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PROFESSIONAL RESPONSIBILITY

*Henry A. Politz**

DISCIPLINE

During the 1976-1977 term the Louisiana Supreme Court disposed of more disciplinary cases than in any prior comparable period. There were four disbarments,[1] one disbarment on consent,[2] two suspensions[3] and two suspensions on consent.[4] In addition six attorneys[5] were suspended from practice on interim suspension orders pending completion of disciplinary proceedings.[6] During the term the court concluded nine proceedings, entered six interim suspension orders, and at the conclusion of the term had fourteen disciplinary proceedings pending.[7]

The four disbarments arose out of the same incident. The four attorneys, and others,[8] were indicted by the grand jury for the United States District Court for the Eastern District of Louisiana. Three were charged with mail fraud and conspiracy to commit mail fraud in violation of 18 U.S.C. §§ 371 and 1341, respectively. The fourth was charged with conspiracy to commit mail fraud. After a trial lasting almost two months, all defendants were found guilty, and each was sentenced to three years imprisonment.[9] The sentence was later changed to three years active

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1. Louisiana State Bar Ass'n. v. Hamilton, 343 So. 2d 985 (La. 1977); Louisiana State Bar Ass'n. v. Hennigan, 340 So. 2d 264 (La. 1976); Louisiana State Bar Ass'n. v. Shaheen, 338 So. 2d 1347 (La. 1976); Louisiana State Bar Ass'n. v. Loridans, 338 So. 2d 1338 (La. 1976).

2. Louisiana State Bar Ass'n. v. Wallace, No. 56,973 (La. 1977).

3. Louisiana State Bar Ass'n. v. McSween, 347 So. 2d 1118 (La. 1977); Louisiana State Bar Ass'n. v. Ponder, 340 So. 2d 134 (La. 1976).

4. Louisiana State Bar Ass'n. v. Ehmig, No. 55,877 (La. 1977); Louisiana State Bar Ass'n. v. Horton, 347 So. 2d 1107 (La. 1977).

5. Theodore J. Adams, Jr., docket number 59,057; Earl J. Schmitt, Jr., docket number 59,001; Charles M. Stevenson, docket number 58,661; James F. Quaid, Jr., docket number 58,520; Dudley A. Phillips, Jr., docket number 58,505; O. Romaine Russell, docket number 58,273.

6. These suspensions were pursuant to ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS'N., LA. R.S. 37, ch. 4, art. XV, § 8, ¶¶ 1-6 [hereinafter cited as ARTICLES OF INCORPORATION].

7. *See* listing in Pate, *Report by Committee on Professional Responsibility*, 25 LA. B.J. 8, 9 (1977).

8. These included a fifth attorney, Irwin L. Tunis, who has since been disbarred. *See* Louisiana State Bar Ass'n. v. Tunis, 352 So. 2d 623 (La. 1977).

9. Shaheen and Loridans were convicted of both the substantive and conspir-

probation with special conditions attached. The Fifth Circuit Court of Appeals affirmed the judgment.[10]

After the Supreme Court denied certiorari and the judgment became final, the Louisiana State Bar Association, through the Committee on Professional Responsibility, instituted disciplinary proceedings.[11] The court appointed commissioners in the cases and hearings were held. After briefing and argument, the Louisiana Supreme Court determined that disbarment was the appropriate remedy in each instance.

The convictions, as noted by the Louisiana Supreme Court and by the Fifth Circuit, grew out of a scheme to defraud insurance companies by staging accidents. The plan involved doctors, lawyers and others. Chief Judge John Brown, in an opinion cited in each of the disbarment proceedings, called the situation a second "American tragedy." He detailed the specifics of what he referred to as "the Louisiana-wide get-rich-quick scheme . . . [the] staging of fraudulent automobile accidents for the purpose of creating false personal injury claims."[12]

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acy counts. Hennigan was convicted only of conspiracy. Hamilton was found guilty of conspiracy.

