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THE CONCEPT OF AN "EARNED FEE" IN THE REGULATION OF ATTORNEY'S FEES BY THE LOUSIANA SUPREME COURT

The regulation of attorney's fees by the Louisiana Supreme Court recently has undergone change in light of the overruling of long-standing jurisprudence and a reinterpretation of certain legislation. In three opinions[1] the court examined the attorney-client relationship and decided that the client's interests at all times must be kept separate from those of his attorney. A major factor in the court's new approach was the Code of Professional Responsibility (Code), which the court expressly approved as the primary authority on the subject of attorney's fees. Significantly, the court determined that the Code envisions that attorneys receive compensation only for "earned fees" and that the client's right to discharge his attorney should not be limited.

In reaching the conclusions in each of the recent cases, the supreme court relied on both its plenary judicial power to regulate the legal profession[2] and its constitutional grant of original jurisdiction in disciplinary proceedings.[3] At an earlier time, the court had adopted as "rules of the court"[4] the Articles of Incorporation of the Louisiana State Bar Association, which contain the Code of Professional Responsibility. Thus, the rules of the bar association, when approved by the supreme court, have the force and effect of

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1. Scott v. Kemper Ins. Co., 377 So. 2d 66 (La. 1979); Calk v. Highland Constr. & Mfg. Co., 376 So. 2d 495 (La. 1979); Saucier v. Hayes Dairy Prods., Inc., 373 So. 2d 102 (La. 1979).

2. LA. CONST. art. V, § 1 provides: "The judicial power is vested in a supreme court, courts of appeal, district courts, and other courts authorized by this article." LA. CONST. art. II, § 2 provides: "Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."

3. LA. CONST. art. V, § 5(B) provides: "The supreme court has exclusive original jurisdiction of disciplinary proceedings against a member of the bar." It has been suggested that the judiciary's power over the legal profession derives solely from its plenary power and that the constitution's grant of exclusive, original jurisdiction to the supreme court over disciplinary matters should be considered as merely divesting lower courts in the state of any jurisdiction on this subject. *See* Patterson & Hardin, *Discharged Counsel: The Dilemma Solved?*, 28 LA. B.J. 177, 178 (1981).

4. Saucier v. Hayes Dairy Prods., Inc., 373 So. 2d at 109. In 1970 the court adopted amendments to the articles of incorporation of the Louisiana State Bar Association that substituted the Code of Professional Responsibility for the Canons of Professional Ethics. *Id.*

substantive law.[5] The recent case law clearly illustrates the court's broad application of the Code as law in the exercise of judicial supervision over the attorney-client relationship.

The History of the Court's Regulation of Attorney's Fees

Early Theories

The relationship between an attorney and his client is a special one which has proven difficult to define. The Code describes the attorney-client relationship as having both personal and fiduciary characteristics.[6] The attorney is required to act in furtherance of his client's behalf to the extent of the attorney's ability; in return, the client owes the attorney adequate compensation. The attorney-client relationship conveys a representative capacity upon the attorney. Primarily because of the attorney's role, this relationship is often classified as one of mandate and not as a hiring of labor.[7] Troplong, the French legal scholar, considered attorneys as mandataries, "saying that a contract for their employment cannot be received as a contract for hiring of labor, that the *honoraire* [remuneration] is proper to the mandate, while the price is proper to the hiring [of labor]. . . ."[8]

Louisiana jurisprudence consistently has considered the attorney-client relationship as one of mandate.[9] The nature of the mandate, however, has been the subject of both litigation and legislation. Courts generally have classified the mandate as either

5. Louisiana State Bar Ass'n v. Connolly, 201 La. 342, 9 So. 2d 582 (1942). "Under the court's admitted inherent power to admit attorneys to practice, it has adopted rules prescribing certain qualifications which must be complied with by the applicant as a condition to obtaining his license. These regulations are unquestionably ones of substantive law." *Id.* at 590.

6. LA. CODE OF PROFESSIONAL RESPONSIBILITY, EC 3-1 (found in ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS'N art. XVI; LA. R.S. 37, ch. 4, app.) [hereinafter cited as CODE OF PROFESSIONAL RESPONSIBILITY].

