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Professional Responsibility

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I. Attorney Fees

A. Referral Fees

Prior to July 1, 1970, the effective date of the Louisiana Code of Professional Responsibility, it was not uncommon, nor was it considered unethical for an attorney to receive a referral fee without doing any work or assuming any responsibility when he sent his client to another attorney. This referral fee was normally one third of the second attorney's total fee. It was understood that the fee to the client would not be raised and thus the total cost of the referral was borne by the second attorney. Generally there was no written contract between the two attorneys and in most cases the referral fee was not even discussed, simply assumed.

The Louisiana Code of Professional Responsibility in Disciplinary Rule 2-107 provided as follows:

> A. A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless
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> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
> (2) The division is made in proportion to the services performed and responsibilities assumed by each.
> (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.[1]

Many lawyers simply were not aware of this provision in the ethics code and routinely continued to pay and receive referral fees where the referring lawyer performed no work and retained no responsibility.

On the other hand, in some referral fee situations the original lawyer continued to participate in the case and, at the conclusion of the matter,

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1. La. Code of Prof. Resp. (La. R.S. 37, Ch. 4, art. 16, DR 2-107 (1987)).

there was sometimes a dispute as to how the fee should be divided. This is what happened in the leading case of *McCann v. Todd*.[2] There was considerable dispute in that case over whether the three attorneys had verbally agreed on how the fee was to be split. The supreme court concluded that although the evidence was conflicting there was no meeting of the minds concerning a percentage distribution, nor was there any agreement that the two original attorneys were employed on a quantum meruit basis. This being so, the court concluded that the three attorneys had undertaken a "joint adventure." Quoting at length from Corpus Juris Secundum, the court concluded that in the absence of any agreement or custom to the contrary, attorneys jointly undertaking to render legal services are entitled to share equally in the compensation. There is no mention in the entire opinion of the 1908 Canons of Professional Ethics[3] which is rather strange because Canon 34 provides: "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."[4] The thrust of the opinion is simply that there was a joint venture among the lawyers and that when no definite agreement is formulated, joint venturers share a fee proportionately.

1. The Effect of Saucier v. Hayes Dairy

The Louisiana Supreme Court decided *Saucier v. Hayes Dairy Products, Inc.*[5] some eight years after the Code of Professional Responsibility became effective.[6] It was like a bombshell on the legal community because it held that the Code of Professional Responsibility which regulates attorney practice has the force and effect of substantive law. As a result, those rules override legislative acts which tend to impede or frustrate the authority of the court. The court then concluded that regardless of the individual contracts which the two attorneys (the first having been discharged without cause) had entered into with the client, only one reasonable fee could be assessed against the client, and that the two lawyers had to divide the fee on the basis of factors which are set forth in DR 2-106[7] of the same Code of Professional Responsibility. The court was very careful not to endorse a division of the fees between the two attorneys on a quantum meruit basis because such a focus is at variance with the reality of a contingent fee agreement.

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2. 203 La. 631, 14 So. 2d 469 (1943).

3. Canons of Professonal Ethics, American Bar Ass'n (amended Sept. 30, 1937).

4. Canons of Professional Ethics, Canon 34, American Bar Ass'n (amended Sept. 30, 1937).

5. 373 So. 2d 102 (La. 1978).

6. La. Code of Prof. Resp. (found in Articles of Incorporation, La. State Bar Ass'n, art. 16; La. R.S. 37, ch. 4 (1987)).

