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PROFESSIONAL RESPONSIBILITY

*Warren L. Mengis**

The Application of Legal Ethics

"Legal ethics" is defined as:

> Usages and customs among members of the legal profession, involving their moral and professional duties toward one another, toward clients, and toward the courts. That branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethren and to his client.[1]

It is usually referred to as a branch of moral science, but it has very little of the exactness of a science. In the 1955 case of *United States v. Standard Oil Co.*,[2] then District Judge Irving R. Kaufman said:

> When dealing with ethical principles, it is apparent that we cannot paint with broad strokes. The lines are fine and must be so marked. Guide-posts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and precise application of precedent.

In a recent dissent from the refusal by the Louisiana Supreme Court to grant relief to a lawyer appealing a private reprimand, Chief Justice Dixon stated: "Sports rules are interpreted literally. Rules of law and ethical conduct are not. A highly developed sense of discrimination is required. Literal interpretation of the Canons of Ethics can lead to the same irrational conclusions as literal interpretation of scripture."[3] When Judge Kaufman made the above statements, the 1908 ABA Canons of Ethics were in effect. Those Canons were broad sweeping statements which gave very little specific guidance. However, Chief Justice Dixon's remarks were made at a time when the Code of Professional Responsibility was in effect in Louisiana. As the reader knows, the Code of Professional Responsibility is broken down into three parts: the Canons

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1. Black's Law Dictionary 804 (5th ed. 1979).
2. 136 F. Supp. 345, 367 (S.D.N.Y. 1955).
3. In re LSBA committee file number 6784, 483 So. 2d 1008 (La. 1986).

which are short axiomatic norms, the ethical considerations which are aspirational in character and the disciplinary rules which are mandatory. Dissatisfaction with the Model Code of Professional Responsibility has brought about the promulgation by the ABA of the Model Rules of Professional Conduct adopted by the American Bar Association on August 2, 1983. As of this date, Louisiana has not adopted the ABA model rules, but proposed model rules of professional conduct which are quite similar to the ABA rules were adopted by the Louisiana State Bar Association (LSBA) House of Delegates and Board of Governors on November 23, 1985 and submitted to the Louisiana Supreme Court. Subsequently, the court advised the Bar Association that if it would make six changes recommended by the court, the court was prepared to adopt the new LSBA Rules of Professional Conduct. Action by the Bar Association is scheduled for November 22, 1986.

Will adoption by the Louisiana State Bar Association of the Model Rules make the application of legal ethics easier for the practicing lawyer and the courts? The preamble to the Model Rules states that they are rules of reason and should be interpreted with reference to the purposes of legal representation and of the law itself. It is submitted, however, that, regardless of whether the 1908 Canons, the Model Code or the Model Rules are in effect, Judge Kaufman will still be correct in his 1977 statement that "[c]ompliance or noncompliance with Canons of Ethics frequently do not involve morality or venality, but differences of opinions among honest men over the ethical propriety of conduct."[4] Let us look now at some of those honest differences of opinions.

Attorneys' Fees

In 1929 the Louisiana Supreme Court decided *Rivet v. Battistella*[5] which held that those who take under a will and the executor thereof are bound by a designation in that will of an attorney to handle the succession. If such a designation be not binding, said the court, it must be because the designation is contrary to law or good morals or in violation of some well recognized public policy. Why? Because the donor may impose on the donee any charges or conditions he pleases provided that they contain nothing contrary to law or good morals.[6]

The court then went on to find that there was nothing contrary to good morals in designating a particular attorney to handle a succession and no law to forbid it. Although the court did not say so in specific terms, one can certainly gather from the opinion that the court considered

4. Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225, 227 (2d Cir. 1977).

5. 167 La. 766, 120 So. 289 (1929).

6. La. Civ. Code arts. 1519, 1527.

the designation as a gratuity to the attorney. When the widow and heirs declined the services of Mr. Rivet and settled the estate of the deceased with other attorneys, Mr. Rivet filed suit against the widow and heirs to recover the amount of the fees to which he would have been entitled had he carried out the employment. The trial court allowed Mr. Rivet $5000.00 which the supreme court reduced to $3500.00. Subsequent decisions, both in the supreme court and in the courts of appeal, differed only in the characterization of the right of the attorney and did not question the existence of the right itself.[7]

