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Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

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Surely the most significant case decided within the past year in the field of professional responsibility is *Leenerts Farms v. Rogers.*[1] As stated by Justice Marcus, who wrote the opinion, the sole issue presented for determination was whether the courts may inquire into the reasonableness of attorney's fees which have been fixed in a note by the parties as a percentage of the amount due upon default of the debtor. In deciding this rather limited question the court has opened a veritable Pandora's box of questions, some of which will undoubtedly be the subject of extensive law review articles. Those who are concerned with the Louisiana Code of Professional Responsibility, which was recognized as having the force and effect of substantive law in *Saucier v. Hayes Dairy Products,*[2] should be intensely interested in the court's further characterization of the Code. Louisiana Civil Code article 11 states in part that "[i]ndividuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals." The court linked this article with the Code of Professional Responsibility and said: "We view the Code of Professional Responsibility as being the most exacting of laws established for the public good. Hence, the prohibition against a lawyer collecting a 'clearly excessive fee' cannot be abrogated by a provision in a note fixing the amount of attorney fees as a percentage of the amount to be collected."[3] The court stressed its duty to assert the authority conferred upon it by the Louisiana Constitution to regulate the practice of law.

The constitutional separation of powers together with the forceful pronouncements in *Saucier* and *Leenerts Farms* throw into immediate doubt the constitutionality of Act 483 of the Regular Session of 1983. This is apparently a legislative attempt to overrule *Leenerts* by adding to Civil Code article 1935 the following language: "But where the parties, by contract in writing, have expressly agreed that the debtor shall also be liable for the creditor's attorney fees in a fixed or determinable amount, the creditor is entitled to that amount as well." As attorneys' fees preoccupied the courts' attention more than usual in the past term, this article will discuss that subject in more detail hereafter.

DISCIPLINE

Twelve disciplinary proceedings were reported during the past year. In the majority of these cases, suspensions for periods ranging from six

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1. 421 So. 2d 216 (La. 1982).
2. 373 So. 2d 102 (La. 1979) (on rehearing).
3. 421 So. 2d at 219.

months to three years were given;[4] in two cases, public reprimands were given;[5] and two attorneys were ordered disbarred.[6] In *LSBA v. Armagnac*,[7] the respondent was charged with receiving succession funds for his client, failing to disburse them, comingling the funds with his own and converting over $15,500 of the funds to his own use. The commissioner recommended suspension for six months, but the Committee on Professional Responsibility disagreed with the recommendation for such leniency as inappropriate for such serious violations of the Code of Professional Responsiblity. The court agreed with the committee, stating that violations of disciplinary rule 9-102A[8] are of the most serious nature, and that the misuse of a client's funds by an attorney represents the gravest form of professional misconduct. Disbarment was ordered. In *LSBA v. Whiting*,[9] a federal conviction of the respondent on four counts of mail fraud served as the basis for the committee's petition to disbar. Although the convictions were in the year 1961, they did not come to the attention of the Committee on Professional Responsiblity until 1972. A suspension was ordered at that time and in 1974, the committee filed its petition for suspension or disbarment. Unfortunately, another delay occurred because the respondent could not be located, and no service was made nor was issue joined until January 1982. The court concluded that mail fraud was a serious crime involving moral turpitude and further found that the long delay, which ordinarily could be considered a mitigating circumstance, was not persuasive in this case because respondent's activities and involvements since the 1964 conviction confirmed that he was still morally unfit to enjoy the privilege of practicing law. Disbarment was ordered.

An extensive delay between the complaint and the resulting disciplinary proceedings in *LSBA v. Daye*[10] resulted in a three-year suspension, rather than a possible disbarment, for misappropriating a client's funds. Full restitution had been made, and it was an isolated incident. Respondent had subsequently regained the respect of his community and was active in religious, civic and professional circles. The court concluded that conversion of a client's funds is not only professionally unethical but also

4. LSBA v. Orpys, 427 So. 2d 842 (La. 1983); LSBA v. Karst, 428 So. 2d 406 (La. 1983); LSBA v. Thompson, 427 So. 2d 1144 (La. 1983); LSBA v. Daye, 427 So. 2d 840 (La. 1983); LSBA v. Bubert, 421 So. 2d 831 (La. 1982); LSBA v. Kramer, 426 So. 2d 1110 (La. 1982); LSBA v. Cannon, 427 So. 2d 827 (La. 1983).