7. Gurley v. City of New Orleans, 41 La. Ann. 75, 5 So. 659 (1889).

8. 41 La. Ann. at 79, 5 So. at 661 (quoting Troplong).

9. Louque v. Dejean, 129 La. 519, 56 So. 427 (1911); Gurley v. City of New Orleans, 41 La. Ann. 75, 5 So. 659 (1889); Wright v. Fontana, 290 So. 2d 449 (La. App. 2d Cir. 1974); Lynch v. Burglas, 286 So. 2d 170 (La. App. 4th Cir. 1973); Woodley v. Robinson, 100 So. 2d 255 (La. App. 2d Cir. 1958).

revocable at will[10] or as coupled with an interest.[11] If deemed a mandate coupled with an interest, courts have had the additional burden of determining the nature of that interest.[12]

Revocable Mandate

Early Louisiana courts followed the revocable mandate theory because "'the principal may revoke his power of attorney whenever he thinks proper.'"[13] This interpretation prevented an attorney from acquiring an interest in his client's claim.[14] Problems arose when attorneys were discharged and prevented from completing the tasks for which they had been engaged. The older jurisprudence consistently used *quantum meruit*[15] to detemine the value of work done by an attorney who was discharged early.[16]

Mandate With an Interest

In more recent times, some courts began to deviate from this general mandate principle[17] by allowing attorneys to acquire an interest in the client's litigation. However, the judiciary was unable to

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10. Louque v. Dejean, 129 La. 519, 56 So. 427 (1911). *See also* Gravity Drainage Dist., No. 2 v. Edwards, 207 La. 1, 20 So. 2d 405 (1944); Foster, Hall, Barret & Smith v. Haley, 174 La. 1019, 142 So. 251 (1932); Simon v. Metoyer, 383 So. 2d 1321 (La. App. 3d Cir. 1980); Kramer v. Graham, 272 So. 2d 716 (La. App. 3d Cir. 1973); Woodley v. Robinson, 100 So. 2d 255 (La. App. 2d Cir. 1958).

11. Succession of Jones, 193 La. 360, 190 So. 581 (1939); United Gas Pub. Serv. Co. v. Christian, 186 La. 689, 173 So. 174 (1937); Succession of Carbajal, 139 La. 481, 71 So. 775 (1916).

12. Succession of Vlaho, 140 So. 2d 226 (La. App. 4th Cir. 1962).

13. Louque v. Dejean, 129 La. 519, 524, 56 So. 427, 428 (1911) (citation omitted).

14. Stiles v. Bruton, 134 La. 523, 64 So. 399 (1914); Louque v. Dejean, 129 La. 519, 56 So. 427 (1911).

15. "Quantum meruit is an equitable doctrine, based fundamentally on the concept that no one who benefits by the labor and incidental materials of another should be unjustly enriched thereby; and that the law implies a promise to pay a reasonable amount for labor, materials, etc. furnished, even in the absence of a specific contract therefor." Bordelon Motors, Inc. v. Thompson, 176 So. 2d 836, 837 (La. App. 3d Cir. 1965).

16. Succession of Robinson, 188 La. 742, 178 So. 337 (1937); Louque v. Dejean, 129 La. 519, 56 So. 427 (1911); Chiasson v. Law Firm of Dragon & Kellner, 335 So. 2d 87 (La App. 3d Cir. 1976); Succession of Mariana, 177 So. 464 (Orl. App. 1937). The principle that the attorney-client relationship is one of revocable mandate is today still consistent with the Code which recognizes the fiduciary relationship an attorney has with his client and the client's unrestricted right to discharge his attorney. *See* CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 6, at EC 4-1.