10. United States v. Perez, 489 F.2d 51 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974).

11. The filing was made pursuant to ARTICLES OF INCORPORATION, *supra* note 6, § 8, ¶ 7(a)-(d).

12. The observations of Judge Brown, quoted extensively by the supreme court, included:

> The facts of this case, in a purely legalistic sense, need no embellishment in a literary sense to classify this as a piece of prose that could well be called a second "American tragedy". It would be an "American tragedy," not only because the events took place here, but because it is just another instance in which large numbers of Americans get willingly involved in enterprises which reflect a lack of compunction, possibly even a proclivity, to enter into the proverbial "get-rich-quick scheme" evidencing not only a disregard for law but, sadly, also a deafness to conscience. As we undertake our profound but prosaic role of adjudicating these cases, what we see is not pleasant. It reveals a wreckage of promising professional careers, evidence of deliberate and unabashed attempts to prey upon financially pressed expectant mothers for gain and the seemingly all too eager participation by a large cast of characters in a patently illegal undertaking.
>
> *The Scheme*
>
> A recital of the facts must precede resolution of the issues raised on appeal. The Louisiana-wide get-rich-quick scheme involved the staging of fraudulent automobile accidents for the purpose of creating false personal injury claims. These claims would be submitted to the insurance carriers for the respective vehicles involved in the wrecks with the aid and contrivance of certain physicians and lawyers.
>
> As the scheme evolved, the participants even coined their own terminolo-

The cases present, sadly, as Judge Brown noted, "a wreckage of promising professional careers." They highlight the onerous but vital duty of the organized bar to police its own for the protection of the courts, the public and the profession.

Procedurally the cases are important since they establish that the date of the finality of the conviction of a felony determines the applicability of article XV of the Articles of Incorporation of the Louisiana State Bar Association.[13]

Of equal, and perhaps surpassing, importance are the holdings that petitions for disciplinary action based on felony convictions are to be

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gy which, though alien to the uninitiated, became known to all those who participated. This glossary of modern day crookedness was quite descriptive. Certain participants were known as "recruiters". The recruiters['] function, not unnaturally, was to recruit others who assumed titles commensurate with their organizational function. There were the "hitters", whose function it was to drive the "hitter" vehicle in each collision which supposedly was to be liable for causing the accident. Then there was [sic] the "target" vehicles. The occupants of the "target" were known as the "driver" and the "riders". It was determined at the outset that pregnant women made exceptionally good riders as they could claim pregnancy related injuries which would be both hard to disprove and easily settleable with the insurance carriers. Throughout the scheme there was an effort made on the part of the participants to use vehicles and drivers which were covered by high limits of liability insurance.

According to a pre-arranged timetable, the "hitter" vehicle would strike the "target" vehicle either broadside or in the rear end. The occupants of the "target" vehicle—the driver and riders—and occasionally some of those in the "hitter" vehicle, feigning injuries, would be sent to a particular doctor and lawyer who would facilitate phony claims by creating a medical history for treatment of non-existent injuries and making a demand on the appropriate insurance company.

The key to immediate financial gain in each staged collision was advances paid by the attorneys to the "riders" for whom allegedly false claims were being submitted. These advances were paid in the form either of cash payments or loans from local financial institutions, co-signed by the attorney handling the claim. Of the usual advance ranging from $250 to $500, part was retained by the rider-claimant with the rest being distributed among the organizers, recruiters, and others who assisted with various aspects of staging the wreck. When the claim was ultimately settled with the insurance carrier, the proceeds would be applied to (i) repay the advancing attorney or in such cases, to liquidate the guaranteed bank loan and (ii) to pay the inflated doctor's bill, not infrequently, with kickbacks going to both the organizers and the participating attorneys in addition to their usual shares.