5. LSBA v. Mundy, 423 So. 2d 1126 (La. 1982); LSBA v. Weinstein, 416 So. 2d 62 (La. 1982).

6. LSBA v. Whiting, 425 So. 2d 725 (La. 1983); LSBA v. Armagnac, 424 So. 2d 996 (La. 1982).

7. 424 So. 2d 996 (La. 1982).

8. LA. CODE OF PROF. RESP. DR 9-102 (found in ARTICLES OF INCORPORATION, LA. STATE BAR ASS'N art. XVI; LA. R.S. tit. 37, ch. 4, app. (1974 & Supp. 1983)) [hereinafter cited as CODE OF PROF. RESP.]

9. 425 So. 2d 725 (La. 1983).

10. 427 So. 2d 840 (La. 1983).

illegal and morally reprehensible, and it is the type of violation that strikes at the very heart of public confidence in the legal profession. Accordingly, a lengthy suspension was deemed appropriate.

In *LSBA v. Karst*,[11] the respondent was charged with violation of disciplinary rule 8-102(B), making false accusations against a judge, and disciplinary rule 1-102, engaging in conduct that was prejudicial to the administration of justice and engaging in other conduct that adversely reflected on his fitness to practice law. According to the committee's specification, Mr. Karst had been involved in a civil suit in which he was the defendant, and having been cast in judgment by Judge Guy E. Humphries, Jr., thereafter publicly accused Judge Humphries of being dishonest, corrupt and engaging in fraud and misconduct. The supreme court took this opportunity to reiterate the purpose of lawyer disciplinary proceedings and the way the court decides upon what sanction to impose. According to the court, the purpose of such proceeding is

> to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice from lawyers who have demonstrated in their conduct that they are unable or likely to be unable to discharge their professional duties. . . . [T]he 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 taking into account aggravating and mitigating circumstances.[12]

Considering that the matter in which Mr. Karst was involved could cause his financial ruin and while at the same time being mindful of the "serious nature of respondent's unwarranted and baseless conduct and its prejudicial effect on the legal profession,"[13] the court imposed a suspension of one year.

MALPRACTICE

It is an unpleasant fact of life that attorney malpractice cases are becoming more prevalent. Letting a claim prescribe or failing to take some other action timely on behalf of a client is one of the prime causes for such actions. It is fairly open and shut in such a case that the attorney was negligent, and the only real question to be decided is what loss the client has suffered. More difficult are those cases in which the attorney is charged with falling below the standard of care, skill and diligence which an attorney is obligated to exercise in his handling of a client's affairs. Canon 6 of the Louisiana Code of Professional Responsibility states that

11. 428 So. 2d 406 (La. 1983).
12. 428 So. 2d at 411.
13. *Id.*

a lawyer should represent a client competently, and disciplinary rule 6-101 provides that a lawyer *shall not* handle a legal matter which he knows or should know that he is not competent to handle without associating with him a lawyer who is competent to handle it. Nor shall an attorney handle a legal matter without preparation adequate in the circumstances, and further he shall not neglect a legal matter entrusted to him. So far, the Louisiana Supreme Court has not used the Code as a set of malpractice rules, but has formulated the general standard that an attorney "is obligated to exercise at least that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in his locality."[14]

In *Jenkins v. St. Paul Fire & Marine Insurance Co.*,[15] the Louisiana Supreme Court was confronted with the first type of malpractice action in which the attorneys negligently failed to file suit until two days after prescription had run, and the majority followed the "case within a case" method in order to determine what loss if any the client had suffered. This method requires that the client's case be actually tried in a full blown adversary setting. If the client is successful in recovering a judgment, the negligent attorney is responsible for that amount. To satisfy the burden of proof imposed prior to *Jenkins*, the plaintiff not only had to prove that the attorney was negligent in handling his client's claim or litigation, but also that the claim or litigation would have been successful, but for the attorney's negligence.[16] In other words, the burden was entirely on the client. In *Jenkins*, with Justice Lemmon writing the majority opinion, the burden of proof was shifted from the client to the attorney once the client had established negligence on the part of the attorney. Once negligence is established, which is usually a simple matter when the attorney has failed to file a claim before prescription or to take a timely appeal, the burden of going forward with evidence to overcome a client's prima facie case by proving that the client could not have succeeded on the original claim falls upon the attorney.