Whether this right of the attorney was an irrevocable mandate, a legacy, a "real interest" or simply a binding condition now makes little or no difference, as the Louisiana Supreme Court in *Succession of Jenkins*[8] has reversed *Rivet* and its progeny, holding that the designation of an attorney for the executor in a last will and testament is merely precatory and not binding upon those who take under the will or on the executor. Only Justice Calogero dissented. The majority held that such an appointment is not binding because it infringes upon the codal authority of the executor; it is not specifically authorized by law; it encourages solicitation and the appearance of impropriety on the part of attorneys; and it is contrary to general civilian principles. In a concurring opinion, Justice Dennis stated that to allow such binding appointments would violate the Code of Professional Responsibility and would tend to embarrass, frustrate and impede the supreme court in its function of regulating the practice of law. The writer agrees with the concurring opinion, seeing it as the only logical step from *Succession of Boyenga*,[9] which held that an attorney who does no work on a succession is not entitled to a fee, but which did not decide the question of whether an attorney had a right to handle a succession.[10]

There is little doubt that some lawyers disagreed with the holding in *Succession of Jenkins*, inasmuch as the Louisiana Legislature passed Act 250 of the Regular Session of 1986, which can only be viewed as a legislative repudiation of that decision. The Act creates Louisiana Revised Statutes (La. R.S.) 9:2448, which provides that the testator may

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7. Succession of Feitel, 187 La. 596, 175 So. 72 (1937); Succession of Rembert, 199 La. 743, 7 So. 2d 40 (1942); Succession of Bush, 223 La. 1008, 67 So. 2d 573 (1953); Succession of Pope, 230 La. 1049, 89 So. 2d 894 (1956); Succession of Falgout, 279 So. 2d 679 (La. 1973); Succession of Zatarain, 138 So. 2d 163 (La. App. 1st Cir. 1962); Roberts v. Christina, 323 So. 2d 888 (La. App. 4th Cir. 1975), cert. denied, 328 So. 2d 109 (La. 1976); Succession of Mangle, 452 So. 2d 197 (La. App. 3d Cir.), cert. denied, 452 So. 2d 1176 (La. 1984).

8. 481 So. 2d 607 (La. 1986).

9. 437 So. 2d 260 (La. 1983).

10. Mengis, Developments in the Law, 1983-1984—Professional Responsibility, 45 La. L. Rev. 523, 534 (1984).

designate in his will an attorney to handle the matters of his estate, to open and close the estate and to represent the executor. In addition, the testator may appoint or designate one or more successor attorneys, which designation shall be valid and binding on the executor or other succession representative and the heirs and legatees. Any designated attorney can only be removed upon just cause. Other provisions of the Act provide that the attorney so named shall be entitled to reasonable compensation, either as provided in the testament or as agreed upon between the attorney and the succession representative or competent heirs.

The majority opinion in *Jenkins* makes it plain that the court considers the attorney/client relationship to exist not between the testator and the attorney named in the will, but between the executor and/or those who take under the will and the attorney who is named therein. This being so under both the Code of Professional Responsibility[11] and the Model Rules,[12] the attorney must withdraw if the representation is terminated by the client. Under both the Code and the Rules,[13] an attorney's fee must be reasonable. Another facet which must be considered relates to the legacy or gratuity theory of the *Rivet* progeny. If the attorney who is named in the will is also the notary public before whom it is executed, then the will is arguably null and void pursuant to the holdings in *Succession of Purkert*[14] and *Succession of Rome.*[15] If the will is executed after the passage of Act 709 of the 1986 Regular Session, then perhaps only the legacy to the notary would be null and void instead of the entire will. Act 709 amends and reenacts article 1592 of the Civil Code to legislatively overrule *Evans v. Evans*,[16] wherein the supreme court held a will totally null and void because a witness was also a legatee.

We should now confront the honest difference of opinion which the above cases and legislative acts evidence. Obviously, many lawyers feel that it is not unethical to bind the executor and those taking under the will by virtue of a testator's designation of an attorney. We are assuming that the designation did not violate ethical consideration 5-6, which provides that a lawyer should not consciously influence a client to name him as lawyer in an instrument, but that the suggestion came from the testator who had confidence in the integrity and competence

11. La. R.S. 37, ch. 4, art. 16, DR 2—110(B) (1974).

12. Model Rules of Professional Conduct Rule 1.16 (a)(3) (Disscussion Draft 1980).

13. La. R.S. 37, ch. 4, art. 16, DR 2-106 (1974) and Model Rules of Professional Conduct Rule 1.5 (Discussion Draft 1980).

14. 184 La. 792, 167 So. 444 (1936).

15. 478 So. 2d 1270 (La. App. 5th Cir. 1985), cert. denied, 480 So. 2d 745 (La. 1986).

16. 410 So. 2d 729 (La. 1982).

of his own attorney. If only the majority opinion of *Jenkins* is considered, the ethical lawyer should have no problem in permitting the designation of himself as attorney for the executor, because that which is specifically permitted by legislative act could not be construed as encouraging solicitation and the appearance of impropriety, and certainly the legislature may limit the authority of an executor and vary general civilian principles. On the other hand, if we consider the concurring opinion in *Jenkins*, the ethical lawyer has many problems. He would, along with the writer, anticipate that the Supreme Court of Louisiana will declare Act 250 of the 1986 legislature unconstitutional as invading the province of the court. Even if that act is not declared unconstitutional, he could hardly afford to bring suit to force the executor and heirs to use him in view of the specific provisions of the Code of Professional Responsibility and the Model Rules of Professional Conduct. Is there anyone so finely tuned with the rules of ethics that he can immediately determine which side of this controversy is the more moral or the more ethical?

