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PROFESSIONAL RESPONSIBILITY

A. *Leon Hebert**

In matters affecting professional responsibility, the 1974-1975 term presented several cases to the Louisiana Supreme Court that deserve attention. In addition, the several courts of appeal handed down decisions relating to the necessity of proving the value of services rendered by attorneys in order to obtain judgments for their fees.

ADMISSION TO THE BAR

Perhaps the most significant case, *In re Dileo*,¹ dealt with admission to the bar. The fact that the bar examination applicant had been convicted of a felony and had served an eighteen-month sentence in a federal penitentiary did not prevent the Louisiana Supreme Court from ordering that he should be allowed to undergo the examination. The Committee on Admissions had refused his application based on his lack of moral fitness. The court relied on evidence that rehabilitation had occurred, declaring:

We believe that the conduct of the applicant is not conduct involving such a degree of moral turpitude that it should *forever* bar him from the practice of law in this state.²

The court then specifically referred to the applicant's need to show that he "has continued to rehabilitate himself" as a requirement for admission to the bar.

Not without significance is the court's rejection of the argument that the transgressions of a non-lawyer, when his moral fitness is later considered, are analogous to the disciplinary rules and sanctions applicable to licensed attorneys. This suggests the possibility of rehabilitation as a basis for readmission to the bar, although the two circumstances might be distinguished.

In *Dileo* the court observed that the work of the Committee on Admissions is onerous and involves great responsibility, inferring that its opinions are entitled to great weight,

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1. 307 So. 2d 362 (La. 1975).

2. *Id.* at 365 (emphasis added).

but recognized that the court itself has the final responsibility of reviewing its findings. The burden of establishing good moral character remains that of the applicant, but it appears that the court attaches more significance to rehabilitation accompanied by genuine contrition on the part of the applicant.

A case pending involves an applicant with no felony convictions but three misdemeanor infractions and a "rap sheet" referring to felony investigations involving the applicant.³ The commissioner who heard the evidence found that mere arrest without further proof of complicity with a felony charge has little evidentiary value. His finding suggested that the bar work closely with law schools to lessen the possibility that moral character will be questioned for the first time only after completion of law school.⁴

COMMINGLING FUNDS

Disciplinary action sought by the Committee on Professional Responsibility in a commingling case resulted in disbarment of the respondent attorney.⁵ The Louisiana Supreme Court rested its decision squarely on DR 9-102 of the Code of Professional Responsibility, after pointing out that an attorney should avoid even the appearance of impropriety⁶ and noting that the respondent had been the subject of earlier complaints. The court reaffirmed the principle that disbarment is for the protection of the public.

Commingling of funds is probably the most frequent violation of the Code of Professional Responsibility. It is indeed sad that failure to follow the simple rules of maintaining the client's funds separately brings about the most severe penalty administered to lawyers—deprivation of the privilege to practice.

. FEES

Before discussing an important case decided by the Louisiana Supreme Court on the subject of contingent fees,⁷

3. *In re* Stephen Young, Louisiana Supreme Court, No. 55, 704.

4. *Id.*

5. Louisiana State Bar Ass'n v. Weysham, 307 So. 2d 336 (La. 1975).

6. LA. CODE OF PROFESSIONAL RESPONSIBILITY, DR 9-102 (found in ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS'N art. XVI; LA. R.S. 37, ch. 4, app.) [hereinafter cited as CODE OF PROFESSIONAL RESPONSIBILITY].

7. Garden Hill Land Corp. v. Succession of Cambre, 306 So. 2d 718 (La. 1975).

it is appropriate to present some background in connection with the growing dissatisfaction with that type of contract. Recognizing the public's concern, and in an attempt to place reasonable limits on contingent fee contracts, the Appellate Division, First Department of New York, adopted Rule 4, placing a limit on such fees in personal injury and death cases.⁸ Basically, the New York court's rule provided a limitation of 50 percent of the first \$1,000 of the sum recovered, 40 percent of the next \$2,000, 35 percent of the next \$22,000, and 25 percent of any sum over \$25,000. Under extraordinary circumstances it allowed a 33 percent fee. The rule declared that the retention of a larger fee would constitute "the exaction of unreasonable and unconscionable compensation in violation of Canons 12 and 13 of the Canons of Professional Ethics of the New York State Bar Association unless authorized by a written order of court."⁹

Rule 4 was upheld in *Gair v. Peck*.¹⁰ The New York court noted that contingent fee contracts are generally allowed in the United States as a means of allowing the poor to obtain competent counsel. It cited the last sentence of the preamble of Rule 4:

When, however, the contingent fee reaches or approaches the 50 percent level, it ceases to be a measure of due compensation for professional services rendered and makes the lawyer a partner or proprietor in the lawsuit. This is not a permissible professional relationship or a proper professional practice.¹¹

Declaring Rule 4, which includes reporting procedures, essential to laying a foundation for disciplinary action against attorneys who violate the rule, the court upheld it as a reasonable exercise of court authority.