7. La. R.S. 37, Ch. 4, art. 16, DR 2-106 (presently Rule 1.5(a) through (d)) (1987).

Shortly thereafter in *Leenerts Farms Inc. v. Rogers*,[8] the court, in abrogating a fee fixed on a promissory note, expressed its view that the Code of Professional Responsibility is of the most exacting of laws established for the public good, and that individuals by their contract could not derogate from the force of such laws. In later cases, particularly *Succession of Cloud*[9] and *Succession of Wallace*,[10] the court made it abundantly clear that when an attorney enters into a contract with his client in direct and flagrant violation of a disciplinary rule, the contract will be considered null and void as in contravention of the Code of Professional Responsibility. In *Succession of Cloud*, the court held that the attorney had acted legally but that his contract with his client violated Model Rule 1.8(j)[11] and was therefore considered null and void.[12] In *Succession of Wallace* the supreme court held Louisiana Revised Statutes 9:2448 to be unconstitutional since it was in contravention of Rule 1.16 which provides that a client can always dismiss his attorney with or without cause.[13]

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8. 421 So. 2d 216 (La. 1982).
9. 530 So. 2d 1146 (La. 1988).
10. 574 So. 2d 348 (La. 1991).
11. La. R.S. 37, Ch. 4, rule 1.8(j) (1987). Rule 1.8(j) provides:

> (j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
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> (1) Acquire a lien granted by law to secure the lawyer's fee or expenses; and
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> (2) Contract with a client for a reasonable contingent fee in a civil case.

12. *Cloud*, 530 So. 2d at 1151.
13. *Wallace*, 574 So. 2d at 355. Rule 1.16 provides:

> (a) Except as stated in Paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
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> (1) The representation will result in violation of the rules of professional conduct or other law;
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> (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
>
> (3) The lawyer is discharged.
>
> (b) Except as stated in Paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
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> (1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
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> (2) The client has used the lawyer's services to perpetrate a crime or fraud;
>
> (3) A client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
>
> (4) The client fails substantially to fulfill an obligation to the lawyer

2. Referral Fees Today

Referral fees today are governed by Rule 1.5(e) which provides as follows:

> A division of fee between lawyers who are not in the same firm may be made only if:
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> (1) The division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
> (2) The client is advised of and does not object to the participation of all the lawyers involved; and
> (3) The total fee is reasonable.[14]

Notice the difference between the provisions of DR 2-107 and Louisiana's Rule 1.5(e).[15] Under the rules it is possible for an attorney to be ethically entitled to share in a fee even though he does no work at all, provided he has assumed joint responsibility for the representation in writing.[16]

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regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) Other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

14. La. R.S. 37, Ch. 4, art. 16, Rule 1-5(e) (1987).

15. Code of Professional Responsibility, American Bar Association, Disciplinary Rule (1969).

DR 2-107 Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fee will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyer does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

16. La. R.S. 37, Ch. 4, art. 16, Rule 1.5(e)(1) (1987).

In the third circuit case of *Fontenot and Mitchell v. Rozas, Manuel, Fontenot & McGee*,[17] the court held that DR 2-107 did not apply where two law firms contested the division of a fee. One of the law firms consisted of four partners and the other of two partners. The four-partner firm contended that the fee should be divided by heads, and the two-partner firm contended that the fee should be divided in half. The court stated that DR 2-107 is aimed at full disclosure, to the client by his attorney, that he or she has associated another lawyer who will be sharing in the fees. This rule mandates that the client must agree to the association and further that in such cases the division of any fees must be proportionate to the work performed by each lawyer. But in *Fontenot* the client actually hired both law firms at the beginning of the representation and consequently there never was a situation of one attorney associating another attorney with the consent of the client. The court further held that quantum meruit did not apply because the client had not discharged one of the firms. The decision of the trial court to split the fee equally between the firms was affirmed. There was considerable reliance on *McCann*[18] and the final conclusion was that the client had actually hired two law firms and not six individual attorneys.

The first circuit addressed the next case bearing on the subject in *Defranchesch v. Hardin*.[19] There, one attorney who was heavily engaged in other matters chose to associate an attorney, Mr. Hardin, to handle a particular case. The trial court found that both attorneys performed work at the inception and during the early months but that later the quantity and quality of work performed weighed heavily in favor of Mr. Hardin. The trial court, whose opinion was adopted by the court of appeal, found that the *Saucier* case did not apply and instead followed *McCann* and *Fontenot*. The court concluded that the attorneys had engaged in a joint venture and that the fee should be split equally between them, regardless of the fact that Mr. Hardin's energy, ability and enthusiasm dominated the case.