489 F.2d at 54-55 (footnotes omitted). *See* Louisiana State Bar Ass'n. v. Shaheen, 338 So. 2d 1347, 1349-50 (La. 1976).

13. ARTICLES OF INCORPORATION, *supra* note 6, § 8. Though this article became effective on September 1, 1971, there was some question regarding its application to criminal acts or convictions occurring prior to that date.

brought under section 8, paragraphs 7(a)-(d) of article XV. These paragraphs set out the parameters of proof admissible before the commissioner and the court. Paragraphs 7(c) and 7(d) provide:

> (c) At the hearing before the Commissioner, the certificate of the conviction of the respondent shall be conclusive evidence of his guilt of the crime for which he has been convicted.
> (d) At the hearing based upon a respondent's conviction of a crime, the sole issue to be determined shall be whether the crime warrants discipline, and if so, the extent thereof. At the hearing the respondent may offer evidence only of mitigating circumstances not inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.

The scope of evidence which is appropriately "evidence of mitigating circumstances" becomes an essential inquiry. In *Louisiana State Bar Association v. Shaheen*[14] Justice Dixon stated:

> "Mitigating circumstances" are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.[15]

In *Louisiana State Bar Association v. Hennigan*[16] Chief Justice Sanders referred to two types of mitigating circumstances which are admissible: that the respondent attorney had led an exemplary life since his conviction, and that the conviction had occasioned loss (presumptively both financial and personal).[17] Justice Calogero, in *Louisiana State Bar Association v. Loridans*,[18] also found proper these two types of mitigating evidence and opined that the respondent is allowed to show that the crime did not involve such misconduct or moral turpitude as to require disbarment.[19]

In *Louisiana State Bar Association v. Hamilton*[20] Justice Calogero found admissible certain evidence reflecting "upon the character or quality of the criminal conduct or on [respondent's] degree of complicity therein." The court would also include as acceptable mitigating evidence proof of the respondent's age, marital status, ages of children, financial support of other members of his family, the financial and emotional costs

14. 338 So. 2d 1347 (La. 1976).
15. *Id.* at 1351.
16. 340 So. 2d 264 (La. 1976).
17. *Id.* at 269.
18. 338 So. 2d 1338 (La. 1976).
19. *Id.* at 1347.
20. 343 So. 2d 985 (La. 1977).

of the conviction, election to office in fraternal organizations after conviction, that no financial profit was realized by respondent in the scheme, that he withdrew from participation in the second fraudulent claim, and that he was charged with involvement in only one accident and then only with conspiracy.[21] In sum, these decisions furnish the framework for the limits of "mitigating circumstances" and will serve as guides for future disciplinary proceedings based on felony convictions.

In *Louisiana State Bar Association v. Ponder*,[22] disciplinary actions were also instituted as a consequence of an attorney's conviction of two counts of violating 26 U.S.C. § 7206(1) by making and subscribing income tax returns which were false as to certain material matters. The case was first before the supreme court in 1972 for rulings on exceptions of prematurity, no right or cause of action, a motion to dismiss and a motion seeking admission of certain facts. The court denied both motions and overruled the exceptions. On joint motion of all parties the proceeding was dismissed without prejudice and the Committee held an informal hearing as requested by the respondent. Subsequently a second petition for disciplinary action was filed. On rehearing the court concluded that the crime "certainly evidences moral turpitude, and, thus, respondent's conduct warrants disciplinary action."[23] Noting mitigating evidence that respondent has been a member of the bar for many years, that he was well regarded by fellow members of the bar and bench in his home area and that he has a good reputation among both fellow professionals and the community-at-large, the court concluded that a suspension for six months was appropriate disciplinary action. In doing so, the court declared, as it had previously, that "disciplinary action is not so much for the punishment of the attorney as it is for the preservation of the integrity of the courts and the salutary effect it has upon other members of the bar."[24]

There were multiple exceptions filed by the respondent attorney, all of which were overruled by the court. These included an exception of no right or cause of action based on the fact that the crimes occurred before the effective date of article XV.[25] That exception also asserted that no action could be sustained under paragraph 7 of section 8 of article XV unless and until the procedural requirements of paragraphs 1 through 6

