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Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

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> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interest, the interest of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.[1]

The focus of this ethical consideration is on the client, whether a present client or a former client. If it is a present client, vigorous representation should not be diluted by any self-interest of the attorney, any interest of other present clients, interest of former clients, or influence by anyone else. If a former client, confidences and secrets gained in the prior representation should not be disclosed nor used in such a way as to prejudice that client.

Perhaps because of the present mobility of lawyers and the escalating size of law firms, both state and federal courts are being confronted with many motions to disqualify attorneys. These motions may be based on direct prejudice to a present or former client of the attorneys sought to be disqualified, or based on an appearance of impropriety, though no actual prejudice exists. As pointed out by Judge Tate in *Brasseaux v. Girouard*:

> Reasons assigned for the fairly strict disqualification principle followed by all American jurisdictions in which the issue has arisen, have included its necessity in order to encourage maximum disclosure by clients to counsel of all relevant facts, without fear of future adverse use of this confidence. The courts also express as rationale that public confidence in the legal profession as a whole might otherwise be impaired. For these reasons of public policy, the general rule is that doubts in borderline cases should be resolved in favor of disqualification, with the important injunction being reiterated that, for these reasons, even the appearance of conflict should be avoided.[2]

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1. La. Code of Prof. Resp. EC 5-1 (found in Articles of Incorp., La. State Bar Ass'n art. XVI; La. R.S. tit. 37, ch. 4, app. (1974)) [hereinafter cited as Code of Prof. Resp.].

2. 214 So. 2d 401, 406 (La. App. 3d Cir.), cert. denied, 253 La. 60, 216 So. 2d 307 (1968) (footnote omitted).

Where a Canon 4 (confidences and secrets) or a Canon 5 (independent professional judgment) conflict is present, the harmful effects of a disqualification are outweighed by the interest of another client or a former client. These adverse interests include the present client's right to counsel of choice, the impingement of judicial economy through time lost, and additional costs to the client. On the other hand, where there is no substance to a Canon 4 or Canon 5 violation, but where there might be an appearance of impropriety, which Canon 9 counsels against, it appears that at least some courts are holding that the disadvantages of disqualification outweigh the broad application of Canon 9, particularly where the disqualification might extend to an entire law firm.[3]

As we shall see, Louisiana courts have also had to deal with several conflict situations.

CONFLICT OF INTERESTS

In civil cases, the courts of appeal were confronted with two motions to disqualify based on Canon 5 and particularly the provisions of Disciplinary Rules 5-101 and 5-102 (DR's) which generally enjoin a lawyer from accepting employment or continuing employment when it is obvious that he should be a witness on behalf of his client. Additionally one motion to disqualify was based on the provisions of Canon 4 and successive representation.

We look first to *Exnicios v. Saunders*,[4] a matter before the fourth circuit on plaintiff's application for writs because of the trial court's disqualification of plaintiff's attorney. Defendants who filed the motion to disqualify asserted that the testimony of plaintiff's lawyer was crucial to plaintiff's case and that his lawyer "ought to be called as a witness," and therefore, withdrawal was mandated by the provisions of DR 5-102. Plaintiff, however, contended that the exceptions set forth under DR 5-101(B) applied, particularly exceptions 1 and 2, which relate to uncontested matters and mere formalities. Plaintiff also contended that a disqualification would work a substantial hardship on him because of the distinctive value of the lawyer, and that this brought the matter squarely under the fourth exception to DR 5-101(B). Defendants then exerted some pressure by announcing that they intended to sequester plaintiff's attorney along with all other witnesses under article 1631 of the Code of Civil Procedure. The situation presents one of the many conflicts between ethical rules and procedural rules. Even if the fourth exception were applicable and plaintiff's attorney would be violating no ethical rule, defendant still had an absolute right to sequester plaintiff's attorney—effectively preventing him from participating in the trial.

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3. Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982); Sierra Vista Hosp., Inc. v. United States, 639 F.2d 749 (Ct. Cl. 1981); Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977).

4. 448 So. 2d 751 (La. App. 4th Cir. 1984).

Citing language from *Gutierrez v. Travelers Insurance Co.*,[5] the court of appeal refused the writ, thereby maintaining the disqualification. The court placed great reliance upon the trial court's discretion and knowledge of the situation and on the general ethical rule that a witness should provide the court with objective truth and should not place himself in a position to champion his own credibility.

Deer Slayers, Inc. v. Louisiana Motel and Investment Corp.[6] was an after-the-fact situation in which plaintiff's attorney had already testified on behalf of his client in a rule for a preliminary injunction. The matter was on appeal from that interlocutory judgment. The trial court had refused to disqualify plaintiff's attorney even though he was a witness in the case. Defendants, relying heavily on Gutierrez, contended that by permitting plaintiff's attorney to testify on a material matter in violation of DR 5-101 and 102, the trial court committed reversible error. On appeal the majority, although expressing disapproval of the lawyer's representation of the plaintiff, held that the admission of the attorney's testimony did not by itself warrant the sanction of reversal and a new trial. "Reversal is not warranted because the 'code [of Professional Responsibility] does not delineate rules of evidence but only sets forth strictures on attorney conduct.'"[7] The court concluded that the refusal to disqualify the attorney was harmless error and that it found no prejudice to defendant. Judge Cole dissented, concluding that the trial court, knowing before trial of the importance of the testimony of plaintiff's attorney, should have disqualified him. This would have prevented the ethical violation and also would have protected the public's confidence in the legal profession. He concluded that the social need for ethical practice outweighs the party's right to counsel of his choice.