Shortly thereafter, the third circuit decided *Lloyd v. Tritico*.[20] The plaintiff, Lloyd, contended that he and the defendant, Tritico, had formed a joint venture, and that by virtue of this joint representation, he was entitled to fifty percent of the total fee. The facts of this case were somewhat unusual in that the original attorney, Tritico, represented the plaintiff completely through a trial on the merits resulting in judgment for the defendant. Tritico then filed various motions for a new trial or in default thereof, a judgment notwithstanding the verdict.

17. 425 So. 2d 259 (La. App. 3d Cir. 1982).
18. McCann v. Todd, 203 La. 631, 14 So. 2d 469 (1943).
19. 510 So. 2d 42 (La. App. 1st Cir.), *writ denied*, 513 So. 2d 819 (1987).
20. 527 So. 2d 57 (La. App. 3d Cir.), *writ denied*, 528 So. 2d 154 (1988).

Realizing that he would have to testify at these motions, he then associated Lloyd. The motions were unsuccessful, and Lloyd assisted with brief writing for the appellate procedure. Eventually Tritico received a fee of $650,000 out of which he paid $130,000 to Lloyd. The court found *McCann* and *Defranchesch* inapplicable because the plaintiff was well aware that Tritico had a policy of sharing fees on a quantum meruit basis and implicitly accepted that arrangement. Under all of the circumstances, the court found that the fee paid to Lloyd was fair, adequate, and just compensation for the work he had performed.

Meanwhile, in the federal court, Judge Politz of the Fifth Circuit was confronted with the division of an attorney fee among three lawyers, two of whom had been discharged without cause. The court held that awarding and approving fees is a part of the inherent power of the court to regulate the professional conduct of attorneys appearing before it.

> In determining an appropriate fee allocation, in a matter involving only the attorneys, the court must achieve an equitable result for the officers of the court who stand before the bar seeking a just apportionment of the earned fee. In such an instance, niceties of contractual interpretation and technical words of conveyances may not impede or prevent the achieving of that just result.[21]

Even more to the point is *Matter of P&E Boat Rentals, Inc.*[22] with Judge Politz again writing for the court. In this case, the facts were rather typical. The original attorney had minimal involvement in the case, and the associated attorney did virtually all of the work including the pretrial discovery, the trial, and the beginning of the appeal. According to the court it was clear from the record that the associated attorney assumed total responsibility for the case, both in its factual and legal preparation and in its financial exposure. The original attorney claimed one-half of the fee under the joint venture theory of *McCann*. The associated attorney argued that DR 2-107 applied and thus the fee had to be divided based on the work actually performed by each attorney. Judge Politz wrote:

> In *McCann* the Louisiana Supreme Court used a joint venture theory to resolve an attorney fee division dispute. Collins (original attorney) misperceives the dispositive law. Nearly a half-century after *McCann*, the Louisiana Supreme Court, which has plenary authority over the admission and discipline of attorneys in Louisiana, adopted the Code of Professional Responsibility

21. Seal v. Pipeline, Inc., 731 F.2d 1194, 1196 (5th Cir. 1984).
22. 928 F.2d 662 (5th Cir. 1991).

> to govern the conduct of attorneys within its jurisdiction. *McCann* and any other previous rulings by Louisiana's highest and intermediate courts necessarily must yield to the Supreme Court's subsequent exercise of its plenary authority over the subject attorneys.
>
> Collins further maintains that the district court erred by not enforcing the alleged agreement between counsel for an equal division of the fee. We do not agree. No such agreement validly could have been made under the Code of Professional Responsibility unless the attorneys equally assumed responsibility for the matter and performed essentially equal services. The record clearly establishes that there was neither a joint assumption of responsibility nor equivalent performance of services. *No contract between counsel which is in conflict with controlling ethical standards should be recognized and enforced by the court.*[23]