Jenkins involved a truck-train collision, and contributory negligence of the plaintiff was the attorneys' main contention. This being so, Justice Watson, in dissent, found the shift in burden of proof had no significance since, in this case, the negligent attorneys already had that burden. Justice Dennis also dissented; although he commended the plurality for improving the law by modifying the case within a case requirement, he would go one step further and jettison the case within the case requirement. He argued that the plaintiff should be allowed to recover for the loss

14. Ramp v. St. Paul Fire & Marine Ins. Co., 263 La. 774, 786, 269 So. 2d 239, 244 (1972).

15. 422 So. 2d 1109 (La. 1982).

16. *See, e.g.*, King v. Fourchy, 47 La. Ann. 354, 16 So. 814 (1895); Lewis v. Collins, 260 So. 2d 357 (La. App. 4th Cir. 1972); Toomer v. Breaux, 146 So. 2d 723 (La. App. 3d Cir. 1962), *cert. denied.*

of his claim, which certainly had some value, regardless of whether he triumphed in a full scale hypothetical trial. Justice Dennis pointed out that an award of damages based upon a reasonable settlement value has considerable logical appeal.

Davis v. United Parcel Service[17] holds that the decision in *Jenkins* is retroactive because the burden of proof rule is procedural. In *Davis*, the attorney had failed to file a workmen's compensation claim on behalf of his client even though he had knowledge of some disfigurement of the client, *i.e.*, a small scar over the left forehead region. The case within a case requirement was followed by the trial court, and the jury returned a verdict in favor of the defendant attorney and his insurer. However, the trial court had instructed the jury concerning the burden of proof in accordance with the rule adhered to prior to *Jenkins*. In addition, the interrogatories submitted to the jury were confusing and could not properly serve as a basis for a judgment either for or against the plaintiff. Accordingly, the third circuit reviewed all of the evidence and concluded that there was no compensable workmen's compensation injury.

In the second type of malpractice case, in which the attorney has simply mishandled his client's affairs, the court should not have too much difficulty in determining the loss suffered by the client. Apparently, the client would have the burden of proving not only the negligence of the attorney but also the amount of damage.

A conflict of authority in the Louisiana First Circuit Court of Appeal has now been cleared up by the decision in *Cherokee Restaurant v. Pierson*.[18] In this forum last year,[19] the conflict between *Jackson v. Zito*[20] and *Vessel v. St. Paul Fire & Marine Insurance Co.*[21] was pointed out. In *Cherokee*, the first circuit, sitting *en banc*, held that a malpractice action against an attorney is normally subject to a one-year prescriptive period, and only when an attorney breaches an express warranty of result does an action for breach of contract, which prescribes in ten years, arise against him. *Jackson* was expressly overruled in so far as it recognized a ten-year prescriptive period for the "negligent breach of contract" by an attorney.

Judge Ponder's dissenting opinion in *Cherokee* brings up the question of just what the relationship between an attorney and his client is. The Code of Professional Responsibility says it is a personal, unique, fiduciary relationship. The Louisiana Supreme Court has on many occa-

17. 427 So. 2d 921 (La. App. 3d Cir. 1983).

18. 428 So. 2d 995 (La. App. 1st Cir.), *writ denied*, 431 So. 2d 773 (1983).

19. Mengis, *Developments in the Law, 1981-1982—Professional Responsibility*, 43 LA. L. REV. 555 (1982).

20. 314 So. 2d 401 (La. App. 1st Cir. 1975).

21. 276 So. 2d 874 (La. App. 1st Cir. 1973).

sions said that the relationship is one of mandate or agency, thus permitting the client to discharge the attorney at will. However, it is not at all difficult to visualize the attorney as an independent contractor who undertakes a certain piece of legal work for a certain fee, usually without any warranty as to results. If the courts adhere to the agency or mandate theory, it would appear that Judge Ponder is correct in his assertion that the opinion effectively eliminates contractual claims against attorneys in the ordinary case. The writer does not see this as a bad result, however, because the alternative of a ten-year prescriptive period in the ordinary malpractice case is certainly too long, and there seems to be no societal reason for giving a client more than one year after he discovers the injury within which to bring his lawsuit. Even in the case of an express warranty or of the guaranty of a title opinion, there does not seem to be any good reason to have such a long prescriptive period. A simple solution would be a legislative act fixing a period of one year or perhaps two years from the negligent act or from the discovery of the negligent act by the client within which to bring suit.