The writer sees the majority opinion as a retreat from the holdings of *Saucier v. Hayes Dairy Products*[8] and *Leenerts Farms' Inc. v. Rogers.*[9] Readers will recall that *Saucier* characterized the Code of Professional Responsibility as having the force and effect of substantive law and *Leenerts* described it as the most exacting of laws established for the public good.

Darby v. Methodist Hospital[10] produced another strong dissent, this time from Chief Judge Redmann of the fourth circuit. The defendants sought to have plaintiff's counsel removed because his law partner represented the defendant in a prior medical malpractice suit. The question, according to the majority, was whether the information obtained

5. 358 So. 2d 349 (La. App. 4th Cir. 1978).

6. 434 So. 2d 1183 (La. App. 1st Cir.), cert. denied, 440 So. 2d 151 (La. 1983).

7. 434 So. 2d at 1187 (quoting Universal Athletic Sales Co. v. American Gym, 546 F.2d 530, 539 (3d Cir. 1976), cert. denied, 430 U.S. 984 (1977)).

8. 373 So. 2d 102 (La. 1979) (on reh'g).

9. 421 So. 2d 216 (La. 1982), superseded by La. Civ. Code art. 1935, as amended by 1983 La. Acts, Reg. Sess., No. 483, § 1.

10. 447 So. 2d 106 (La. App. 4th Cir.), cert. denied, 448 So. 2d 1351 (La. 1984).

from the doctor in the earlier case was substantially related to the instant case. Finding that it was not, the application for supervisory writs was denied. Judge Redmann quoted extensively from *T.C. Theater Corp. v. Warner Brothers Pictures*,[11] perhaps the leading case on successive representation and the Canon 4 ethical conflict presented. It is generally presumed that confidences and secrets received by one partner in a law firm are received by all partners in that firm.[12] Whether this presumption is rebuttable is hotly debated where very large firms are involved, but with small law firms the presumption is usually considered irrebuttable.[13] In the instant case Judge Redmann cited DR 5-105(D) as authority for disqualifying all lawyers associated with the "infected" lawyer. However, Louisiana's DR 5-105(D) presumably does not extend to Canon 4 disqualifications or Canon 9 disqualifications since the 1974 amendment to the ABA DR 5-105(D) was not adopted by Louisiana. Judge Redmann concluded that the two matters were substantially related, that there was a presumption that confidences and secrets of the client were shared with the law partner, and therefore, both lawyers in the partnership would be disqualified. If there is any doubt about these conclusions, said Judge Redmann, Canon 9's injunction to avoid even the appearance of professional impropriety should resolve the doubt in favor of disqualification.

As to criminal cases the supreme court dealt with three cases involving possible conflicts of interests in multiple representation: The cases are: *State v. Edwards*,[14] *State v. Kahey*,[15] and *State v. Morrow*.[16] As pointed out in these cases, multiple representation is not by itself illegal and does not violate either the Sixth Amendment or article 1 section 3 of the Louisiana Constitution unless it gives rise to a conflict of interest. In other words, there must be an actual conflict of interest adversely affecting the lawyer's performance. Where such a conflict of interest exists, the prejudice may be subtle, even unconscious, and may elude detection on review. Accordingly, where the conflict is real, a claim of denial of effective representation may be made without a showing of specific prejudice.

In *State v. Morrow*, the most recent of the three cases, the relator sought post-conviction relief on the ground that a plausible defense helpful to him, but possibly prejudicial to a co-defendant, was not

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11. 113 F. Supp. 265 (S.D.N.Y.), reh'g denied, 125 F. Supp. 233 (1953).

12. Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982); Novo Teraputisk Laboratorium A/S v. Baxter Travenol Labs., Inc., 607 F.2d 186 (7th Cir. 1979) (on reh'g *en banc*).

13. Arkansas v. Dean Foods Prods. Co., 605 F.2d 380 (8th Cir. 1979), rev'd in part on other grounds, 612 F.2d 377 (8th Cir. 1980); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978).

14. 430 So. 2d 60 (La. 1983).

15. 436 So. 2d 475 (La. 1983).

16. 440 So. 2d 98 (La. 1983).

advanced by relator's attorney. Finding that another plausible defense *did* exist that could not be presented because of an actual conflict of interest, the court set aside the relator's conviction and remanded the matter to the district court for a new trial. Justice Lemmon, who authored the court's opinion, suggested in a footnote that in every case of multiple representation trial courts should inquire into potential conflicts and inform the accused, on the record, of the possible dangers. Justice Lemmon also stated that, for ethical reasons, defense attorneys should ordinarily decline to represent more than one of several co-defendants, unless a careful investigation reveals that there is no likely conflict, and that the co-defendants have consented, on the record and after full disclosure, to the multiple representation.[17]

Another criminal case, *State v. Costillo*,[18] involved an "out-of-time" criminal appeal granted by the district court on an application for post-conviction relief. In one assignment of error, the defendant alleged denial of effective assistance of counsel on the ground that his court-appointed counsel was the husband of the assistant district attorney who prosecuted him. Although the last name of the two attorneys was the same, the evidence in the record did not show that they were married, so the matter was remanded to the trial court for the introduction of more evidence. The Professional Responsibility Committee for the Louisiana State Bar Association considered a similar question in its opinion number 346.[19] One of the questions submitted to the committee was: may spouses personally represent or assist in the representation of opposing parties in a legal matter (either civil or criminal)? The answer was an emphatic *no*, based on Canons 4, 5 and 9.