Though Rule 4 and the *Gair* case preceded the adoption of the Code of Professional Responsibility, the conclusions reached there concerning contingent fee arrangements are expressed in EC 2-17, 2-20 and 2-24.¹² More recently the Supreme Court of New Jersey adopted a rule regulating contin-

8. See discussion in *Gair v. Peck*, 188 N.Y.2d 491, 160 N.E.2d 43 (N.Y. App. 1959).

9. The rule is found in *id.* at 493, 160 N.E.2d at 45.

10. 188 N.Y.2d 491, 160 N.E.2d 43 (N.Y. App. 1959).

11. *Id.* at 495, 160 N.E.2d at 46.

12. CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-17, 2-20, 2-24.

gent fees.¹³ A judicial hearing is provided for lawyers who feel aggrieved by the rule. The rule was contested by the American Trial Lawyers Association but was found to be constitutional and valid in its entirety.¹⁴

The Louisiana Supreme Court addressed itself, in *Garden Hill Land Corp. v. Succession of Cambre*,¹⁵ to the propriety of 50 percent contingent fee contracts in a case in which a lawyer representing a minor, also a forced heir, intervened in a partition suit to obtain his fee. Although a court order was obtained authorizing the tutrix "to enter into a contract with counsel for the payment of a reasonable fee on a contingency fee basis, not exceeding one-half of the minor's interest in the [e]state,"¹⁶ counsel did not actually obtain a contract until some nine weeks after the order. Nor was the specific contract ever approved by the court. Reviewing a decision of the Fourth Circuit Court of Appeal,¹⁷ which had reversed an award by the district court, Chief Justice Sanders had no difficulty in finding that valuable legal services had been performed on behalf of the minor; some 240 hours were claimed by the lawyer. The court made no definitive award because the intervenor had not claimed alternatively a fee on quantum meruit.

The court reiterated its strong duty to protect and safeguard the interest of minors; however, the real significance of the case is the court's declaration that:

A contract disposing of an entire 50% interest of a minor's sizable estate, where there is no real risk of non-recovery (she was a forced heir) would seem on its face to be unreasonable.¹⁸

13. N.J. S. CT. R. 1-21:7 (1972) imposes graduated limits on the permissible rate of contingent fees in all tort matters, except business torts and subrogation matters.

14. *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 316 A.2d 19 (N.J. App. 1974).

15. 306 So. 2d 718 (La. 1975).

16. *Id.* at 720 (emphasis deleted). The minor's interest in the property partitioned, ten lots of Woodland Plantation, was 1/12th of \$600,240, the amount for which the ten lots were ordered sold.

17. *Garden Hill Land Corp. v. Succession of Cambre*, 299 So. 2d 403 (La. App. 4th Cir. 1974).

18. *Garden Hill Land Corp. v. Succession of Cambre*, 306 So. 2d 719, 722 (La. 1975). Language found in *Spilker v. Hankin*, 188 F.2d 35, 37-39 (D.C. Cir. 1951), extends this thought to all attorney-client relationships: "In a very real sense attorneys are officers of the courts in which they practice; and

The opinion left no doubt that some court should pass on the reasonableness of the fee in view of the size of the estate of the minor. It remanded the case, suggesting to counsel that he might amend his pleadings to the alternative relief of quantum meruit, or even bring his claim in the tutorship proceedings pending in the district court.

The Louisiana Supreme Court seemingly bent over backwards to suggest relief to the lawyer who represented the minor and who had spent a great deal of his time in doing so, but it cast a dark shadow on the reasonableness of a 50 percent contingency fee contract where recovery is certain. An hourly rate or a fixed fee certainly would have been more suitable; and, most assuredly, it would have been protected by the minor's ownership of a sizeable estate.

Coming on the heels of *Succession of Butler*,¹⁹ which disapproved the use of contingent fee contracts in separation and divorce cases, the *Garden Hill* case should alert the bar to the rising criticism of contingency fee contracts, especially those approaching the 50 percent level. The Code of Professional Responsibility mandates a lawyer not to enter into an agreement for a clearly excessive fee and then offers guidelines for fee determination.²⁰ Closer adherence to that disciplinary rule will improve the image of all lawyers.

