning the limitation of Rule 11 sanctions. First, the rule should not be used simply because parties disagree as to the correct resolution of a matter in litigation. Secondly, it should be used only in exceptional circumstances. Third, no sanction should be imposed simply because a particular

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21. Hampton, Toward an Expanded Use of the Model Rules of Professional Conduct, 4 Geo. J. Legal Ethics 655 (1991).

22. Smith, The Locality Standard of Care Legal Malpractice, 3 Geo. J. Legal Ethics 581 (1990).

23. 580 So. 2d 506 (La. App. 4th Cir. 1991).

24. 836 F.2d 866 (5th Cir. 1988).

argument or ground for relief contained in a nonfrivolous motion is found to be unjustified. Lastly, sanctions should not be used in such a manner as to inhibit imaginative legal or factual approaches to applicable law or to unduly harness good faith cause for reconsideration of settled doctrine.

The courts of appeal in *Loyola* and the other Article 863 cases decided in the past year[25] have shown a balanced approach to applying sanctions. As pointed out in *Fairchild*, in determining a violation of Rule 11 or Article 863 the trial court should avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or other paper was submitted. If the courts of appeal continue to use these standards set out in *Loyola* (taken from *Thomas v. Capital Security Services*), then Louisiana will probably avoid the pitfalls of Rule 11 which have been so widely criticized and which have led to an effort to revise that rule.

*Some Changes in Court Rules*

By order dated December 13, 1990, the Supreme Court of Louisiana made the Interest on Lawyer's Trust Accounts (IOLTA) a mandatory program requiring the participation by attorneys and law firms whether proprietorships, partnerships or professional corporations. In connection therewith, Rule 1.15 of the Model Rules of Professional Responsibility was also amended to require a lawyer to

> create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time in compliance with the following provisions:
>
> (1) No earnings from such an account shall be made available to a lawyer or firm.
>
> (2) The account shall include all clients' funds which are nominal in amount or to be held for a short period of time.
>
> (3) An interest-bearing trust account shall be established with any bank or savings and loan association or credit union authorized by federal or state law to do business in Louisiana and insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration. Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.

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25. Barry W. Miller, A Professional Law Corp. v. Poirier, 580 So. 2d 558 (La. App. 1st Cir. 1991); Fairchild v. Fairchild, 580 So. 2d 513 (La. App. 4th Cir. 1991); Derouin v. Champion Ins. Co., 580 So. 2d 1043 (La. App. 3d Cir. 1991); and Billeaud v. Association of Retarded Children of Evangeline, 569 So. 2d 1020 (La. App. 3d Cir. 1990).

(4) The rate of interest payable on any interest bearing trust account shall not be less than the rate paid by the depository institution to regular, non-lawyer depositors.

(5) Lawyers or law firms depositing client funds in a trust savings account shall direct the depository institution:

A. To remit interest or dividend, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the Louisiana Bar Foundation, Inc.;
B. To transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied; and
C. To transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made.[26]

Also contained in the order itself is a provision concerning the use of the funds forwarded to the Louisiana Bar Foundation, Inc. They are to be used solely for the following purposes:

A. To provide legal services to the indigent and to the mentally disabled;
B. To provide law related educational programs for the public;
C. To study and support improvements to the administration of justice; and
D. For such other programs for the benefit of the public and the legal system of the state as are specifically approved from time to time by the Supreme Court of Louisiana.

In view of the purposes for which the money is to be spent and the fact that neither lawyer nor client would have received any interest from this type of account, one would expect that the mandatory program would have been well-received by the rank and file lawyer throughout Louisiana. Nothing could be further from the truth, however. At continuing legal education seminars in New Orleans, Shreveport, Lake Charles, Baton Rouge and Monroe, the writer took a poll to determine how many lawyers favored the mandatory program and how many opposed it. Out of approximately 700 in New Orleans, approximately 30 lawyers approved and all the others disapproved. Basically, the same ratio re-