Conflict of Interest

Only one case involving a possible conflict of interest was decided in the state courts, namely *State v. Bosworth*.[22] The defendant in *Bosworth* contended that his prior attorney had had an irreconcilable conflict of interest in that the attorney had previously represented a potential prosecution witness in the same matter. The Louisiana Supreme Court found that no conflict had actually existed because, at the time the attorney began his representation, the accused had already admitted commission of the acts and had no intention of going to trial. In a footnote,[23] the court discusses the holdings of the United States Supreme Court case of *Cuyler v. Sullivan*[24] and the federal Sixth Circuit case of *Smith v. Bordenkircher*.[25] As interpreted by the Sixth Circuit, the *Cuyler* decision directs the lower courts to determine, on the facts of each case, whether there was an actual conflict of interest and whether that conflict had caused ineffective performance in a situation where the accused's present attorney also represented a prosecution witness at a prior time. In other words, there is no *per se* disqualification.

Assistance of Counsel

It is now conceded that defendants in criminal trials are entitled to effective assistance of counsel under the sixth amendment to the United

22. 415 So. 2d 912 (La. 1982).
23. *Id.* at 925 n.15.
24. 446 U.S. 335 (1980).
25. 671 F.2d 986 (6th Cir. 1982).

States Constitution. However, what constitutes *effective assistance* has been the subject of much disagreement and many opinions. For instance, in *United States v. Decoster*,[26] there were four long opinions, a short statement by Judge Wright, and no majority opinion. The latest expression of the United States Supreme Court is simply that the Constitution guarantees criminal defendants only a fair trial and a competent attorney.[27] The federal Fifth Circuit has been fairly consistent in requiring representation by an attorney "reasonably likely to render and rendering reasonably effective assistance."[28] Louisiana has basically followed the same standard as set forth in *State v. Myles*,[29] *State v. Ratcliff*,[30] *State v. Felde*,[31] and *State v. Seiss*.[32]

In *State v. Berry*,[33] the Louisiana Supreme Court adopted a two-step inquiry. The first step is to determine whether counsel has violated a duty to his client, for example, by failing to prepare for trial. If so, the second inquiry is whether the violation has resulted in prejudice to the defense of the case. The initial burden of proof is on the defendant, but once met, he is entitled to a new trial unless the court can say beyond a reasonable doubt the error was harmless. Justice Dennis, in concurrence, agreed that the two-step inquiry is appropriate for use in resolving claims of ineffective assistance grounded in lack of trial preparation, but he concluded that the second inquiry represents too stringent a burden to be placed fairly upon a defendant for other types of ineffective assistance claims. It can be readily foreseen that convicted defendants will continue to raise the question of effective assistance of counsel in writs of habeas corpus, despite the clarification of the meaning of "effective assistance."

In *State v. Brooks*,[34] the second circuit held that a criminal defendant's right to counsel of his choice is a right that must be exercised at a reasonable time, in a reasonable manner, and at an appropriate stage of the proceeding. The defendant, although arraigned in March 1982, and advised that she would be tried in October, did not obtain counsel until the 10th or 11th of October, and her new attorney immediately filed a motion for a continuance which was denied by the trial judge. The court held that "[a]bsent a justifiable basis, there is no constitutional right to change counsel on the day of trial with the attendant necessity of a continuance and its disrupting implications."[35] "The right to counsel of choice

26. 624 F.2d 196 (D.C. Cir. 1979).
27. Engle v. Isaac, 456 U.S. 107 (1982).
28. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981).
29. 389 So. 2d 12 (La. 1980) (on rehearing).
30. 416 So. 2d 528 (La. 1982).
31. 422 So. 2d 370 (La. 1982).
32. 428 So. 2d 444 (La. 1983).
33. 430 So. 2d 1005 (La. 1983).
34. 431 So. 2d 865 (La. App. 2d Cir. 1983).
35. *Id.* at 868.

cannot be manipulated to obstruct orderly procedure in the courts or to impair the fair administration of criminal justice."[36]

It was clear in *Brooks* that the delay in obtaining counsel was the fault of the defendant, whereas in *State v. Weisenbaker*[37] the defendant ended up without a lawyer on the day of the trial because of an apparent mix-up between out-of-state counsel and local counsel. The defendant in *Weisenbaker* requested additional time to obtain counsel, but the trial court denied the continuance and ordered the defendant to trial without counsel. Thereafter, defendant was convicted of a nine-count theft indictment and subsequently sentenced to serve a total of nine years imprisonment at hard labor and pay fines totaling $9000. The Louisiana Supreme Court reversed the conviction and remanded for a new trial, holding that if counsel and not defendant was at fault for counsel's failure to appear or to give timely notice to the trial court of a conflict in schedule, sanctions must be taken against counsel and not the defendant.