ASSISTANCE OF COUNSEL

The many courts which have been concerned with defining "effective assistance of counsel" were understandably disappointed with the decision of the United States Supreme Court in *United States v. Cronic*,[20] decided in May of 1984. The Tenth Circuit[21] had set up a five criteria test which considered (1) the time afforded for investigation and preparation, (2) the experience of counsel, (3) the gravity of the charge, (4) the complexity of possible defenses, and (5) the accessibility of witnesses to counsel. The Supreme Court said that the use of this test, without more, was wrong because it would require reversal even if the lawyer's actual performance was flawless.[22] The Court stated that effective assistance of counsel should not be recognized for its own sake, but

17. 440 So. 2d at 103 n.7.
18. 448 So. 2d 238 (La. App. 1st Cir. 1984).
19. Louisiana State Bar Association, Attorney's Desk Book 0-138.
20. 104 S. Ct. 2039 (1984).
21. United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982).
22. *Cronic*, 104 S. Ct. at 2043.

because of its effect on the ability of the accused to receive a fair trial.[23] The five factors listed by the court of appeal are relevant to an evaluation of a lawyer's effectiveness in a particular case, but neither separately nor in combination do they provide a basis for concluding that competent counsel was not able to provide the particular accused with the guiding hand that the constitution guarantees.[24] Since the court of appeal had only passed on the overall performance of the attorney and had not discussed or ruled on the specific errors, the case was remanded to the court of appeal for further consideration. *Cronic* added nothing concrete to the Supreme Court's decision in *McMann v. Richardson*[25] in which the Court held that the right to counsel is the right to "effective assistance of counsel."

In Louisiana, effective assistance was again considered in *State ex rel. Graffagnino v. King*[26] in which the court, adhering to former pronouncements, held that effective assistance of counsel does not mean errorless counsel or counsel which may be judged ineffective on mere hindsight, but rather counsel reasonably likely to render, and actually rendering, reasonably effective assistance. The court also reaffirmed the two-pronged inquiry enunciated in *State v. Berry*,[27] taken by the court from *McQueen v. Swenson*.[28] Under the inquiry, the court must first ascertain whether counsel violated some duty to the client and if so, whether this violation prejudiced the client in the defense of his case. This test is consistent with the rationale of *United States v. Cronic*. In other words, inferential error is not sufficient, but failure to assist the client or to present a defense is reversible error.[29]

In *State v. Maggio*[30] and *State v. Lowenfield*,[31] the courts plainly indicated that an indigent's right to counsel is not absolute and cannot be manipulated to obstruct orderly procedures which would thwart the administration of justice nor can an indigent seek to change court-appointed attorneys unless he can produce sound reasons for the disqualification of the first attorney.

Apparently the Department of Health and Human Resources has decided not to consider the decision in *In re Lamm*[32] a final pronouncement that it must pay the attorney fee of an attorney assigned to represent the child in an abandonment proceeding. To the contrary, it

23. Id. at 2046.
24. Id. at 2049.
25. 397 U.S. 759, 90 S. Ct. 1441 (1970).
26. 436 So. 2d 559 (La. 1983).
27. 430 So. 2d 1005 (La. 1983).
28. 498 F.2d 207 (8th Cir. 1974).
29. State v. Brooks, 452 So. 2d 149 (La. 1984).
30. 449 So. 2d 547 (La. App. 1st Cir.), cert. denied, 450 So. 2d 354 (La. 1984).
31. 450 So. 2d 675 (La. App. 5th Cir. 1984).
32. In re Lamm, 423 So. 2d 1210 (La. App. 4th Cir. 1983).

successfully argued in *State in the Interest of Dillard*[33] that such a fee should fall under the provisions of Louisiana Revised Statutes 15:144-149 creating and funding Judicial District Indigent Defendant Boards and that an attorney so appointed to represent an abandoned child should apply for fees to that particular Indigent Defendant Board. The court further held that Article 95 of the Code of Juvenile Procedure, and in particular subsection B thereof, does not apply in an abandonment proceeding.[34]

MALPRACTICE

The Louisiana Supreme Court, by a four to three vote, denied a writ application in *Wingate v. National Union Fire Insurance Co.*,[35] thereby declining an opportunity to clear up the conflict in the circuit courts concerning prescription of a malpractice action against an attorney. The first circuit had clarified the conflict in its own jurisdiction by its decision in *Cherokee Restaurant Inc. v. Pierson*,[36] in which the court held that the normal malpractice action against an attorney is a tort action prescribed by one year and that only when an attorney breaches an express warranty of result does an action of breach of contract arise, in which case a ten year prescriptive period should be applied. The third circuit, however, disagreed with this approach in *Wingate*,[37] holding that a malpractice action could state a claim both in tort and in contract, and consequently, the longer prescriptive period would apply. In a footnote, the court noted and disagreed with the first circuit's decision. The second and fourth circuits, however, have both adopted the *Cherokee Restaurant* approach.[38] It seems to the writer that ten years is an inordinate amount of time within which to bring a malpractice action against an attorney, and no sound reason exists for applying such a lengthy prescriptive period.

In 1982 the writer reviewed *Boyette v. Auger Timber Co.*,[39] in which one of the plaintiffs was met with a third party demand and suddenly found himself with two lawyers, one which he had retained for the principal suit and one which the insurer furnished for the third party demand. The insurance company's attorney took a position contrary to the position taken by plaintiff and the majority of the court of appeal

33. 450 So. 2d 977 (La. App. 5th Cir. 1984).

34. See also State in the Interest of a Minor, 446 So. 2d 1385 (La. App. 3d Cir. 1984).

35. 440 So. 2d 762 (La. 1983).