26. Rules of Professional Conduct 1.15(d) (Supp. 1992).

sulted in the other cities. It is difficult to establish any one reason for this overwhelming disapproval. Every state in the Union, with the exception of Indiana, has either a voluntary or a mandatory IOLTA program. Literally millions of dollars are being obtained to carry out worthwhile programs. The *National Law Review* on Monday, July 29, 1991, carried an article which listed all of the states, together with funds which had been collected for IOLTA from the inception of the program in that particular state along with the amount of funds spent and for what purposes. The article stated that nationally IOLTA had raised almost half a billion dollars since 1981. Unfortunately, as the article also pointed out, some IOLTA programs had been the victim of budget shortfalls in other branches of the government which resulted in a resort to IOLTA funds to make up the deficit. This probably could not happen in Louisiana since our program is not set up by the legislature, but by the Supreme Court of Louisiana.

When one considers the ongoing effort to establish the constitutional right of an attorney to compensation when appointed to represent an indigent, it would seem that IOLTA would go hand in glove with this program. But the opposition to IOLTA has not been just with the lawyers themselves, but also with the legislature which passed Act No. 546 of 1991. That act amended and reenacted Louisiana Revised Statutes 6:311 to read as follows:

> State banks may offer any type of deposit accounts, interest bearing or not, that are consistent with the provisions of this law, rules and regulations of the commissioner, or applicable rules and regulations of the Federal Deposit Insurance Corporation or the Federal Reserve System, except that in no case may any bank establish any interest bearing account funded with deposited monies belonging to third persons identified in accordance with the provisions of R.S. 6:317 which allows the interest to be paid to any person other than the owner of the monies in accordance with Civil Code Article 510.

The act also enacted Louisiana Revised Statutes 9:2789 which provides in its entirety as follows:

> *Section 2789. Interest Bearing Deposit Accounts*
> No person other than the owner of the monies deposited in any interest bearing account funded with deposited monies belonging to third persons as identified in accordance with the provisions of R.S. 6:317 may receive the interest earnings, as provided under Civil Code Article 510, on those monies.

It seems fairly certain that the author or authors of this legislation had the Louisiana IOLTA program in mind. Although the Louisiana Supreme Court has not been hesitant about setting aside and annulling statutory provisions which impinged upon its staked out bailiwick, it

would seem rather doubtful that this act would fall into that area. It will be extremely interesting to see what develops. In the meantime, the writer believes that the Louisiana State Bar Association should continue its public relations efforts with its own members as well as with the state and federal banks.

Another rule change was an amendment to Rule 3.8 dealing with the special responsibilities of a prosecutor. The American Bar Association had passed a similar change in 1990. Subparagraph F was added to Rule 3.8 in an effort to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which the evidence sought is essential to the successful completion of the investigation or prosecution. The most important provision of the amendment is that the prosecutor must obtain prior judicial approval for the issuance of the subpoena to the attorney after an opportunity for an adversarial proceeding. The Louisiana Association of Criminal Defense Lawyers worked very hard to get this change made in Louisiana. Whether the rule change will be implemented in the federal courts is still open to question. In *Baylson v. Pennsylvania Superior Court*,[27] the court held that such a change could not be imported into the local federal district court rules because it could not be reconciled with the Federal Rules of Criminal Procedure. It seems to the writer that the amendment is a good one because any successful attempt to subpoena an attorney in an ongoing matter intrudes upon the client-lawyer relationship. An adversarial hearing will permit the court to make the decision whether the requirements of the amendment have been met.

Finally, the court has amended its Rule 19 concerning the disciplinary procedures governing attorneys so as to increase the permanent disciplinary board from nine members to thirteen members, four of whom shall be public members and nine members of the Bar of this state. Unfortunately, the court did not amend the provision which requires a majority of the whole Board to act in any matters other than administrative matters. It would thus seem that the Board still could not break into panels for its appellate review functions. Because of the proliferation of hearing committees, this may cause a slowdown of the appellate process.