In an interesting case out of the fourth circuit,[38] the court affirmed a money judgment against the State of Louisiana for attorney's fees awarded to an attorney appointed to represent a child in an abandonment proceeding. The court relied on dicta from *State v. Campbell*[39] to buttress its holding. Judge Schott in concurrence concluded that the legislature by not providing a statutory device for compensating the attorney, whose services it had required by statute, authorized "extraordinary judicial measures" in the form of a money judgment against the state for the fee of the attorney.

ATTORNEYS' FEES

Suppose an attorney and a successful businessman enter into a contract under which the attorney will handle a particular legal matter for the businessman at the rate of one hundred dollars per hour, or that an attorney who is well known for his representation of persons accused of a crime agrees to represent a mature, competent individual who is accused of a felony for a fee of $15,000, or finally that a competent businessman signs a promissory note in favor of XYZ Bank, the note containing an attorney fee provision set at twenty percent of the amount in suit. In any of these cases, should the courts have anything whatsoever to say about the reasonableness of the fee? It is beyond argument that the client in the first two suppositions may discharge his lawyer with or without cause at anytime he sees fit.[40] Taking the first supposition and

36. *Id.*
37. 428 So. 2d 790 (La. 1983).
38. *In re* Lamm, 423 So. 2d 1210 (La. App. 4th Cir. 1982).
39. 324 So. 2d 395 (La. 1975).
40. CODE OF PROF. RESP. DR 2-110(B)(4), *supra* note 8; Fowler v. Jordan, 430 So.

assuming further that the client discharged the lawyer after twenty hours of work, is there any reason to hold that the fee provision in the contract would not govern the amount owed the attorney? After all, *Saucier v. Hayes Dairy Products*[41] holds that the amount provided "in the contingency fee contract, not quantum meruit, is the proper frame of reference for fixing compensation for the attorney prematurely discharged without cause."[42] Should the court have the right to review the reasonableness of the hourly amount which had been agreed to between the parties? In the second supposition, assuming that all of the work was done, should the client have the right upon being sued by the attorney for his fee to contest the reasonableness thereof?

In the recent case of *Hebert v. Neyrey*,[43] the first circuit summarized the law concerning contractual attorney's fees.

> The prevailing party in litigation is not entitled to the award of an attorney fee unless it is authorized by statute or contract. *Killebrew v. Abbott Laboratories*[44] . . . . Parties to a contract may lawfully obligate themselves for the payment of an attorney fee, *Maloney v. Oak Builders*[45] . . . subject to review and control by the courts. *Saucier v. Hayes Dairy Products*[46] . . . Although a written agreement may provide for a specified attorney fee, the court may inquire into the reasonableness of the fee. *Leenerts Farms, Inc. v. Rogers*[47] . . . .

In *Watson v. Cook*,[48] the second circuit, citing *Saucier* stated that its review of the jurisprudence led it to conclude that *any* dispute relative to an attorney/client relationship (including the enforcement of the contract sought to be enforced in the case at bar) is subject to the close scrutiny of the courts, and is to be resolved under the provisions of the Code of Professional Responsibility. The court wrote:

> Therefore, it is clear that although parties are permitted to contract and/or agree with respect to attorney's fees, . . . attorney's fees and all contracts and agreements pertaining to such fees are subject to the review and control of the courts. . . . The collec-

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2d 711 (La. App. 2d Cir. 1983); Krebs v. Bailey's Equip. Rental, 328 So. 2d 775 (La. App. 1st Cir. 1976).

41. 373 So. 2d 102 (La. 1979).

42. *Id.* at 118.

43. 432 So. 2d 396, 401 (La. App. 1st Cir. 1983) (emphasis and footnotes added) (citations omitted).

44. 359 So. 2d 1275 (La. 1978).

45. 256 La. 85, 235 So. 2d 386 (1970).

46. 373 So. 2d 102 (La. 1979).

47. 421 So. 2d 216 (La. 1982).

48. 427 So. 2d 1312 (La. App. 2d Cir. 1983).

> tion of excessive fees for which no commensurate service is performed is not vouchsafed by law.[49]

In a companion case in the same circuit, *City of Shreveport v. Standard Printing Co.*,[50] the court was faced with a stipulation between parties to the effect that if Standard Printing Co. was awarded attorney's fees, twenty-five percent of its recovery in excess of the city's final offer of $165,000 would be reasonable. A fee calculated in accordance with the stipulation would have been a little bit over $100,000, but the trial court only awarded $80,000. The appellate court, citing *Leenerts Farms*, held that even when parties purport to fix the amount of an attorney's fee by contract, the courts may still inquire into the reasonableness of that fee. The court affirmed the trial court's award and granted an extra $2000 for services rendered in connection with the appeal.