36. 428 So. 2d 995 (La. App. 1st Cir.), cert. denied, 431 So. 2d 773 (La. 1983).

37. 435 So. 2d 594 (La. App. 3d Cir.), cert. denied, 440 So. 2d 762 (La. 1983).

38. Knighten v. Knighten, 447 So. 2d 534 (La. App. 2d Cir. 1984); Sturm v. Zelden & Zelden, 445 So. 2d 32 (La. App. 4th Cir. 1984).

39. 403 So. 2d 800 (La. App. 2d Cir. 1981), discussed in Mengis, Developments in the Law, 1981-1982—Professional Responsibility, 43 La. L. Rev. 555, 557 (1982).

found that (1) the position taken by the insurance company's counsel was highly prejudicial to the plaintiff and (2) the trial should not have been allowed to proceed. *Lowe v. Continental Insurance Co.*,[40] a sequel to *Boyette* was essentially a malpractice action against the insurance company's attorney. Unfortunately for Mr. Lowe, however, he had to show that, but for the prejudice caused by his insurance company lawyer's taking a position contrary to his retained lawyer's position, he would have won a judgment. Judge Marvin, writing for the court, took cognizance of *Jenkins v. St. Paul Fire and Marine Insurance Co.*[41] and imposed on the defendants the burden of overcoming the plaintiff's prima facie case by showing that the plaintiff could not have succeeded notwithstanding the impropriety. When the second circuit initially reviewed *Boyette* it completely disregarded the jury verdict in favor of the defendants, reviewed all of the evidence, and found that the plaintiffs had in fact received a fair trial and that the evidence preponderated in favor of the defendants. In the instant case, Judge Marvin stated that the court had again reviewed *Boyette* in the light most favorable toward the present plaintiff and again found that the sole fault of the *Boyette* accident rested with Lowe (the plaintiff in this malpractice action) and that, therefore, he was not entitled to any recovery even though there had been an impropriety. As an epilogue the court said:

> The Code of Professional Responsibility has the force and effect of substantive law. . . . The disciplinary rules are mandatory. If each member of the profession, lawyer or judge, recognizes his or her obligation to maintain competency in this area of the law for the good of the client and the profession, disputes of this sort will, as they should, be avoided.[42]

Occasionally even competent and diligent attorneys will give advice which is patently and obviously wrong even to a lay person. Whether we blame this on gremlins, an attack of senility, or stenographic error, we know that it does happen. Any lawyer who questions the advisibility of carrying professional liability insurance should read *SpeeDee Oil Change No. 2, Inc. v. National Union Fire Insurance Co.*[43] in which the attorney had advised in writing that an option to extend a lease could be exercised 31 days after the termination of the lease. He gave this advice to a vice president of the lessee corporation who, relying on the attorney's advice, did not attempt to renew until after the lease had expired. The court was of the opinion that a person of ordinary

40. 437 So. 2d 925 (La. App. 2d Cir.), cert. denied, 442 So. 2d 460 (La. 1983), 104 S. Ct. 1924 (1984).

41. 422 So. 2d 1109 (La. 1982).

42. 437 So. 2d at 930 (citation omitted).

43. 444 So. 2d 1304 (La. App. 4th Cir. 1984).

common sense would not have to read a lease to know that once a lease has expired, its expiration can no longer be prevented and, therefore, when the vice president received the mistaken advice from the attorney, he should have recognized the error. However, the court refused to impute the vice president's negligence to the corporation and permitted recovery against the attorney's insurer in the sum of $50,800 (the difference between the rent if the option had been timely exercised and the rent which the corporation was now forced to pay). The vice president was not a party to the law suit and, therefore, the question of contribution from him could not be adjudicated.

Failure to read a loan commitment resulted in a $237,200 judgment against an attorney in *Meyers v. Imperial Casualty Indemnity Co.*[44] The commitment specified a closing date of no later than October 31, 1980 and set two deadlines in connection with that date. First, ninety days in advance of the closing date, the borrower had to submit a formal notice of his intention to execute the commitment. Second, forty-five days in advance of the closing date, the borrower had to deliver the required mortgage documentation. The borrower met the first deadline but missed the second. The attorney attempted to show that the borrower was also negligent in failing to gather necessary information, but the court held that a client is entitled to rely on the expertise and diligence of his attorney. The court reiterated the standard of negligence in a legal malpractice case: "[a]n attorney is obligated to exercise at least that degree of skill and diligence which is exercised by prudent practicing attorneys in his locality."[45]

ATTORNEY'S FEES

In this forum last year[46] the writer gave considerable space to decisions involving attorney's fees. *Leenerts Farms, Inc. v. Rogers*[47] had been decided recently and considerable speculation existed among lawyers concerning the continued viability of attorney fee stipulations in promissory notes. In addition, the legislature amended Civil Code Article 1935 in an apparent attempt to overrule *Leenerts.*[48] In essence, the *Leenerts* court held that the courts always have the right to reduce an attorney fee which is unreasonably high. In *Knighten v. Knighten*[49] the court held that it might inquire into the reasonableness of an attorney fee even if no issue as to the fee was raised by the opposing party

44. 451 So. 2d 649 (La. App. 3d Cir. 1984).
45. 451 So. 2d at 653.
46. Mengis, Developments in the Law, 1982-1983—Professional Responsibility, 44 La. L. Rev. 489 (1983).
47. 421 So. 2d 216 (La. 1982).
48. 1983 La. Acts, Reg. Sess., No. 483.
49. 447 So. 2d 534 (La. App. 2d Cir. 1984).