*Discipline*

A review of the disciplinary cases during the past year reveals much the same pattern as in prior years. The most serious offense, and the offense for which disbarment is most often the penalty, is the commingling and conversion of funds of clients. Finding no or insufficient

27. 764 F. Supp. 328 (E.D. Pa. 1991).

mitigating factors, the supreme court disbarred four attorneys[28] and as to an attorney who had already been disbarred, found additional violations warranting disbarment which would be added to his record in the event he were ever considered for readmission.[29]

Rather than automatically disbarring an attorney who has been found guilty of conversion, the court attempts to apply a sanction which will fit the facts and circumstances of each case. In *Louisiana State Bar Association v. Gold*,[30] the court said it would consider the following factors in a case of commingling and conversion:

> Whether the lawyer acts in bad faith or intends a result inconsistent with his client's interest; whether the lawyer commits fraud or forgery in connection with the offense; the magnitude and duration of the deprivation; the magnitude or risk of damage, expense or inconvenience to the client; whether the lawyer makes restitution, and whether such restitution is before or after disciplinary or legal proceedings.

Following these factors, the court imposed a six month suspension in *Gold*, as well as in *Louisiana State Bar Association v. Guidry*.[31] Perhaps the mildest sanction was imposed in *Louisiana State Bar Association v. Keyes*.[32] In this case, the respondent was primarily an oil and gas lawyer who operated several businesses from his law office and who depended almost entirely on a long time employee for the internal operation of his law office, including his various accounts. The employee, not knowing that funds in a succession account could not be transferred without court order, but knowing that her employer was entitled to a substantial fee, transferred funds from the succession account to the operating account. After considering all of the evidence, the court concluded that the respondent attorney did not authorize or even know of the secretary's unauthorized withdrawal from the succession account. Because there was negligence rather than wilfulness and because there was a total absence of dishonesty as well as swift repudiation of the employee's misconduct and replacement of the misused funds, only a thirty day suspension was meted out.

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28. Louisiana State Bar Ass'n v. Kilgarlin, 561 So. 2d 1377 (La. 1990); Louisiana State Bar Ass'n v. Haymer, 563 So. 2d 242 (La. 1990); Louisiana State Bar Ass'n v. Porterfield, 568 So. 2d 1036 (La. 1990); Louisiana State Bar Ass'n v. Thierry, 573 So. 2d 1099 (La. 1991).

29. Louisiana State Bar Association v. Chatelain, 573 So. 2d 470 (La. 1991).

30. 563 So. 2d 855 (La. 1990).

31. 571 So. 2d 161 (La. 1990).

32. 567 So. 2d 588 (La. 1990).

In three other cases, a six month suspension was ordered for each attorney for neglect of matters which the attorney was supposed to be handling.[33]

Three disciplinary cases reported last year deserve more than a passing comment. They are *Louisiana State Bar Association v. Wilkinson*,[34] *Louisiana State Bar Association v. Sanders*,[35] and *Louisiana State Bar Association v. Harrington*.[36] In *Wilkinson*, the attorney had pleaded guilty in a United States District Court to aiding and abetting wire fraud and was sentenced to one year in prison. Accordingly, the court found that for disciplinary purposes the sole issue was one of sanction inasmuch as the issue of the attorney's guilt could not be relitigated. The court began its opinion by outlining the background of the scheme which had resulted in the guilty plea, and then it considered the ABA standards for imposing lawyer's sanctions (Section 3.0). This section suggests that the court should consider (1) the ethical duties the lawyer violated; (2) the lawyer's mental state related to his ethical violation; (3) the extent of the actual or potential injury caused by the lawyer's misconduct; and (4) the aggravating and mitigating circumstances. The court then went over each of the factors as they applied to the facts of the particular case, and applied them in two steps. First, the court decided upon the starting point or base level of sanctions warranted by focusing on the nature of the duty violated, the lawyer's mental state and the actual or potential injury resulting from that misconduct and then applied the aggravating and mitigating factors to fine tune or shape the sanction to fit the unique facts and circumstances of the particular case. The court then concluded that the misconduct involved called for a base-line sanction or disbarment. However, when applying the aggravating and mitigating factors to that sanction, the court concluded that a thirty month suspension was appropriate. The decision is helpful in that it gives the Bar a fairly straightforward picture as to how the court is going to approach any particular disciplinary matter.