The latest development is *Scurto v. Siegrist*,[24] a case decided by the first circuit. Again, the issue was the division between two attorneys of a contingent attorney fee for the settlement of a personal injury case. The attorney fee in question amounted to a total of $130,300. There was an unusual twist in that the forwarding attorney claimed two-thirds of the fee and tendered only one-third to the associated attorney. In testimony proffered after an exclusion by the trial court, it appeared that this had indeed been the original understanding of the parties. The forwarding attorney was to receive two-thirds, and the associated attorney who allegedly did most of the work was to receive one-third. The associated attorney contended, however, that the arrangement had to comport with DR 2-107, therefore, the legal fee had to be divided in proportion to the value of the services furnished by each attorney. He further contended that any division of legal fees which did not comply with the Code of Professional Responsibility was against public policy and unenforceable. The court did not agree with this assertion and held that where a retained attorney associates, employs, or procures the employment of another attorney to assist him in handling a case involving a contingency fee, the agreement regarding division of the fee is a joint venture which gives the parties to it the right to participate in the fund generated when the client pays the fee. Thus, according to the court, the suit was one for a breach of the agreement to share in the fund resulting from the payment of the fee. The court cited and relied heavily on *Duer & Taylor v. Blanchard, Walker, O'Quin & Roberts*.[25] It then concluded that "[w]hen attorneys in a *Duer* situation have entered into

23. *Id.* at 665 (emphasis added).
24. 598 So. 2d 507 (La. App. 1st Cir.), *writ denied*, 600 So. 2d 683 (1992).
25. 354 So. 2d 192 (La. 1978).

an agreement regarding the division of the fee, the Code of Professional Responsibility (or Rules of Professional Conduct) does not prohibit enforcement of that agreement and does not require apportioning of the fee on a quantum meruit basis."[26]

It is respectfully submitted that this is a misinterpretation of the *Duer* decision which concerned only the question of prescription of an action by an attorney against another attorney who had been associated to collect a portion of an attorney fee. There is no argument that the action in *Scurto* was not one for an attorney's fee because the total fee had been paid by the client. It is also admitted that the characterization of the agreement between the attorneys as a joint venture or special partnership was correct. But the conclusion that this eliminated the application of the Rules of Professional Responsibility was not and cannot be correct. If it were correct, the attorneys could avoid the application of Rule 1.5(e) by simply agreeing among themselves that the forwarding attorney would receive one-third of the total fee even though he performs no work and retains no responsibility. This flies in the teeth of the holding of the Louisiana Supreme Court in *Succession of Boyenga*[27] wherein the court unequivocally stated that the reasonable fee for doing nothing is nothing. Is it possible to avoid this holding in the provisions of Rule 1.5(e) by simply stating that the attorneys are not dividing a fee, but a fund resulting from the payment of a fee by a client? Charles Wolfram in his text, *Modern Legal Ethics*,[28] has this to say:

> Both the code (DR 2-107) and the Model Rules (MR 1.5(e)) permit fee splitting among lawyers only if rather elaborate rituals and restrictions are observed. Violations are disciplinary offenses. In both codes the restrictions apply, however, to fee splitting between lawyers not in the same firm; lawyers in the same firm may share fees in any way they chose. Fee splitting between lawyers not in the same firm is narrowly confined to worker lawyers by the Code, but the Model Rules are more permissive and permit some pure forwarding. As far as they go, the requirements of the lawyer codes are enforced in discipline cases, through denying effect to impermissible fee splitting arrangements, and by denying fee awards to lawyers who participate in impermissible fee splitting arrangements.[29]

It seems apparent to the writer that if a lawyer is incompetent to handle a particular type of case or too busy to handle it for one reason

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26. *Scurto*, 598 So. 2d at 510.
27. 437 So. 2d 260 (La. 1983).
28. Charles W. Wolfram, Modern Legal Ethics 511 (Student ed. 1986).
29. *Id.* (footnotes omitted).

or the other, that he should not accept the case in the first place. If he does accept the case, then it is the contention of the writer that he must comply with Rule 1.5(e) and that the model rules are superimposed upon his agreement with the associated attorney. To hold otherwise certainly conflicts with the broad language of *Succession of Wallace* wherein the court said "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."[30]