because this is a matter of public policy.[50] Further, if the matter comes up on confirmation of default and the record does not reflect whether the trial court inquired into the reasonableness of the fee, the appellate court will remand to the trial court for a hearing to determine the amount of attorney fees to be awarded to the plaintiff.[51] That the confirmation and the attorney fee were based upon a stipulation in the promissory note presumably agreed upon between the parties will not prevent the remand where the fee appears to be excessive in view of the routine nature of the proceeding. In *City Bank and Trust Co. v. Hardage Corp.*[52] the defendant maker of the note which bore a twenty-five per cent attorney's fee provision appealed solely on the basis that the default judgment was entered against it without sufficient proof of the adequacy or excessiveness of the fee (so far the writer has not seen any case where the fee was increased in a promissory note situation). The appellate court, instead of remanding, reviewed the record and determined that a $1500 fee, instead of the $12,500 fee stipulated by the note, would be reasonable. The court stated that while the general rule is that the trial court is in the better position to determine what is a reasonable fee under the facts of a particular case, appellate courts can and should set the fees when the record reflects a basis therefore. *Banks v. Pearson*[53] presented somewhat different facts. Here the attorney had consummated a loan closing and at the finale he had handed the buyer a bill for $5,000 which the buyer paid by issuing his check. However, immediately after leaving the closing, he stopped payment on the check, which led to this lawsuit by the attorney. The trial court found that the buyer issued the check simply to avoid a public dispute, that there had never been a meeting of the minds between the attorney and the buyer concerning the fee and, therefore, no contract existed. However, on the basis of unjust enrichment the trial court set a $1500 fee and rendered judgment subsequently affirmed on appeal. We shall have to wait and see what the courts will do with the amendment to article 1935 of the Civil Code. If constitutional, will the amendment apply only to promissory notes executed after the date of the amendment or will it simply put the law back where it was prior to the supreme court decision in *Leenerts*? At least one case is pending in the First Circuit Court of Appeal where these issues are being presented.[54] Another consideration is the effect of the obligations revision[55] which became

50. See also City of Shreveport v. Standard Printing Co., 427 So. 2d 1304 (La. App. 2d Cir. 1983).

51. Alliance Fed. Sav. & Loan Ass'n v. Eskan, 450 So. 2d 767 (La. App. 5th Cir. 1984).

52. 449 So. 2d 1181 (La. App. 2d Cir. 1984).

53. 446 So. 2d 545 (La. App. 3d Cir. 1984).

54. Graham v. Seqoia Corp., No. CA 84-0336 (La. App. 1st Cir., filed March 16, 1984).

55. 1984 La. Acts, Reg. Sess., No. 331.

effective on January 1, 1985. Old article 1935 is replaced by new article 2000[56] which does not contain the language added to article 1935 by the 1983 amendment. New articles 2005[57] and 2012[58] should also be read carefully.

Farrar v. Kelly,[59] presents what is a wholly predictable result of the *Leenerts* decision. Once the work is done, the client may have a different appreciation of the attorney's worth and may wish to renegotiate his fee. If the lawyer refuses, the client may simply resort to the court, asserting that the fee is excessive. At the time the attorney in *Farrar* took the case, the client was seeking to be recognized as an illegitimate child of his father and to recover his part of his father's succession. This was prior to the supreme court decision in *Succession of Brown*.[60] Obviously the attorney's task was made much easier by *Succession of Brown*, but the attorney nevertheless performed substantial services on the client's behalf with a completely successful result. The court found that under the circumstances a 50-percent contingent fee was not excessive. However, it is obvious that the attorneys had to earn the fee twice, once in the initial litigation and once again to collect the fee. This leads to two cases which opened the door to collecting attorney's fees on attorney's fees.

Louisiana Revised Statutes 9:2781, which provides for an award of "reasonable attorneys fees incurred in connection with the successful prosecution of a suit on open account," was amended by Act 463 of 1981 to provide that an "open account" shall include debts incurred for professional services, including, but not limited to, legal and medical services which are rendered on a continuing basis. Whether the matter in *Farrar* would have qualified as an open account is doubtful, to say the least, but in *Metropolis, Inc. v. Hanson*,[61] the attorney was permitted to recover attorney fees on an "open account" for legal services involving a divorce suit and a suit to rescind a community property settlement.

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56. When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the legal rate in effect at the time it is due. The obligee may recover these damages without having to prove any loss.

La. Civ. Code art. 2000 (enacted by 1984 La. Acts, Reg. Sess., No. 331, § 1).

57. Parties may stipulate the damages to be recovered in case of nonperformance, defective performance, or delay in performance of an obligation.

That stipulation gives rise to a secondary obligation for the purpose of enforcing the principal one.

La. Civ. Code art. 2005 (enacted by 1984 La. Acts, Reg. Sess., No. 331, § 1).

58. Stipulated damages may not be modified by the court unless they are so manifestly unreasonable as to be contrary to public policy.

La. Civ. Code art. 2012 (enacted by 1984 La. Acts, Reg. Sess., No. 331, § 1).

59. 440 So. 2d 939 (La. App. 2d Cir. 1983).

60. 379 So. 2d 1172 (La. App. 2d Cir.), aff'd, 388 So. 2d 1151 (La. 1980).

61. 434 So. 2d 1207 (La. App. 1st Cir. 1983).

It is doubtful that services rendered on a one case basis would qualify as an open account, and one must also be mindful of ethical consideration 2-23 which provides, among other things, that a lawyer should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.[62] In addition, the Louisiana Supreme Court, in *Frank L. Beier Radio, Inc. v. Black Gold Marine, Inc.*,[63] held that Louisiana Revised Statutes 9:2781 must be construed strictly because the award of attorney fees is exceptional and penal in nature and that if there is any difference in the amount billed and the amount found to be due by the court, attorney fees will not be awarded.