The next case is *Louisiana State Bar Association v. Sanders*. The writer previously discussed the facts which led to the disciplinary action in a faculty symposium for 1988-1989.[37] Looking only at the law of litigious rights and the jurisprudence concerning those rights, it would

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33. Louisiana State Bar Ass'n v. Amberg, 573 So. 2d 1092 (La. 1991); Louisiana State Bar Ass'n v. Villa, 570 So. 2d 1165 (La. 1990); and Louisiana State Bar Ass'n v. Jones, 570 So. 2d 1161 (La. 1990).

34. 562 So. 2d 902 (La. 1990).

35. 568 So. 2d 1025 (La. 1990).

36. 585 So. 2d 514 (La. 1990).

37. Mengis, Professional Responsibility, Developments in the Law, 1988-1989, 50 La. L. Rev. 335, 341 (1989).

appear that Mr. Sanders was following a perfectly proper course of action. Even Louisiana Revised Statutes 37:218 seemed to permit a contract by which an attorney acquired an interest in the subject matter of a lawsuit. Overlooked, unfortunately, was the advent of the Code of Professional Responsibility, adopted in 1969, and the decision of *Saucier v. Hayes Dairy*,[38] which reinterpreted the plain language of Louisiana Revised Statutes 37:218 to authorize the attorney to obtain only a privilege on the proceeds from his representation. The court acknowledged that *Succession of Cloud*[39] did not overrule *Gautreaux v. Harang*,[40] but that it did establish a new interpretation which represented a change in the law. After pointing out that the client was not hurt by the actions of the attorney and that there was conflicting testimony whether the initial transaction from the client's father to her and to her husband was a donation or a sale, the court imposed a sanction consisting of a nine month suspension.

Finally, there is the case of *Louisiana State Bar Association v. Harrington*. As summarized by the court, Harrington was found guilty of two instances of making false statements, one of which involved misleading opposing counsel and the court, two instances of unduly embarrassing, delaying, or burdening a third person, one of which included criminal threats, and improper ex parte communication with a judge. The court stated that Harrington had "engaged in a pattern of misconduct evidencing a lack of respect for the administration of justice and for the rights of third persons. He engaged in conduct which constitutes multiple offenses, consistently flouting the rules to which those who are licensed to practice must conform their conduct."[41] Only his relative inexperience in the practice of law saved Mr. Harrington from disbarment. An eighteen month suspension was meted out, which was reduced to nine months on rehearing.

The interesting thing about this opinion is its interpretation of Rule 3.5 involving impartiality and decorum of the tribunal. The rule provides that a lawyer shall not seek to influence a judge, juror, prospective juror, or other official *by means prohibited by law*. The commissioner had concluded that the words "by means prohibited by law" meant activities such as obstruction of justice, public bribery, or other criminal acts. The court disagreed with this interpretation. The Code of Judicial Conduct in Canon 3(a)(4) directs a judge not to permit private ex parte interviews, and when Mr. Harrington attempted to induce the judge to violate the Code of Judicial Conduct, this fit under the definition "by

38. 373 So. 2d 102 (La. 1979).
39. 530 So. 2d 1146 (La. 1988).
40. 190 La. 1060, 183 So. 349 (1938).
41. 585 So. 2d at 523.

means prohibited by law" inasmuch as the Louisiana Supreme Court has many times held that the ethical rules have the force and effect of substantive law.[42] The court concluded that "[i]t is thus clear that the intention of the Model Rule, adopted in Louisiana verbatim, is that the communication need not be made by the attorney while representing a client and, in fact, need not be made with the intent to influence the judge."[43]

*Conclusion*

When one considers and compares the Code of Professional Responsibility with the Model Rules which are now in effect in Louisiana, it becomes immediately apparent that there has been a change in direction. One does not find in the Model Rules the exhortation that a lawyer should represent his client zealously within the bounds of the law, although certainly this concept has not been discarded. One does find, however, a more balanced treatment of the duties of a lawyer to his client, to the system of justice, and to others. It is the writer's belief that an attorney can be absolutely dedicated to his client's cause and yet still maintain respect for and adherence to the system of justice and further maintain respect and civility to third persons, even including the opposing lawyer and his client.

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42. Succession of Cloud, 530 So. 2d 1146 (La. 1988); Saucier v. Hayes Dairy, 373 So. 2d 102 (La. 1979).

43. 585 So. 2d at 522.