It must also be recognized that the holding in *Scurto* is in conflict with *Leenerts Farms, Inc. v. Rogers*[31] and *City of Baton Rouge v. Stauffer Chemical Co.*,[32] cases where the Supreme Court of Louisiana made it crystal clear that neither a statutory provision nor a contract between a client and his lawyer could support an attorney fee which is unreasonable. To justify the holding in *Scurto* by saying that Rule 1.5(e) is client directed is simply to ignore the history of referral fees and the fact that the ethical rules govern the relationships between attorney-client, attorney-court, and attorney-attorney.

B. Retainer Fees

As part of its practice guide, the ABA/BNA Lawyers Manual on Professional Conduct advised attorneys that:

> Funds belonging only in part or potentially to the lawyer, such as advanced fees or judgement awards in which the lawyer has an interest, usually must be deposited in clients' trust accounts, and may be withdrawn only when there is an accounting and severance of interest or when advanced fees are actually earned by the lawyer. A minority view permits lawyers to deposit advanced fees in their personal accounts and then refund any unearned portion at the end of the representation.[33]

There was considerable confusion among attorneys concerning the terminology which was applied to fees. Some ethics opinions referred to "true retainers" to distinguish them from "advance on a fee for a particular representation." Other opinions seem to indicate that even where a fee was paid in advance for a particular representation, a certain portion of it or a "minimum" could be non-refundable.

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30. Succession of Wallace, 574 So. 2d 348, 350 (La. 1991).
31. 421 So. 2d 216 (La. 1982).
32. 500 So. 2d 397 (La. 1987).
33. ABA/BNA Lawyers' Manual on Professional Conduct, § 45:101 (1989).

In 1987 the Louisiana Supreme Court in *Louisiana State Bar Association v. Williams*[34] adopted the majority view and held that a fee which secures the attorney's general availability to the client and which is not related to the fee for particular representation is a true retainer fee and may be placed in the attorney's operating account immediately. 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. This case was followed by *Louisiana State Bar Association v. Tucker*[35] and *Louisiana State Bar Association v. Fish.*[36] Although these decisions were fairly well received by large law firms, lawyers practicing by themselves or in smaller firms felt that the decisions were unfair and unduly prejudiced them. These attorneys, along with most attorneys who practiced criminal law, had followed the minority view. Because of the dissatisfaction of so many Louisiana lawyers, the supreme court, through Justice Lemmon, on November 15, 1990 appointed a committee of Louisiana State Bar Association members to study the advisability of amending the Louisiana Rules of Professional Responsibility concerning fees paid in advance. The committee met several times and circulated various versions of an amended rule. It was apparent from the very first meeting that the majority of committee members were in favor of adopting the minority rule. This rule basically meant that if the client paid a fee for a particular representation in advance, title to those funds should pass immediately to the attorney. He could then place them in his operating account, subject to having to refund all or part of the funds in the event the job was not completed or the attorney was terminated prior to completion.

On July 8, 1992 the Supreme Court of Louisiana, considering the recommendations of the House of Delegates which had adopted the committee's recommendations, amended Rule 1.5 to add sub-paragraph (f) which reads as follows:

> Rule 1.5. Fees
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> * * * *
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> (f). Payment of fees in advance of services shall be subject to the following rules:
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> (1) When the client pays the lawyer a fee to retain the lawyer's general availability to the client and the fee is not related to a particular representation, the funds become the property of the lawyer when paid and may be placed in the lawyer's

34. 512 So. 2d 404 (La. 1987).
35. 560 So. 2d 435 (La. 1989).
36. 562 So. 2d 892 (La. 1990).

operating account.

(2) When the client pays the lawyer all or part of a fixed fee or of a minimum fee for particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(6). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account.

(3) When the client pays the lawyer an advance deposit against fees which are to accrue in the future on an hourly or other agreed basis, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may transfer these funds as fees are earned from the trust account to the operating account, without further authorization from the client for each transfer, but must render a periodic accounting for these funds as is reasonable under the circumstances.