17. See note 9, *supra*.

decide upon the exact nature of the interest the attorney acquired. The courts also had difficulty in fashioning a clear rationale between those attorneys who were dismissed *for cause* and those who were dismissed *without cause*.[18]

The Contingency Fee and Act 124 of 1906

The development of the use of the contingency fee contract greatly influenced the legislature and the judiciary in their construction of the attorney-client relationship as one of a mandate coupled with an interest. In Act 124 of 1906 the Louisiana legislature recognized contingency fee contracts as allowing an attorney to acquire as a fee "an interest in the subject matter of the [litigation]."[19] The Act was the source of Louisiana Revised Statutes 37:218 which provides, in part:

> By written contract signed by his client, an attorney at law may acquire as his fee an interest in the subject matter of a suit, proposed suit, or claim in the assertion, prosecution or defense of which he is employed, whether the claim or suit be for money or for property. In such contract, it may be stipulated that neither the attorney nor the client may, without the written consent of the other, settle, compromise, release, discontinue or otherwise dispose of the suit or claim . . . . [Such disposition] by either the attorney or the client, without the written consent of the other, is null and void and the suit or claim shall be proceeded with as if no such settlement, compromise, discontinuance, or other disposition had been made.

Initially, Act 124 was not followed strictly by the courts. In an early decision the Louisiana Supreme Court refused to give "unqualified assent to the rigor of the rule that the contract in such cases is 'the law between the parties and that as a party binds himself, so shall he be bound.'"[20] However, eventually this limited construction of the statute was abandoned in favor of one based on freedom of contract. The judiciary slowly adopted the view that an attorney could acquire an interest in his client's suit and even have some authority over the client's control of the litigation. In time, courts began to hold expressly that contingency fee contracts ex-

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18. This distinction was the basis of the decision in *Saucier* by the fourth circuit. 353 So. 2d 732 (La. App. 4th Cir. 1977).

19. 1906 La. Acts, No. 124.

20. Husk v. Blanchard, 155 La. 816, 99 So. 610 (1924).

ecuted pursuant to Revised Statutes 37:218 were "the law between the parties."[21]

When an attorney and his client executed a section 37:218 contingency fee contract, the attorney would, according to the statute, "acquire an interest in the subject matter of the suit."[22] However, tribunals often found difficulty in determining the exact nature of this interest.[23] In several cases the attorney-client relationship was interpreted as one of mandate with the attorney acquiring a "vested interest" in the litigation.[24] Thus an attorney who fulfilled the requirements of the statute could be dismissed *only when the client had cause for so doing.* Obviously, this rationale contradicted the principle that the client should exercise complete control of the lawsuit. In contrast to this anomalous result, other courts interpreted the attorney's interest in the litigation as not being a vested one. For example, in *Succession of Vlaho*[25] the provisions of Louisiana Revised Statutes 37:218 were construed strictly and the court expressed that "the attorney has no vested interest in the client's suit or claim and obtains no vested interest therein even where the contract in express terms grants such an interest to him."[26]

While the exact nature of this interest that the attorney enjoyed under Louisiana Revised Statutes 37:218 was never agreed upon completely, the courts required more than the mere filing of the contract to allow the attorney to avail himself of the statute's provisions. In *Guilbeau v. Fireman's Fund Insurance Co.*[27] the attorney's only work done in a tort case was the filing of the suit one day before prescription ran and the execution of a contingency fee contract in compliance with Louisiana Revised Statutes 37:218. Concluding that the "statute envisions an *earned fee*," the court refused to allow the attorney to use the provisions of section 37:218 and determined that *quantum meruit* would be the proper standard for fixing the amount of compensation due the attorney.[28]

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21. Singleton v. Bunge Corp., 364 So. 2d 1321 (La. App. 4th Cir. 1978); Guilbeau v. Fireman's Fund Ins. Co., 293 So. 2d 216 (La. App. 3d Cir. 1974); Dickerson v. Scholvin, 261 So. 2d 110 (La. App. 4th Cir. 1972).

22. LA. R.S. 37:218 (1950 & Supp. 1975).

23. Succession of Jones, 193 La. 360, 190 So. 581 (1939); United Gas Pub. Serv. Co. v. Christian, 186 La. 689, 173 So. 174 (1937); Succession of Carbajal, 139 La. 481, 71 So. 775 (1916); Succession of Vlaho, 140 So. 2d 226 (La. App. 4th Cir. 1962).