Another predictable result of *Leenerts* and *Saucier*[64] is the attempted intervention by a discharged attorney to collect his fee. The fourth circuit, in *American General Investment Corp. v. St. Elmo Lands*,[65] had decided that an attorney had no right to intervene to protect his fee stipulated in the promissory note since the stipulation ran in favor of the holder of the note rather than in favor of the attorney. *Leenerts*, which suggests that the right to the attorney fee would run in favor of the attorney, also suggests that the attorney should have the right to intervene where he had been discharged after performing at least part of his services. *Van Lieu v. Winn Dixie of Louisiana, Inc.*[66] does not hold that an attorney cannot intervene for his fee, but simply holds that the intervention must be filed only while suit is pending and before judgment on the main demand. Since the intervention in *Van Lieu* was filed for the first time in the appellate court, the intervention was considered untimely.

The question of whether an attorney who is named to represent the executor or executrix in a testament has an irrevocable mandate, a legacy (remunerative donation), or a "real interest" was not decided by the supreme court in *Succession of Boyenga*.[67] Due to the peculiar posture of the case and because the attorney who had been removed but had been awarded a fee did not appeal, the supreme court only affirmed the appellate court decision setting aside the attorney fee awarded since the attorney performed no work and was not entitled to an unearned fee under the Code of Professional Responsibility. In a very short dissent, Chief Justice Dixon seemed to believe that the naming of the attorney amounted to a bequest. *Rivet v. Battistella*[68] and its progeny[69] are still alive if somewhat weakened and debilitated by the Code of Professional Responsibility.

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62. La. Code of Prof. Resp. EC 2-23.

63. 449 So. 2d 1014 (La. 1984).

64. 421 So. 2d 216 (La. 1982); 373 So. 2d 102 (La. 1979) (on reh'g).

65. 391 So. 2d 570 (La. App. 4th Cir. 1980), cert. denied, 395 So. 2d 682 (La. 1981).

66. 446 So. 2d 1362 (La. App. 1st Cir. 1984).

67. 437 So. 2d 260 (La. 1983).

68. 167 La. 766, 120 So. 289 (1929).

69. Succession of Falgout, 279 So. 2d 679 (La. 1973); Succession of Pope, 230 La.

DISCIPLINE

In spite of the injunction of DR 1-102(A)(4) that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation and despite the fact that "manifest dishonesty" appears to lead the causes for disbarment,[70] a small number of Louisiana lawyers continue to fall into the trap of commingling and misusing client's funds. During the past year, four lawyers were disbarred for this reason.[71] In each of these cases the Louisiana Supreme Court emphasized that the misuse of client funds represents the gravest form of professional misconduct and strikes at the heart of the public's confidence in the legal profession—a confidence which the supreme court is obligated to protect. Minimum or average standards of honesty are not considered sufficient for the practicing attorney—high standards of honesty have been erected for those engaged in the legal profession and all members of the profession are required to take an oath to uphold these ideals of exemplary conduct. As a class, lawyers are subject to a great deal of stress, and when financial pressures or personal problems are added, it is perhaps foreseeable that serious violations of the Code of Professional Responsibility will occur. However, one would ordinarily expect these violations to fall under Canon 6 where neglect or incompetent handling of a client's affairs are proscribed.[72] No matter what the pressures, a lawyer who has properly set up his bookkeeping system and who follows the dictates of DR 9-102(B) should not be seriously tempted to commingle or misuse his client's funds.

Another growing cause of disbarment is the conviction for a serious crime. Two cases fell into that category within the past year: *Louisiana State Bar Association v. Brumfield*[73] and *Louisiana State Bar Association v. Paige*.[74] Mr. Brumfield was convicted in the Western District of Louisiana for conspiracy to escape and aiding in the attempted escape of one Garvin Dale White. Mr. Brumfield was initially suspended by the Louisiana Supreme Court and then, upon the finality of his conviction and after the completion of the disciplinary proceedings, he was

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1049, 89 So. 2d 894 (1956); Succession of Bush, 223 La. 1008, 67 So. 2d 573 (1953); Succession of Rembert, 199 La. 743, 7 So. 2d 40 (1942); Succession of Feitel, 187 La. 596, 175 So. 72 (1937); Succession of Mangle, 452 So. 2d 197 (La. App. 3d Cir. 1984); Succession of Boyenga, 424 So. 2d 414 (La. App. 2d Cir. 1982); Roberts v. Christina, 323 So. 2d 888 (La. App. 4th Cir. 1975); Succession of Zatarain, 138 So. 2d 163 (La. App. 1st Cir. 1962); Succession of Martin, 56 So. 2d 176 (La. App. Orl. 1952).

70. Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

71. LSBA v. Zeringer, 447 So. 2d 466 (La. 1984); LSBA v. Daye, 443 So. 2d 1107 (La. 1984); LSBA v. Atkins, 440 So. 2d 106 (La. 1983); LSBA v. Powell, 439 So. 2d 415 (La. 1983).

72. LSBA v. Bubert 421 So. 2d 831 (La. 1982); LSBA v. Causey, 393 So. 2d 88 (La. 1980).

73. 449 So. 2d 1017 (La. 1984).