(4) When the client pays the lawyer an advance deposit to be used for costs and expenses, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may expend these funds as costs and expenses accrue, without further authorization from the client for each expenditure. But must render a periodic accounting for these funds as is reasonable under the circumstances.

(5) The fee under Rule 1.5(f)(1), (2), or (3) must be reasonable under the circumstances and the contract between the lawyer and the client regarding the fee should preferably be in writing and should specify the basis on which fee payments are to be made.

(6) When the client pays the lawyer a fixed fee or a minimum fee for particular services to be rendered in the future under Rule 1.5(f)(2) and the funds are placed in the lawyer's operating account, and a fee dispute subsequently arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client the unearned portion of the fee, if any. If the lawyer and the client cannot agree on the amount of unearned fee, the lawyer shall immediately refund to the client, the amount if any, that the parties agree has not been earned, and the lawyer shall deposit into a trust account an amount which represents the portion of the fee which is reasonably in dispute. The funds shall be held in the trust account until the dispute is resolved and the lawyer may not hold the disputed portion of the funds to coerce a client into accepting the lawyer's contentions. The

> lawyer should also suggest means for a prompt resolution of the dispute such as the Louisiana State Bar Association Fee Dispute Program or other similar arbitration.[37]

The above amendment became effective on September 1, 1992, and it is believed by the writer that it will be well received by attorneys and will not be prejudicial to the rights of clients. It should be noted that in every instance the fee must be "reasonable" and this of course is judged by the factors set forth in Rule 1.5(a).

One of the concessions made to those who practice in the criminal law field where fees are generally obtained in advance was that a certain portion of the fee could be designated as a "minimum fee" which would essentially be non-refundable. This was in recognition of the fact that when an attorney accepts criminal representation, he thereby excludes himself from representing any of the other persons who might have been caught up in the police web. If the lawyer is then discharged without cause he certainly should be entitled to reasonable compensation for this exclusion.

The rule provides that when the client pays all or part of a fixed fee for particular representation, the funds become the property of the lawyer. This means that they should not be placed into the trust account. Accordingly, if a firm or lawyer wants to operate under the majority view there should be a specific agreement with the client, preferably in writing, that the funds paid in advance will remain the property of the client until earned. The attorney could then place those funds initially into a trust account. If he does not have this specific agreement, then it could be concluded that the lawyer is "commingling funds" when he places funds which belong to him exclusively into the trust account which contains funds belonging to clients or to both clients and the attorney together.

C. *Contingency Fees in Successions*

Judge Irving R. Kaufman in *Fund of Funds, Ltd. v. Arthur Andersen & Co.* said that "compliance or noncompliance with canons of ethics frequently do not involve morality or venality but differences of opinions among honest men over the ethical propriety of conduct."[38] An issue has recently come up which will surely divide attorneys and that is the contention that charging a fee in a succession matter based upon the gross value of the decedent's estate is unethical because the lawyer has an apparent conflict between his duty to represent his client's interest

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37. La. R.S. 37, ch. 4, art. 16, Rule 1.5(f) (1992).

38. *See also* Warren L. Mengis, *Professional Responsibility, Developments in the Law*, 1985-1986, 47 La. L. Rev. 415, 416 (1986).

in the valuation of the succession and its property and his own interest in the setting of his fee. The writer believes that the contention is not correct for two reasons. First, no matter how a fee is set, whether on a contingent fee basis, on an hourly basis, or on a by-the-job basis, there is always a tension between the lawyer and the client. Certainly a lawyer who is working by the hour has no pressing desire to settle the representation quickly, whereas his client does. A lawyer who is charging a fixed fee certainly is inclined to complete the job as quickly and with as little research as possible. The same is true for the lawyer who is working on a contingent fee basis; it is certainly not to his benefit to set "a very low contingent fee" although it would be for the benefit of the client.