24. *See* authorities cited in note 23, *supra.*

25. 140 So. 2d 226 (La. App. 4th Cir. 1962).

26. *Id.* at 231.

27. 293 So. 2d 216 (La. App. 3d Cir. 1974).

28. *Id.* at 218. The court's interpretation of the statute envisioning an earned fee

The client's control of the lawsuit was weakened further by the judiciary's acceptance of the provision in section 218 which allows the attorney and client to stipulate that neither party may settle, compromise, or otherwise dispose of the suit without the other's permission. If the client settled or compromised the suit without the permission of the attorney, the agreement would "be null and void."[29] In an early interpretation of this provision, the supreme court held "that the only method which the statute . . . provides, whereby the plaintiff in a suit can be prevented from exercising the right . . . of compromising and discontinuing the [suit] is the insertion in the written contract of employment, between him and his attorney, of a stipulation to that effect. . . ."[30]

However, the fourth circuit, when faced with the question whether such a stipulation could be "construed as limiting the client's right not to prosecute an appeal," refused to adopt such a construction.[31] The panel analyzed the jurisprudence concerning the statute and found that "the only effect which a contingent fee contract entered into in compliance with . . . [Louisiana Revised Statutes] 37:218 has is to limit to such extent as may be stipulated therein the client's otherwise ever-existing right to settle or otherwise dispose of his suit or claim at will."[32]

Some early cases hold that when a "no compromise without consent" stipulation is included in a section 37:218 contingency fee contract, the client is prohibited from trying to prevent the attorney from completing the case.[33] If the client interfered with the attorney in such a way as to prevent settlement of the suit, the client would be liable to the extent of the contract. To arrive at this result, courts often applied Civil Code article 2040 which provides that, "the condition is considered fulfilled, when the fullfillment of it has

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is consistent with the supreme court's rationale in *Saucier*, *Calk*, and *Scott*. See note 74, *infra*, and accompanying text.

29. LA. R.S. 37:218 (1950 & Supp. 1975).

30. Succession of Carbajal, 139 La. at 484, 71 So. at 775. The court further held that the stipulation would "not necessarily be binding on the defendant, unless the contract with the stipulation in it is served upon him as required by the statute." *Id.* In 1975 the statute was amended and the requirement of service upon the defendant was removed. However, the provision requiring the filing of the contract with the clerk of court where the action was pending or was to take place or at the domicile of the client was retained. LA. R.S. 37:218 (1950 & Supp. 1975).

31. Succession of Vlaho, 140 So. 2d at 231.

32. *Id.*

33. United Gas Pub. Serv. Co. v. Christian, 186 La. 689, 173 So. 174 (1937); D'Avricourt v. Seeger, 169 La. 620, 125 So. 735 (1929).

been prevented by the party bound to perform it." Therefore, the client was liable if the attorney was prevented from completing the condition (settlement of the case) for which his contingency fee contract was based.[34]

Thus, at least until recent times, Louisiana courts tended to allow attorneys an interest in the subject matter of a client's litigation if a section 37:218 contingency fee contract had been executed. The contracts would be enforced if the statutory requirements were met and if the attorney actually performed *some* legal work in the client's behalf.

Recent Regulation of Attorney's Fees

The "Earned Fee"

Saucier v. Hayes Dairy Products[35] was the first case in a trilogy of recent decisons marking a departure from previous judicial interpretations of the attorney-client relationship. The client in *Saucier* was injured in an automobile accident. He hired an attorney and signed a 33⅓ percent contingency fee contract in accordance with Louisiana Revised Statutes 37:218. Three years after the suit was filed (and approximately four years after the accident) Saucier dismissed the first attorney. Saucier hired another lawyer with whom he also signed an identical 33⅓ percent contingency fee contract. This second attorney was able to settle the suit quickly and obtain a $75,000 award. The first attorney then sought a full one-third of the award. The trial judge instead, on the basis of *quantum meruit*, awarded this attorney only $3,000 plus medical expenses which the attorney had incurred upon his client's behalf. The fourth circuit modified the trial court's judgment and awarded the first attorney one-third of the judgment, as the original contract had provided.[36] On original hearing, the Louisiana Supreme Court affirmed this decision.[37] After the first hearing before the supreme court, the $75,000 judgment was to be divided as follows: $25,000 to the first attorney, $25,000 to the second attorney, and the remaining $25,000 to the client. However, on rehearing, the supreme court reversed, four to three.[38]

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34. *See* cases cited in note 33, *supra*.