The courts have further held that once the client has exercised his right to terminate the contract, whether in writing or otherwise, the fee provisions of the contract then become unenforceable and the attorney's only claim is in quantum meruit.[51] So it can be seen that the Code of Professional Responsibility overrides legislative acts which tend to impede or frustrate it (*Saucier*) and also overrides the deliberate contractual provisions of persons of equal bargaining power (*Leenerts Farms*).

It was indicated in the introduction to this article that *Leenerts Farms* is a most important decision which poses many unanswered questions. In that case, Leenerts Farms paid attorney's fees of $72,755 along with the principal and interest, and the sole question to be decided was whether or not the courts may inquire into the reasonableness of attorney's fees which are fixed in the note by the parties as a percentage of the amount due upon default of the debtor. In order to arrive at the conclusion that the courts do have such authority, the court had to and did overrule the old Louisiana Supreme Court case of *W. K. Henderson Iron Works & Supply Co. v. Meriwether Supply Co.*[52] The court thus approved the fourth circuit decision in *People's National Bank v. Smith*[53] and disapproved a first circuit decision in *Fidelity National Bank v. Pitchford*.[54] Although Justice Marcus, writing for the majority in *Leenerts Farms*, said that the attorney's fee provision was not a stipulation for the payment of liquidated damages, he did not say what it was, nor did he say in whose favor the

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49. *Id.* at 1316 (citations omitted).

50. 427 So. 2d 1304 (La. App. 2d Cir. 1983).

51. Fowler v. Jordan, 430 So. 2d 711 (La. App. 2d Cir. 1983); Simon, Corne & Block v. Duke, 429 So. 2d 507 (La. App. 3d Cir. 1983); Simon v. Metoyer, 383 So. 2d 1321 (La. App. 3d Cir. 1980).

52. 178 La. 516, 152 So. 69 (1934).

53. 360 So. 2d 560 (La. App. 4th Cir. 1978).

54. 374 So. 2d 149 (La. App. 1st Cir. 1979).

stipulation runs. It would be inappropriate in this article to go into any great detail in considering the questions which attorneys are asking themselves, but the following should be considered: if the stipulation runs in favor of the holder of the note, which apparently has been the law since 1878,[55] is the holder of the note (a) practicing law, (b) obligated to pay the entire fee to an attorney, and/or (c) capable of using it as a set-off? On the other hand, if the stipulation runs in favor of the attorney, may the holder independently sue for the attorney's fees or must the attorney intervene, and if he must intervene, is he violating canon 5 by acquiring an interest in the lawsuit? These and other questions, including the constitutionality of Act 483 of 1983, will be considered in a note to be published in an upcoming issue of the Louisiana Law Review.

In the meantime, the lower courts are not hesitating to adjust attorneys' fees considered excessive under the circumstances. In *McCarthy v. Louisiana Timeshare Venture*,[56] a fourth circuit decision, a promissory note allegedly defaulted upon was turned over for collection to the attorney who then made a demand upon the maker which included attorney's fees of $42,500. The maker immediately responded by offering to pay the principal and interest but declined to pay the $42,500 and proposed a $1,000 fee instead. The attorney then proceeded by executory process in an attempt to collect the full amount. A subsequent offer to pay attorney's fees of $10,000 was also rejected by the attorney. After negotiation and by agreement the executory process matter was recalled and the note was assigned by the plaintiff to a third party, but the questions of a prepayment penalty and the amount of attorney's fees were reserved and litigated. As to the former, the court held that an accelerating creditor can not demand a prepayment penalty inasmuch as the note itself contemplated such a penalty only when the option to prepay was elected by the maker of the note. As to the latter, the court held that although the creditor was entitled to demand attorney's fees once the suit was filed, the fee must be commensurate with counsel's legal skills, the complexity of the litigation, time expended and results achieved; the setting of a percentage in the promissory note did *not* bar the court from inquiring into the reasonableness of the fee. The matter was remanded to the trial court to determine the amount of attorney's fees.