The second reason is that the fee of the attorney may be analogized to the fee of the succession representative. Where no fee has been fixed by the testament and none agreed upon by the heirs and legatees, the Code of Civil Procedure fixes the fee at two and one-half percent of the amount of the inventory. The succession representative is supposed to include in the inventory all property of the decedent, and if there is any question whether the property belongs to the decedent, he should include it and let the other claimants traverse the inventory. The attorney is supposed to be taking his instructions from the succession representative, if there is one. Perhaps even more important, the law specifically sets out what items are to be included in a decedent's estate and what items are to be excluded.[39]

It is also pertinent to note that until the minimum fee schedules were abandoned after the *Goldfarb* decision,[40] these schedules all provided that the minimum fee in handling a succession was determined by a percentage of the gross value of the decedent's estate. The writer does not believe that most attorneys who handled successions in those days had any belief that they had any control over what went into the succession or what was left out of the inventory. It is certainly true, however, that if this mechanical application of a percentage results in a fee which is unreasonable, then it should be reduced. On the other hand, if this application of a percentage results in a fee which is unreasonably small, then it should be increased. It does not seem that the use of the percentage is unethical, but the charging of an unreasonable fee under the circumstances would be. Finally, it might be pointed out that Rule 1.5(a)(4) states that the amount involved is one of the factors in calculating a reasonable fee, ergo, small estate, small fee; large estate, large fee, even though the time to settle both successions might be comparable.

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39. *See, e.g.*, La. R.S. 47:2404 (1990); La. Civ. Code art. 1505; La. R.S. 9:2354, 2372 (1991).

40. Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004 (1975).

II. MALPRACTICE

A. *The* Lima *Decision*

Lima v. Schmidt[41] involved attorney malpractice and prescription. In June of 1983, the attorney overlooked a $150,000 collateral mortgage while doing a title examination. His clients, the Limas, were not aware of the mistake until a bank began foreclosure in July of 1985. The attorney continued to represent the Limas and hired another attorney to defend the foreclosure. This was unsuccessful and in June or August of 1987 the Limas obtained a new attorney. In August of 1987, the defendant attorney wrote the former clients that he was negotiating with the bank for the repurchase of the property and cancellation of the note. In January of 1988, the defendant attorney again wrote his former clients that it was his intent to return the Limas to the position they would have been had he not overlooked the mortgage. This suit was filed in November of 1988, some five years after the error was committed. Both the lower courts upheld an exception of prescription. The supreme court reversed, finding that *contra non valentum* principles prevented the running of prescription until the second lawyer was hired. The two letters were acknowledgments of the obligation and each interrupted prescription so that the suit was timely filed.

This case is extremely important because it held that no intent to interrupt the prescription is necessary and that the acknowledgment may be made on an informal basis. The court specifically overruled *Marathon Insurance Co. v. Warner*[42] which had held that it was necessary for the obligor to have the intent of interrupting prescription in ordinary obligations as well as delictual actions even though the intent principle had been developed in connection with mineral servitudes. Summarizing the jurisprudential principles relied upon, the supreme court stated:

> A renunciation of prescription is an abandonment of the right derived from prescription that has accrued and is subject to stringent proof requirements. An acknowledgement is a simple admission of liability resulting in the interruption of prescription that has commenced to run, but not accrued, and may be made on an informal basis.[43]

The facts of *Lima* arose prior to the enactment of Louisiana Revised Statutes 9:5605[44] which sets up one and three year peremptive periods

41. 595 So. 2d 624 (La. 1992).
42. 244 So. 2d 353 (La. App. 2d Cir. 1971).
43. *Lima*, 595 So. 2d at 634.
44. La. R.S. 9:5605 (1990).

for legal malpractice as pointed out in footnote 1 of the decision.[45] Interestingly enough, in view of *B. Swirsky and Co. v. Bott*,[46] the supreme court also discussed the rule that malpractice is ordinarily governed by a one year prescriptive period with two limited exceptions: (1) When the attorney expressly warrants a specific result and fails to obtain the result; and (2) when the attorney agrees to perform certain work and does nothing whatsoever.[47]