35. 373 So. 2d 102 (La. 1979).

36. Saucier v. Hayes Dairy Prods., Inc., 353 So. 2d 732 (La. App. 4th Cir. 1977).

37. Saucier v. Hayes Dairy Prods., Inc., 373 So. 2d 102 (La. 1979).

38. Justice Calogero, writing for the majority on rehearing, noted the rehearing was "prompted chiefly by the change in composition of this Court's membership. . . ." *Id.* at 114.

On rehearing, the court held that Louisiana Revised Statutes 37:218 could not be construed to allow an attorney a vested interest in the subject matter of the client's litigation.[39] Notably, the court based this decision specifically on the Code of Professional Responsibility.[40] Justice Calogero, writing for the majority, quoted from

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39. *Id.* at 115.

40. The majority relied specifically on the following provisions of the Code:

DR 5-103 Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty, and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

DR 2-110 Withdrawal from Employment.

(A) In general

. . . .

(3) A lawyer who withdraws from employment should refund promptly any part of a fee paid in advance that he has not earned.

(B) Mandatory withdrawal.

A lawyer representing a client . . . shall withdraw from employment, if:

. . . .

(4) He is discharged by his client.

The comment to Rule 1.5 of the 1981 FINAL DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT provides:

[R]elevant factors in determining the reasonableness of a fee include the novelty and difficulty of the matter; the skill, standing and experience of the lawyer; the time involved; the urgency of the matter; the degree of contingency; the effect in preempting the lawyer's opportunity to represent other clients; the fact that the relationship is a continuing one; the amount involved and the results obtained; the client's ability to pay; and the normal range of rates for legal services of similar kind.

Justice Dennis' dissent on the original hearing:

> Under our *rules* an attorney may contract with a client to provide legal services for a fee contingent and calculated upon the amount recovered or preserved, so long as the contract does not restrict the client's right with or without cause to discharge the attorney, or grant as a fee to the attorney without requirement of commensurate services an immutable proprietary percentage of the client's claim, or result in an attorney collecting a "clearly excessive" fee which has not been "earned" as defined by the *rules*.[41]

The interest conveyed by the statute was interpreted as merely a "*privilege* granted to aid the attorney's collection of a fully earned fee. . . ."[42]

Reasoning that the Disciplinary Rules permit only an "earned fee," the court "conclude[d] that only one contingency fee should be paid by the client, the amount of the fee to be determined according to the highest ethical contingency percentage to which the client contractually agreed in any of the contingency fee contracts he executed."[43] The fee apportionment was to be figured "on the basis of the factors which are set forth in the Code of Professional Responsibility . . ."[44] and *not* on the basis of *quantum meruit*.[45]

The Attorney's "Privilege"

Statutory contingency fee contracts were examined further in *Calk v. Highland Construction & Manufacturing*.[46] In *Calk*, the supreme court, applying *Saucier*, held that "R.S. 37:218 gives the attorney who has a written contract affording him an 'interest' in the claim, *a privilege to the extent of his earned fee on any recovery obtained by the settlement*."[47]

The *Calk* court also had to decide whether this privilege primed the rights of a seizing creditor. In *Calk* the contingency fee contract was not recorded. Tracing the legislative history of Louisiana Re-

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41. 373 So. 2d at 117 (emphasis added).
42. *Id.* (emphasis added).
43. *Id.* at 118.
44. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 6, at DR 2-106(B).
45. 373 So. 2d at 118. The case was remanded to the trial court for determination of the allocation of the fee. The court further held that the second attorney must be joined as an indispensable party. *Id.* at 119.
46. 376 So. 2d 495 (La. 1979).
47. *Id.* at 499 (emphasis added).