21. *Id.* at 992.
22. 263 La. 743, 269 So. 2d 228 (1972).
23. Louisiana State Bar Ass'n. v. Ponder, 340 So. 2d 134, 148 (La. 1976).
24. *Id.*
25. Article XV became effective September 1, 1971 and the offenses were for tax returns for years prior thereto.

thereof had been followed.[26] The court held that those latter paragraphs provide the procedure for the entry of interim suspension orders in instances where the conviction is not yet final (i.e., appeals are yet pending). In *Ponder*, the proceedings were filed after all appeals were concluded and the delays had expired following denial of writs by the United States Supreme Court. The same exception was also urged on the basis that the Governor of Louisiana had granted a pardon. This plea was also rejected, as it had been in the earlier decision,[27] for it was more appropriately addressed to a subsequent modification of the disciplinary penalty than to the issue of the existence of a cause of action. The court also again affirmed that a federal felony may form the basis of a disciplinary proceeding.

In addition, respondent again asserted prematurity, vagueness, and liberative prescription. All pleas were denied. Of interest is the comment by the court on the plea of prescription: "Assuming that there is some prescriptive period applicable to disciplinary proceedings founded upon a conviction of a crime, it would not begin to run until the conviction had become final since, until that point, the Committee could not proceed under paragraph seven of Section 8."[28]

There is no reference to time limitation either in article XV or in the Code of Professional Responsibility itself.[29] The entire question of whether any of the prescriptive periods, civil and/or criminal, provided in the Louisiana codes, apply to disciplinary matters remains for another day.

In another case involving a federal conviction, the respondent pled guilty to three counts of an indictment charging him with receiving funds from proceeds of loans made by a federally insured savings and loan association of which he was an officer.[30] He had been fined $10,000.00 on each count and sentenced to serve one year on each count. The sentences of imprisonment were suspended and he was placed on probation, a special condition thereof being that he not practice law for one year from the date of the sentencing on January 31, 1976.

26. Paragraphs 1-6 of section 8 deal with the determination by the Committee on Professional Responsibility and the supreme court for purposes of interim suspension of whether the crime for which the attorney is convicted constitutes a "serious crime." Paragraph 7 dictates the disciplinary procedure to be followed once the conviction is final.

27. Louisiana State Bar Ass'n. v. Ponder, 263 La. 743, 269 So. 2d 228 (1972).

28. 340 So. 2d at 143.

29. *See* ARTICLES OF INCORPORATION, *supra* note 6, art. XV.

30. Louisiana State Bar Ass'n. v. McSween, 347 So. 2d 1118 (La. 1977).

In a per curiam opinion the court referred to evidence reflecting that the respondent had been a member of the bar for many years, that despite his conviction he had maintained a good reputation among many of his professional associates and the lay community and that after the completion of the year of suspension from practice as ordered by the sentencing judge he continued to refrain from practicing law in a spirit of contrition. Quoting from *Ponder* on the purpose of disciplinary action,[31] the court imposed a three year suspension, beginning with the date of his sentencing.

ADVERTISING

Another decision, by the United States Supreme Court, merits the very careful attention of the members of the bar, individually and collectively. Reference is made to *Bates v. State Bar of Arizona*,[32] a decision involving advertising by attorneys. The opinion compels far more careful and detailed analysis than this writing would make possible and is destined to be the subject of many scholarly articles. In essence, it holds that certain limited advertising by attorneys is protected by the first amendment to the United States Constitution. The responsibility of the organized bar to define the limits of such advertising looms large and must be intently and seriously addressed. This matter is considered by many as the most serious and far-reaching challenge facing the bar in the immediate future.