The first circuit, in *Carter's Insurance Agency v. Franklin*,[57] on rehearing acknowledged that *W. K. Henderson Iron Works & Supply Co. v. Meriwether Supply Co.* and *Fidelity National Bank v. Pitchford* had been

55. Renshaw v. Richards, 30 La. Ann. 398 (Orl. 1878); *e.g.*, American Gen. Inv. Corp. v. St. Elmo Lands, 391 So. 2d 570 (La. App. 4th Cir. 1980), *cert. denied*, 395 So. 2d 682 (1981); First Nat'l Bank v. Doni Homes, Inc., 338 So. 2d 1202 (La. App. 3d Cir. 1976).

56. 426 So. 2d 1342 (La. App. 4th Cir. 1982).

57. 428 So. 2d 808 (La. App. 1st Cir. 1983).

overruled by *Leenerts Farms* and inquired into the reasonableness of twenty-five percent attorney's fees, but in view of the relatively small balances on the promissory notes, the court concluded twenty-five percent was reasonable.

In *Reynolds, Nelson, Theriot & Stahl v. Chatelain*,[58] the fifth circuit found an oral contract between the client and the attorney even though no hourly rate had been specified or agreed upon. After the work was completed, the attorney sent a bill based on a rate of seventy dollars per hour, and when that was not paid, he sent a second bill revised upward wherein he calculated his rate at one hundred dollars per hour. The trial court found that seventy dollars per hour was not an "unconscionable fee" but that the amount of the second bill was arbitrary, and there was no agreement permitting the increase of the hourly rate upon nonpayment of the first bill. The fifth circuit affirmed, reiterating the rule that the fee agreed to may not be excessive and is subject to scrutiny. It is a little difficult to justify the court's holding that an oral contract rather than quantum meruit was involved, but the court said that in a situation in which the client employs the attorney for professional services and the amount or the measure of the lawyer's fee is not especially agreed upon, there is an implied promise to pay the value of those services.

The *Reynolds* decision introduces very well *Succession of D'Antoni*,[59] wherein the attorney was named in the will of the decedent as the attorney for the estate, but the will did not contain any provisions for a fee and there was no evidence that the decedent and the attorney had ever agreed upon any particular fee. The court said that under such circumstances it is presumed in law that the parties intended payment of a reasonable fee, and under the jurisprudence appropriate attorney's fees in the administration of a succession depend upon the facts and circumstances of each case. A rate of one hundred dollars per hour was found by the trial court to be reasonable, and this finding was affirmed on appeal.

There are several other fee cases which the writer would like to address briefly. *Succession of Boyenga*,[60] now pending in the Louisiana Supreme Court, is a case which should make every lawyer sit up and take notice. Dr. Boyenga had named attorney Samuel P. Love as the attorney to represent Dr. Boyenga's executrix in his last will. However, prior to his death, Dr. Boyenga had consulted with another attorney concerning changing the will and in particular changing the attorney named to represent the estate. But, before the second will could be signed, Dr. Boyenga died. Thereafter, Mr. Love was asked to renounce any right that

58. 428 So. 2d 829 (La. App. 5th Cir. 1983).
59. 430 So. 2d 1111 (La. App. 4th Cir. 1983).
60. 424 So. 2d 414 (La. App. 2d Cir. 1982), *writ granted*, 430 So. 2d 81 (1983).

he might have to serve as the attorney for Dr. Boyenga's succession, but he refused. Mrs. Boyenga, as the testamentary executrix, then filed a petition for probate of Dr. Boyenga's will and at the same time asked for the removal of Mr. Love as the attorney designated to represent the estate. Mr. Love answered the rule to remove him and further filed a reconventional demand seeking a fee of two and one-half percent of the gross estate in the event of his removal as compensation for services which he would otherwise have rendered to the estate.

The trial court removed Mr. Love as attorney for the succession on the basis that the executrix was not bound to accept his services and awarded him a fee of two and one-half percent of the gross assets of the succession. The executrix appealed but Mr. Love did not. This was a serious mistake on Love's part because the second circuit was faced only with the question of whether Mr. Love could collect an "unearned" fee and was without power to reinstate him as attorney for the succession. First, the second circuit held that under existing law and jurisprudence a testator may not orally revoke a prior designation of an attorney for his estate in a will, and consequently that Dr. Boyenga's stated intention to remove Mr. Love was insufficient. The executrix argued that *Rivet v. Battistella*[61] and the other cases holding that the designation of an attorney in a will is in the nature of a legacy[62] had been overruled by the Code of Professional Responsibility, which has been determined to be a part of the substantive law of Louisiana. The court agreed and held that under the facts and circumstances of the case, an award to Mr. Love of two and one-half percent of the gross value of the assets would constitute an unearned fee clearly prohibited by the law of Louisiana, citing disciplinary rule 2-106 and *Saucier*.