vised Statutes 37:218, the court held that the statute "was intended to give attorneys comparable rights as are given in R.S. 9:5001."[48] Section 5001 provides attorneys a special privilege on judgments they secure. This privilege is effective even if unrecorded. The court in *Calk* held that Louisiana Revised Statutes 37:218 applied only to settlements and not judgments.[49] Considering their common origin, the majority concluded that both provisions were intended to assist attorneys in collecting their fees and, by analogy, held that a contingency fee agreement made pursuant to Louisiana Revised Statutes 37:218 "does not have to be recorded to be effective."[50] To protect himself, the attorney must assert "his claim by intervention or other legal proceedings prior to disbursement of the proceeds to a third party."[51]

The Right to Settle

The final case in the trilogy, *Scott v. Kemper Insurance Co.*,[52] arose when a discharged attorney sought to have his client's settlement declared null because he and the client had signed a contingency fee contract with a "no settlement without consent"[53] stipulation—a stipulation allowed by the last sentence of Louisiana Revised Statutes 37:218.[54]

The court relied on both *Saucier* and *Calk* and held that the last sentence of the statutes could not be applied literally. The majority cited Disciplinary Rule (DR) 2-110(B) of the Code which "recognized the client's absolute right to discharge his attorneys."[55] While acknowledging that a lawyer may contract with a client for a contingency fee, the majority also acknowledged that the Code "specifically prohibits . . . an attorney's acquiring a proprietary interest in the client's cause of action. . . ."[56] The court again noted

48. *Id.* LA. R.S. 9:5001 (1950) provides: "A special privilege is hereby granted to attorneys at law for the amount of their professional fees on all judgments obtained by them, and on the property recovered thereby, either as plaintiff or defendant, to take rank as a first privilege thereon."

49. *Id.*

50. *Id.* "In 1950 when [the] statutes were revised, Act 124 of 1906 was split into two separate statutes, R.S. 9:5001, containing the first paragraph . . . and R.S. 37:218, containing the second paragraph. With only some minor amendments, this is the state of the law today." *Id.*

51. *Id.*

52. 377 So. 2d 66 (La. 1979).

53. *Id.* at 67.

54. See text accompanying note 18, *supra*.

55. 377 So. 2d at 69.

56. *Id.* at 70.

that the legislative intent in passing Louisiana Revised Statutes 37:218 was to prevent the discharged attorney from being deprived of his fee. Thus, while the last sentence could not be applied literally, the court held that if an

> attorney with a written contingency fee contract bearing the no consent stipulation "file[s] and records it with the clerk of court in the parish in which the suit is pending," then a defendant who disburses the settlement proceeds without ascertaining and paying the fee to which the attorney is due, will do so to his prejudice.[57]

The supreme court, distinguishing *Scott* from *Calk*, further held that the provisions of Louisiana Revised Statutes 37:218 must be complied with fully by the attorney. "Unlike . . . *Calk*, where recordation . . . of the contract is irrelevant in a contest between an attorney and the client's creditor, imposition of an obligation upon the client's obligor in its suit to retain settlement funds until determination of fee entitlement is dependent upon the attorney's full compliance with R.S. 37:218. . . ."[58]

The Future

These three cases have transformed completely the meaning of Louisiana Revised Statutes 37:218 from a statute that allows attorneys to obtain a vested interest in a client's litigation to one that affords the attorney merely a privilege to any settlement his client might obtain.[59] To interpret the statute in this manner, the court fully exerted its plenary power to control the conduct of the state bar and to regulate the profession in general.[60] However, these decisions resulted in several unanswered questions relating to attorney-client relations.