In *Swirsky*, the plaintiff hired the defendant and his firm to present a fire loss claim against the insurance companies which had provided coverage. In spite of repeated requests, the defendant never filed a proof of claim nor did he take any other action. He asserted that his failure to act was based upon the client's failure to pay delinquent legal fees from prior representation. The fire loss claim prescribed. This suit was subsequently filed, but more than two years after the prescription had accrued. Plaintiff contended that the malpractice claim had not prescribed because the attorney did nothing whatsoever and therefore the prescriptive period was ten years. The court held that the "do nothing whatsoever" is a form of breach of guaranty or warranty to obtain a particular result and not a separate exception to the rule that a one year tort prescription governs legal malpractice. The court then concluded that the attorney did not expressly warrant any result and therefore the claim had prescribed. With all due respect, the writer believes that the *Swirsky* decision is patently wrong. As the court stated in *Cherokee Restaurant, Inc. v. Pierson*:[48]

> A malpractice action against an attorney will now normally be subject to the one year prescriptive period of La. Civ. Code Art. 3536. However, when an attorney expressly warrants a particular result, i.e., guarantees winning a law suit, guarantees title to property, guarantees or warrants the ultimate legal effect of his work product, or agrees to perform certain work and does nothing whatsoever, then clearly there would be an action in contract and the ten year prescriptive period of La. Civ. Code Art. 3544 would apply.[49]

Nothing in the later cases would suggest that the "do nothing" and the "warranty" are necessarily connected.

B. The Hartwick *Decision*

It is not unusual for lawyers to share office space, libraries, and even secretarial help and not be partners. However, it appears to be

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45. *Lima*, 595 So. 2d at 628.
46. 598 So. 2d 1281 (La. App. 4th Cir.), *writ denied*, 605 So. 2d 1149 (1992).
47. *Lima*, 595 So. 2d at 628 n.2.
48. 428 So. 2d 995 (La. App. 1st Cir. 1983).
49. *Id.* at 999.

fairly common for such attorneys to combine their names on letterheads and even on office doors, in the telephone directory, etc. This is a clear violation of the model rules because Rule 7.5(d) clearly provides that "[l]awyers may state or imply that they practice in a partnership or other organization only when that is the fact."[50] Comment (2) under Rule 7.5 says: "With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, 'Smith & Jones,' for that title suggests partnership in the practice of law."[51] The problem arises when one of the attorneys commits some negligent act and suddenly all the attorneys listed in the letterhead find themselves as defendants in a malpractice action.

Such was the case in the recent decision of *Hartwick v. Hartley*.[52] Although the attorney who was allegedly negligent was not listed in the various names on the letterhead, he wrote letters on the "firm" letterhead, and the plaintiff at all times believed that the attorney was an employee of the firm. In upholding a motion for summary judgment on behalf of the other attorneys, the court relied on *Gravois v. New England Insurance Co.*[53] In *Gravois* the court found that no partnership by estoppel existed even though the two attorneys' names were on the letterhead, were listed as the law firm of Wegmann and Longenecker in the telephone directory as well as the Martindale Hubbell Legal Directory, and even though they had obtained professional malpractice insurance together.

Admittedly, if *Gravois* is correct, then *Hartwick* is also correct. However, the writer agrees with the concurring opinion of Chief Judge Schott in *Hartwick* wherein he stated: "[W]hen a law firm permits an individual practitioner to hold himself out as a member of the firm the principals of that firm should have some responsibility to the client who suffers a loss because of the attorney's malpractice."[54] Of course, the model rules have never been adopted in Louisiana as malpractice standards, but it does seem unfair to the client who thinks he or she is dealing with a firm and finds out ultimately that only one individual lawyer is responsible.

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50. Annotated Model Rules of Professional Conduct (2d ed.), American Bar Ass'n Rule 7.5.

51. *Id.*

52. 598 So. 2d 1241 (La. App. 4th Cir.), *rev'd*, 604 So. 2d 957 (1992).

53. 553 So. 2d 1034 (La. App. 4th Cir. 1989).

54. *Hartwick*, 598 So. 2d at 1244.