74. 456 So. 2d 990 (La. 1984).

disbarred. The supreme court found that conspiracy to assist in and aiding in the escape of the prisoner is no less serious a crime than others for which the court has found disbarment to be the appropriate penalty. Such convictions include mail fraud, conspiracy to import cocaine, burglary involving theft of property bonds, subordination of a witness, felony theft, and participation in mail fraud conspiracy. In *Paige*[75] the attorney entered a plea of *nolo contendere* in federal court to a charge of willfully and knowingly embezzling and misapplying the sum of $7,000. After the conviction became final, the Committee on Professional Responsibility filed the usual petition pursuant to article 15, section 8, paragraph 7. The court refused to consider the excuse that the attorney's secretary was to blame and held that where there is a conviction of a serious crime, only matters of mitigation and extenuation will be considered by the court. The disciplinary procedures in such cases are designed to avoid a retrial of the issue of guilt. Despite some mitigation and extenuation, the court imposed the penalty of disbarment.

In *Louisiana State Bar Association v. Meyer*,[76] Mr. Meyer, having been convicted of serious crimes, was suspended from the practice of law and the Committee on Professional Responsibility was ordered to institute the necessary disciplinary proceedings seeking disbarment or other appropriate remedy. During the past year other reported decisions reveal the suspension of six attorneys, one apparently by consent[77] and five after full-blown disciplinary proceedings.[78] In *Fazande* the suspension was for a period of 30 months for the violation of DR 6-101 (A)(3) (neglecting legal matters entrusted to him), DR 7-101(A)(2) (failing to carry out contracts of employment), and DR 1-102(A)(4) (engaging in misconduct involving misrepresentation). In *Schoemann*, Mr. Schoemann's conviction of evasion of federal income tax resulted in a one year suspension. The period of suspension was relatively short because of convincing evidence of mitigation and extenuation presented by Mr. Schoemann. In *Hopkins*, the suspension was also for a period of one year for failing to remit to a client the funds due her. The court concluded that a conversion and misuse of funds had occurred but in view of ultimate payment of the funds to the client and other considerations, the court imposed the relatively mild suspension of one year. In *Wilkins*, commingling and conversion of funds also initially resulted in a penalty of disbarment. However, on rehearing the court deemed a suspension of three years to be appropriate. Finally, in *Martin*, failure to record mortgages and sales netted a six month suspension.

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75. 456 So. 2d at 990.

76. 444 So. 2d 1207 (La. 1984).

77. LSBA v. Klein, 449 So. 2d 1025 (La. 1984).

78. LSBA v. Martin, 451 So. 2d 561 (La. 1984); LSBA v. Wilkins, 449 So. 2d 1011 (La. 1984); LSBA v. Hopkins, 447 So. 2d 464 (La. 1984); LSBA v. Schoemann, 444 So. 2d 608 (La. 1984); LSBA v. Fazande, 436 So. 2d 549 (La. 1983).

In three other cases, public reprimands were imposed.[79] In *Cryer*, the attorney had failed to record a bill of sale and, even after being notified of this failure, did not take any corrective action for two years. In *Porobil*, the attorney was convicted as an accessory after the fact of the crime of furnishing a false financial statement to a bank. The court found that while the respondent's conduct was not serious enough to warrant disbarment or a lengthy suspension, the conduct did constitute a federal crime and that sanctions were necessary to preserve the integrity and dignity of the profession. In *Dowd*, the attorney had been charged with two specifications under both the provisions of Canon 6 and its associated DR's prohibiting neglect of a client's affairs. It appears from the opinion that procrastination was the attorney's chief fault under specification 1 and that permitting a client's suit to prescribe was the cause of discipline under specification 2. The court concluded that although Mr. Dowd's procrastination was insufficient to constitute a violation of DR 6-101(A)(3), permitting his client's suit to prescribe *was* sufficient to warrant discipline.

A dispute between two attorneys concerning a division of fees ended in disciplinary proceedings against one of those attorneys.[80] After reviewing the entire matter, the supreme court found that a disciplinary proceeding was inappropriate and that the proper action was a civil suit. Accordingly, the disciplinary proceedings were dismissed.

In several of the cases cited above, the court reiterated (1) that the purpose of disciplinary proceedings is not so much to punish the attorney as it is to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice and (2) that the discipline to be imposed in a particular case will depend upon the seriousness and circumstances of the offense, fashioned in light of the purpose of lawyer discipline and aggravating or mitigating circumstances.[81]

MISCELLANEOUS

In the Baton Rouge area, in which the writer practiced for over twenty years, it was the custom not to default an opposing party when one was aware that he was represented. When the opposing lawyer procrastinated in filing pleadings, it was the custom to advise him in writing that a preliminary default would be taken on a particular day, and then confirm the default if responsive pleadings were not filed by then. If an attorney forgot the custom and entered a default or even confirmed a default, upon being reminded of representation, the attorney usually agreed to set aside the judgment. Where deliberate action resulted

79. LSBA v. Dowd, 445 So. 2d 723 (La. 1984); LSBA v. Porobil, 444 So. 2d 613 (La. 1984); LSBA v. Cryer, 441 So. 2d 734 (La. 1983).