PROOF OF VALUE OF ATTORNEY'S FEES

Several cases handed down by the Louisiana courts of appeal touched on the proof needed to support an award for an attorney's fees.²¹ In *Masinter v. Grunewald*,²² involving a fee for services rendered in a criminal case allegedly according to a contract, the fourth circuit remanded the suit to allow proof of the value of services rendered after finding no specific contract had been entered.

clients are wards of the court in regard to their relationship with their attorneys Fee contracts between attorney and client are a subject of special interest and concern to the courts. They are not to be enforced upon the same basis as ordinary commercial contracts."

19. 294 So. 2d 512 (La. 1974).

20. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106.

21. *Masinter v. Grunewald*, 309 So. 2d 739 (La. App. 4th Cir. 1975); *Sokol v. Bob McKinnon Chevrolet, Inc.*, 307 So. 2d 404 (La. App. 4th Cir. 1975); *James, Robinson, Felts & Starnes v. Powell*, 303 So. 2d 229 (La. App. 2d Cir. 1974).

22. 309 So. 2d 739 (La. App. 4th Cir. 1975).

*Sokol v. Bob McKinnon Chevrolet, Inc.*²³ dealt with the absence of proof in the record to sustain an award for attorneys' fees. The fourth circuit noted that the plaintiff did file suit and completed the matter to judgment. It referred to some of the considerations used in DR 2-106 to establish a reasonable fee. While admitting that expert testimony on the subject of attorneys' fees may be used as a guide, the court concluded that expert testimony is not necessarily controlling, stressing the ability of the trial judge to estimate and adjudge the value of an attorney's services.

The same conclusion was reached in *James, Robinson, Felts & Starnes v. Powell*,²⁴ in which the second circuit expressed the fixing of the fee as a *duty* of the trial judge when the nature and extent of an attorney's services are borne out by the record, even in the absence of expert testimony on the subject. The conclusion is in accord with the rule that the court may assess the value of fees for a lawyer when the services are performed in the presence of the court. As long as the fees awarded by the court are relatively nominal the lack of expert testimony offers no risk. But what appears to be a reasonable fee to one court might not strike another judge the same way. Prudence would require proof by expert testimony in doubtful cases.

An interesting facet of the *James* decision was the court's statement that interest is due on legal fees from the date of the statement rendered by the attorney after completion of the work. The defendants had argued that interest was due from the date of judgment.²⁵ The court's statement raises an interesting question as to whether an attorney would be justified in printing on his bill-head a notice that interest at a specified percentage is due on the amount charged from date of the billing after completion of the case.

In *Jefferson Bank & Trust Co. v. Post*²⁶ the fourth circuit decided whether a lending institution can keep an attorney's fee collected under the terms of a mortgage note. The peculiar facts of the case may have worked in favor of the attorney, who had foreclosed the mortgage and purchased the property at sheriff's sale for two-thirds of its appraised value in the

23. 307 So. 2d 404 (La. App. 4th Cir. 1975).

24. 303 So. 2d 229 (La. App. 2d Cir. 1974).

25. See *Nugent v. Down*, 230 So. 2d 597 (La. App. 3d Cir. 1970); *Hargrove v. Blanchard*, 216 So. 2d 127 (La. App. 2d Cir. 1968).

26. 312 So. 2d 907 (La. App. 4th Cir. 1975).

name of his client. After holding the property for several months, the plaintiff bank sold the property to one of its original debtors for a price exactly equal to principal, interest, attorney's fees and costs. The same lawyer who handled the matter for the bank in court handled the sale, and he conveniently withheld the attorney's fee for his own account.

Once the bank became the owner of the property by purchase at the foreclosure sale, it could have fixed any price which it desired for the sale of the property. The fact that the ultimate price equaled the total indebtedness, inclusive of attorney's fees at the rate of 25%, no doubt influenced the court in its conclusion that the bank had indeed collected an attorney's fee. Had the amount been the sum paid over to the sheriff for payment to the attorneys of the fee stipulated in the note, this would have been the proper disposition of this case. It is less certain, however, that the attorneys would have prevailed if less than the total judgment amount had been the sales price to the purchaser after foreclosure.

Though the court did substantial justice in this case, since the attorney's fees were used in the exact total as provided for in the note, the case will provide fuel for further argument in the question of attorney's fees on foreclosures.