The Single Contingency Fee

In *Saucier*, and again in *Scott*, the court held that "only one contingency fee should be paid by the client, the amount of the fee to be determined according to the highest ethical contingency percentage to which the client contractually agreed. . . ."[61] This approach, said the court, would "discourage professional disputes[,] . . . en-

57. *Id.*
58. *Id.*
59. Saucier v. Hayes Dairy Prods., Inc., 373 So. 2d at 118.
60. See discussion at notes 2-5, *supra*, and accompanying text.
61. 373 So. 2d at 118.

courage out of court settlements . . . [and] assure fair treatment of the client. . . ."[62]

However, such a result may be problematical. First, two attorneys both may do a substantial amount of work on a case and a single contingency fee simply would be inadequate to compensate them both. Contingency fee contracts are said to allow greater access to the judicial system by those who normally would be unable to hire legal representation because such agreements provide a *res* for the payment of the attorney's services.[63] But, by limiting the possible fee to only the highest ethically agreed upon contigency fee, some attorneys might be hesitant to take a case in which the client has previously discharged an attorney. If not hesitant, the second attorney still might demand a higher than normal, but still ethical, contingency fee. A second problem is raised when a client retains over a period of time three separate attorneys and the highest fee contracted is for one-third of the settlement. The attorneys' compensation could be minimal while the expenses could amount to more than the allowable attorney's fees. Also, the court will have to decide which was the highest ethically agreed upon contingency fee contract.[64]

In addition, the court construed contingency fee contracts as conditioning payment "upon performance of all or substantially all legal services necessary to accomplish settlement or other disposition [of] the claim. . . ."[65] Thus, an attorney who has completed

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62. *Id.*

63. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 6, at EC 2-20 provides:

> [C]ontingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid.

EC 5-7 states:

> The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. . . . Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a laymen can obtain the services of a lawyer of his choice. . . .

64. "The question of the value of legal services rendered by an attorney is one that comes within the expertise of the trial judge." Lynch v. Burglas, 286 So. 2d 170, 172 (La. App. 4th Cir. 1973).

65. 373 So. 2d at 117.

"substantially all" of the work required in a case and is deserving of the full contingency fee might be forced to share part of his compensation with a second attorney whose work the first attorney had to duplicate partially. If the supreme court continues to insist that the client pay only one contingency fee, an exception should be made for those attorneys who are discharged after completing "substantially all" of the work required.

The Reasonableness of the Fee

The supreme court relied strongly on the factors in the Code for determining the reasonableness of a contingency fee. "Resort to the Code . . . also will have in the future a salutary effect of assuring that unethical conduct, such as solicitation on the part of one attorney of another's client, will not be countenanced or rewarded."[66] This approach is consistent with the adoption of the Code as "rules of the court."[67] The rationale departs, however, from the previous Louisiana practice[68] and common law rule[69] of determining the value of attorneys' services on the basis of *quantum meruit*.

Subsequent to *Saucier*, *Calk*, and *Scott*, in *Simon v. Metoyer*[70] a discharged attorney who had been hired on a *flat fee* basis sued his client for his fee. The court held that *quantum meruit* was the proper basis for determination of the value of the attorney's services. The court distinguished *Saucier* as being a departure from a long line of cases establishing *quantum meruit* as the general rule. "The instant case is distinguished from *Saucier* in that it does not involve a contingent fee contract or special legislation aimed at protecting the attorney's rights under such a contract."[71] This conclusion was not the result of adherence to the Code's guidelines for the determination of the value of attorneys' fees, which considers as a factor whether "the fee is *fixed or contingent*."[72] The factors in the Code should therefore be sufficient to allow a determination of the fair value of an attorney's services, even in a flat fee contract. Arguably, these factors should be used especially in light of the court's reliance on the Code to regulate the profession and because they are

66. *Id.* at 118.

67. See note 4, *supra*.

68. Tennant v. Russell, 214 La. 1046, 39 So. 2d 726 (1949); Succession of Carbajal, 139 La. 481, 71 So. 774 (1916).

69. Monsanto Chem. Co. v. Grandbush, 162 F. Supp. 797 (W.D. Ark. 1958).

70. 383 So. 2d 1321 (La. App. 3d Cir. 1980).

71. *Id.* at 1324.

72. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 6, at DR 2-106(B)(8) (emphasis added).

specifically tailored to the needs of the legal profession. Furthermore, while numerous Louisiana cases have been decided on the basis of *quantum meruit*, the concept is a common law device and its appropriateness in a civil law system is debatable.[73]

The Earned Fee Concept

The supreme court's decisions reflect an awareness of the need to preserve the integrity of the legal profession, especially in matters concerning the attorney-client relationship.[74] Of particular importance is the court's adoption of the requirement of an "earned fee"[75] before an attorney may demand compensation ethically. This result can have a valuable impact on the integrity of the profession if the judiciary will continue to require performance by the attorney before a fee may be collected.