80. LSBA v. Causey, 440 So. 2d 125 (La. 1983).

81. LSBA v. Powell, 439 So. 2d 415 (La. 1983).

in a default judgment, one could usually count on the court setting aside that judgment upon being advised of the representation and the prior knowledge of that fact by plaintiff's attorney. Against this background, the Louisiana Supreme Court decided *Kem Search, Inc. v. Sheffield*[82] in 1983. The facts presented a very close case. Both the trial court and the First Circuit Court of Appeals found that there had been no fraud or ill practices. The defendant was an attorney who had communicated with the plaintiff's lawyer on several occasions both orally and in writing. On one of these occasions, he advised the plaintiff's lawyer that he intended to use a particular attorney to defend him in the suit if it became necessary. Prior to confirming the default, plaintiff's attorney contacted this defense attorney but was advised that Sheffield had not retained him. Whereupon, plaintiff's lawyer went forward with the confirmation of default but without notifying Mr. Sheffield or Sheffield's purported attorney that he intended to do so. The supreme court concluded that under all of the facts and circumstances, enforcement of the judgment would be unconscionable and inequitable, and set it aside under the provisions of article 2004 of the Code of Civil Procedure and the jurisprudence interpreting it. The court pointed out that, although Sheffield could have more prudently protected his rights by filing responsive pleadings, he had the not unreasonable impression that plaintiff's attorney would give him an opportunity to file pleadings if his settlement overtures were rejected. The court said that the attorney's belief was fully supported by the local court custom, acknowledged by the trial court, that an attorney should not confirm a default judgment without prior notice to the opposing attorney. This occurred in the Baton Rouge area and the writer has been called upon to testify on occasion concerning that custom. The court did not cite but certainly could have cited the provisions of DR 7-106(C)(5) which provide that an attorney in his professonal capacity before a tribunal shall not fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.[83] However, the court stated that whether innocently or otherwise, the *Kem Search* attorney's confirmation of the default judgment without giving prior notice constituted ill practice under the circumstances of the case and entitled Sheffield to have the default judgment annulled. The court also pointed out that Sheffield had shown several defenses which would make a substantial difference in the total amount of the claim.

Several other cases present matters of interest to the practicing attorney. In *Weeden Engineering Corporation v. Hale*,[84] the court held

82. 434 So. 2d 1067 (La. 1983).

83. Code of Prof. Resp. DR 7-106(C)(5).

84. 435 So. 2d 1158 (La. App. 3d Cir.), cert. denied, 441 So. 2d 764 (La. 1983).

that an attorney who engages an expert witness in order to prove his client's case is personally liable to that expert witness, along with his client, for the fees and expenses of the witness. It may simply be a matter of semantics, but while a lawyer is not supposed to obligate himself directly for the benefit of his client, he may advance or guarantee the expenses of litigation (including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence) provided the client remains ultimately liable for such expenses.[85] Whether the attorney is regarded as primary obligor or surety, the expert witness is certainly justified in looking to the attorney who hired him for payment.

In *Fredric Hayes, Inc. v. Rollins*[86] a law corporation sued to recover a contingent fee on a settlement negotiated by the law corporation but rejected by the client. The court found that since the attorney did not have authority to settle a client's claim without that client's clear and express consent, the matter had not been concluded and therefore no contingent fee was yet due. This was in accord with ethical consideration 7-7 which provides in part that it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense.

Scaccia v. Lowe[87] involved the attorney-client privilege and whether the address of a client, or information concerning his whereabouts, is protected by that privilege. A divorced husband appealed the dismissal by summary judgment of his damage suit against his former wife's attorneys for their refusal to reveal the whereabouts of his minor daughter, who was in the wife's custody. He alleged a conspiracy to defeat the court's visitation orders by refusal to reveal his former wife's whereabouts. The court found no Louisiana precedent, concluded that authorities in other jurisdictions were divided, and then avoided the issue by concluding that regardless of whether the privilege applied, the defendant attorneys could not be held liable to the husband in tort. The court did not go into the distinction between "confidences" and "secrets" as set out in Canon 4. Even though the attorney-client privilege did not apply, the attorneys ethically could not reveal a secret of their client to her former husband.

CONCLUSION

Having begun this symposium article with conflicts, it is perhaps appropriate to conclude it with a final word on that subject. It is interesting to notice the difference in the state and federal systems concerning the procedure of getting the judgment on the motion to

85. Code of Prof. Resp. DR 5-103(B).
86. 435 So. 2d 1151 (La. App. 3d Cir. 1983).
87. 445 So. 2d 1324 (La. App. 4th Cir. 1984).

disqualify to a higher court. In the state courts, almost without fail, the procedure is an application for supervisory writs. In the federal system we must first distinguish civil cases from criminal cases. In civil cases, when the motion to disqualify is granted, it is immediately appealable;[88] where the motion to disqualify is denied, it is not immediately appealable.[89] In criminal cases, where the motion to disqualify is granted, it is not immediately appealable because it would disrupt the criminal process.[90] Although no holding on point has been found, presumably the denial of a motion to disqualify would also not be immediately appealable. Most attorneys consider a motion to disqualify them a personal affront; however, it must be realized that there is a time to fight and a time to retreat. In *Analytica, Inc. v. NPD Research, Inc.*,[91] the attorneys made a stubborn defense, resisting the disqualification. The trial court found that their resistance was in bad faith and directed the attorneys to pay $25,000 to the defendant for resisting the order of disqualification. This amount covered attorney fees for opposing counsel and costs. The judgment was affirmed by the United States Court of Appeals for the Seventh Circuit.

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88. Intercoast Sys. v. Omni Corporate Serv., 733 F.2d 253 (2d Cir. 1984); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715 (7th Cir. 1982); but see Gibbs v. Paluk, 742 F.2d 181 (5th Cir. 1984) for the contrary holding.

89. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 101 S. Ct. 669 (1981); Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980), vacated, McAlphin v. Armstrong, 449 U.S. 1106 (1981).

90. Flanagan v. United States, 104 S. Ct. 1051 (1984).

91. 708 F.2d 1263 (7th Cir. 1983).