The Louisiana State Bar Association has addressed itself to the *Bates* decision, finding a solution which this writer feels is most compatible with the profession's ideals and goals as well as the public's best interest. Most of the substantive changes effected by the bar association are contained in Disciplinary Rule 2-102(A)(7) and Ethical Consideration 2-9. Rule 2-102(A)(7) now permits "[p]ublication of a notice in a regularly published newspaper, magazine, periodical and the Yellow Pages of Telephone Directories having general circulation in the parish where the attorney advertising maintains an office advertising the availability of routine legal services as defined herein and the fees to be charged therefor." The Rule further provides:

> The advertisement must include the following: name, including name of law firm, one or more routine legal services, as defined herein, which are offered and the maximum legal fee to be charged therefor; the advertisement may include the advertiser's office address, telephone number, office hours or foreign language proficiency. Any use of the phrase "Legal Clinic" or words of similar import must be in

31. See note 24, *supra*, and accompanying text.
32. Bates v. State Bar of Ariz., 97 S. Ct. 2691 (1977).

conjunction with the name of the lawyer or law firm advertising and no geographical or other descriptive words may be used. Advertisement in the form of signs, posters, hand bills, mailings, and the like, and the use of radio or television are expressly prohibited.

No further representations may be made concerning the maximum legal fees stated in said advertisement except as provided herein. Further, no representation shall be made in any such advertisement as to the quality of legal services to be performed or the expertise of any lawyer or firm of lawyers to perform such services.

Said advertisement shall be of a [reasonable] size and all information allowed therein shall be printed in no larger than twelve point type.

All advertisements shall contain the following statements in type no smaller [than] the largest size type used therein:

"The Code of Professional Responsibility of the Louisiana State Bar requires that the above services be performed for not more than the advertised maximum legal fee.

"The advertised maximum legal fees do not include costs."

The term, "routine legal services" as used herein, shall be limited to the following:

(1) Uncontested separations and divorces
(2) Uncontested adoptions
(3) Personal bankruptcies
(4) Change of name
(5) Drafting unsecured promissory notes
(6) Drafting powers of attorney
(7) Preparation of individual income tax returns
(8) Drafting bills of sale of movables
(9) Consultation with client

Failure to perform an advertised service at the advertised maximum legal fee for a person responding to the advertisement shall be misleading advertising and deceptive practice.[33]

Ethical Consideration 2-9 now provides:

EC 2-9 The traditional ban against advertising is rooted in the public interest. Unlimited advertising would encourage extravagant,

33. LA. CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 2-102. *Id.*, E.C. 2-9.

artful, self-laudatory efforts to secure business which could easily mislead the public. Such would inevitably foster unrealistic expectations in particular cases and inexorably lead to distrust in the fairness of the law and integrity of lawyers. Public confidence in our legal system would be impaired by unrestricted advertisement of professional services. The attorney-client relationship is personal and unique in our society and should not be established through artifices or deceptions. Maintenance of this critically important public confidence in our system of justice is best achieved by reasonable, self-imposed controls on advertising by lawyers. Special care must be taken by lawyers to avoid misleading the public and to assure that the information contained in any advertising is relevant to an informed selection of a lawyer. The lawyer must be ever mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Illustrative examples of prohibited representations in advertising by lawyers include: misstatements of fact, suggestions that the ingenuity or prior experience of a lawyer, rather than the justice of the claim, are determining factors in the result attained, inclusion of information irrelevant to knowledgeable selection of a lawyer, and representations as to quality, since such cannot be measured or verified. Lawyer advertising is not spontaneous, but rather it is calculated. Therefore, reasonable regulations designed to foster compliance with appropriate standards serve the public interest without impeding the free and clear flow of useful, meaningful, and relevant information. Advertising by the electronic media presents specific concerns for it is weighted more to form than substance, is fleeting and almost impossible to adequately monitor. Accordingly, unless and until it is demonstrated that the public interest cannot be adequately met by advertising in the print media, advertising in the electronic media should be and is proscribed.[34]