For illustration, the "earned fee" rationale can benefit the public and the profession in preventing unethical referral fees. Disciplinary Rule 2-107 clearly prohibits the payment of referral fees from one attorney to another who is not his partner unless three conditions are met.[76] First, the client must consent, after full disclosure, that a division of fees will be made; second, the division must be in proportion to the services performed and the responsibility assumed; and third, the total fee must not be clearly excessive. Attorneys who accept divided fees from other attorneys violate the Code if the fee is for the mere referral of a client and the attorney has actually performed no work. The practice of sending "finder's fees" is condemned by the Code but is a practice of many attorneys.[77] Nevertheless, ethically, an attorney cannot accept such a fee unless it truly represents an "earned fee" and reflects the proportion of the services performed and authority assumed.

Another way in which the "earned fee" approach could prove beneficial is when an attorney named in a will to represent the estate does no work. The Louisiana jurisprudence indicates that an

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73. *See* Nicholas, *Unjust Enrichment in Civil Law and Louisiana Law*, 37 TUL. L. REV. 49 (1962).

74. *See* 373 So. 2d at 108 (Dennis, J., dissenting).

75. *Id.* at 117.

76. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 6, at DR 2-107. The proposed Model Rules of Professional Responsibility would allow the payment of referral fees if the client consents and all attorneys assume responsibility for the representation. *See* FINAL DRAFT OF THE MODEL RULES OF PROFESSIONAL RESPONSIBILITY, Rule 1.5(d) (1981).

77. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 6, at EC 2-22. *See also* Annot., 6 A.L.R.3d 1446 (1966).

attorney named in a will to handle a succession has an irrevocable interest and cannot be dismissed by the heirs if he wants to perform the work.[78] The first circuit noted in one case that "we wish to make it clearly understood that the agency thusly established is irrevocable in the sense that it may not be cancelled or terminated by the executor or heirs of the testator without the consent of the attorney."[79] Under recognized law in Louisiana "a testator may impose such conditions on his gratuities as he sees fit."[80] Possibly the courts in the future will find this interpretation of the laws of descent and distribution[81] to be in opposition to its rules contained in the Code of Professional Responsibility. If the courts continue to allow such stipulations, an attorney could not ethically accept any compensation from the estate if he does not handle the succession. In light of the "earned fee" rationale of *Saucier*, such an acceptance of compensation would contravene the Code. While a testator may name the attorney in his will, the designation is not the bestowal of a gift but rather the privilege to handle his succession. Any compensation paid such a designated attorney to secure his release is clearly not an "earned fee" and therefore under *Saucier* would be prohibited.

Conclusion

The primary reliance on the Code of Professional Responsibility for the regulation of the attorney-client relationship denotes the supreme court's desire to maintain judicial control over the legal profession and not to be constrained by legislative directives. This approach is correct under the provisions of the Louisiana Constitution as a proper assertion of the court's plenary power. The legal profession is essentially a self-regulated one and the Code of Professional Responsibility evidences the bar association's attempt to provide such regulation. The decisions in *Saucier*, *Calk*, and *Scott* should strengthen the judiciary's (and the profession's) control over individual members of the bar and therefore represent a positive step in the area of attorney-client relations.

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78. Rivets v. Battistella, 167 La. 766, 120 So. 289 (1929); Roberts v. Cristina, 323 So. 2d 888 (La. App. 4th Cir. 1975); Succession of Zatarain, 138 So. 2d 244 (La. App. 1st Cir. 1962); Schiro v. Macaluso, 126 So. 244 (La. App. Orl. Cir. 1930).

79. Succession of Zatarain, 138 So. 2d at 169.

80. Rivets v. Battistella, 167 La. at 770, 120 So. at 290.

81. LA. CIV. CODE art. 1527.