It will be interesting to see what the Louisiana Supreme Court does with this case, not only concerning the fee but also the issue of whether an attorney named by a testator enjoys an irrevocable status in that he may not be discharged without his consent except for cause. To hold that the attorney does enjoy such a status simply does not seem consistent with the Code of Professional Responsibility.

In *Fontenot & Mitchell v. Rozas, Manuel, Fontenot & McGee*,[63] two law firms had been hired by the same client to work on the same personal injury law suit with nothing said in the written contract concerning how the two law firms were to split the fee, which was to be a total of one-third of the amount recovered. One law firm consisted of two partners, and the other consisted of four partners. Inasmuch as the two firms could not agree as to how the fee was to be split, suit was instituted.

61. 167 La. 766, 120 So. 289 (1929).
62. *E.g.*, Succession of Falgout, 279 So. 2d 679, 681 (La. 1973).
63. 425 So. 2d 259 (La. App. 3d Cir. 1983).

The larger firm, of course, contended that the fee should be divided by heads so that the two-man law firm would receive only two-sixths of the fee and the four-member law firm would receive four-sixths of the fee. The smaller law firm contended that the fee should be split equally, with one-half of the fee going to each firm. Initially, the third circuit found that quantum meruit did not apply since neither law firm had been discharged at any stage of the proceedings and both firms worked throughout. Further, the court found that disciplinary rule 2-107 concerning the division of fees among lawyers was not applicable because the rule is aimed at full disclosure to the client by his attorney that another lawyer has been associated *by the lawyer* and will be sharing in the fee. The court concluded that the client had retained the services of two law firms rather than six individuals and affirmed the dividing of the fee on a fifty-fifty basis.

The fifth circuit considered the question of whether an attorney could charge a client to correct a mistake which the attorney had committed. In *Farris v. Lamont*,[64] a judgment adverse to the client in a domestic proceeding was rendered because of a misunderstanding between the attorney's law partner, who was standing in for the attorney, and opposing counsel. The erroneous judgment then had to be corrected and a number of court appearances were required in order to rectify the matter. The attorney then billed his client for approximately $1,300 for the time involved in corrective work. The court wrote:

> Basically, it comes to this: The plaintiff as an attorney was hired by the defendant to perform specific professional services, which he performed in such a manner as to subsequently require substantial remedial services to correct his errors. Should a lawyer be allowed to profit by his own mistakes at the expense of his innocent client? The obvious answer is no.
>
> The doctrine of equity is founded in the Christian principle not to do unto others that which we would not wish others to do unto us.[65]

An earlier section of this article discussed prescription of a malpractice action. In *Julien v. Wayne*,[66] the first circuit was confronted with the length of the prescriptive period when a client is suing to recover for an over-payment of fees. The plaintiff contended that the action prescribed in ten years under Civil Code article 3544 governing personal actions, but the attorney contended and the lower court found that the three-year prescriptive period of article 3538 applied. In spite of the argument by the attorney that it would be exceedingly burdensome to have to main-

64. 425 So. 2d 970 (La. App. 5th Cir. 1983).
65. *Id.* at 971.
66. 415 So. 2d 540 (La. App. 1st Cir. 1982).

tain files for ten years, the court found article 3544's ten-year period to be the applicable prescriptive period on a claim for restitution under Civil Code article 2301.

CONCLUSION

This article does not attempt to cover each and every case involving professional responsibility, but covers those cases which the writer deems to be of the most interest and importance. One wonders if the *Leenerts Farms* case will spur litigation every time a client gets a bill from an attorney. This possibility will not only be disagreeable to the attorney but will probably cause him much expense, given the additional time required to collect the fee as well as the tendency of judges as a group to be quite conservative when setting attorneys' fees.

Even more intriguing is the question of whether the Code of Professional Responsibility should displace the Civil Code articles on obligations where attorneys' fees are concerned. The thesis of several commentators is that the Code of Professional Responsibility is substantive law to be followed by *all lawyers*, not by the courts in deciding disputes.[67] John F. Sutton, Jr. argues that the disciplinary rules of the Code of Professional Responsibility were never intended to be used as procedural rules in litigation, but were designed only as regulatory rules to be enforced in *disciplinary* proceedings.[68] There is much to be said for this view.

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67. Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RESEARCH J. 421; Sutton, *How Vulnerable Is the Code of Professional Responsibility*, 57 N.C.L. REV. 497 (1979).

68. Sutton, *supra* note 67, at 514-15.