Another area where honest lawyers differ is the practice of compelling attorneys to represent indigent defendants without receiving any compensation. Ethical consideration 2-25 imposes the basic responsibility for providing legal services for those unable to pay ultimately upon the individual lawyer, and states that personal involvement in the problems of the disadvantaged "can be one of the most rewarding experiences in the life of a lawyer." This is the view taken by Justice Blanche dissenting in *State in the Interest of Johnson*,[17] wherein the majority affirmed an order of the family court for the Parish of East Baton Rouge requiring the Department of Health and Human Resources to pay an attorney fee to the attorney who was appointed to represent an indigent parent. For an opinion contrary to that of Justice Blanche, see "Slave Labor in the Courts,"[18] and the ancient case of *Webb v. Baird*[19] wherein the court said:

> [T]he public can no longer justly demand of that class of citizens (the legal profession) any gratuitous services which would not be demandable of every other class. To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic.

Many attorneys feel, as does the writer, that if indigents are to be provided free, effective counsel in almost all criminal cases and in many

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17. 475 So. 2d 340, 344 (La. 1986).
18. Hunter, Slave Labor in the Courts, Case & Com., July-Aug. 1986, at 3-12.
19. 6 Ind. 13, 17 (1854).

cases involving the parent/child relationship, and most lawyers would concede that they should have such representation, society in general should provide it and not the individual lawyer at his own expense. May the ethical lawyer refuse to serve if no compensation is available? Justice Blanche in his dissent in *Johnson* stated that the attorney accepts this obligation in exchange for the privilege to practice law in this state.

Another case involving attorneys' fees is *Graham v. Sequoya Corp.*,[20] where the question presented was whether the legislative amendment to article 1935 of the Civil Code should be applied retroactively. The first circuit had held that the legislative act[21] was curative and therefore was to be applied retroactively. The majority of the supreme court reversed, holding that the Act did not clarify procedure or provide any new remedy for enforcement of the obligation, and therefore it did not deserve retroactive application. Justice Blanche dissented stating, "[T]he definition of curative legislation fits this amendment 'like a glove.'"[22] The problem is still open because the legislature responded to *Graham* by amending article 2000 (the successor to article 1935 after the obligations revision) to add the following sentence: "If the parties, by written contract, have expressly agreed that the obligor shall also be liable for the obligee's attorneys' fees in a fixed or determinable amount, the obligee is entitled to that amount as well." So that there would be no misunderstanding, the legislature added a second paragraph providing that the provisions of this Act are "remedial and shall be applied retrospectively and prospectively to any delay of performance of an obligation which has as its object a sum of money, arising prior to, on, or after the effective date of this Act."

It will be interesting to see what will be the end result of this collision between the legislative and judicial bodies. Realistically, we can expect the courts to continue to grant relief when they feel that the fee charged by the attorney is unreasonably high.

Assistance of Counsel

An interesting case out of the second circuit is *State v. Beverly*,[23] which features some rather strong language by the trial judge, Robert T. Farr, which was adopted by the court of appeal. Every lawyer who is appointed to represent an indigent in a criminal case usually finds himself on the horns of a dilemma. If he handles the case as he thinks he should, both ethically and professionally, he will probably find himself defending his competency on a writ of habeas corpus hearing. On the

20. 478 So. 2d 1223 (La. 1985).
21. 1984 La. Acts No. 483.
22. *Graham*, 478 So. 2d at 1226.
23. 483 So. 2d 1027 (La. App. 2d Cir.), cert. granted, 485 So. 2d 55 (La. 1986).

other hand, if he follows the teaching of *Anders v. California*,[24] he will file every motion and objection which he can think of and appeal all convictions regardless of whether in his opinion the appeal has any merit. As Judge Farr points out, countless thousands of man hours in court time are wasted on frivolous motions and objections; and countless millions of tax dollars are spent dealing with such matters—all without any cost or consequences to the accused himself.

Here again there is little doubt that honest men may come to different conclusions concerning their ethical duties. Some may conclude, as does Judge Farr, that it is not the attorney's duty to permit his client to dictate his activity and procedure, irrespective of ethics or law. In contrast, others may conclude that it is clearly their duty under Canon 7 to "try the system" and to use every court-made rule to secure a reversal of a conviction.

Counsel for the indigent defendant should also be aware that although he is not required to take an appeal which he considers frivolous (though he is certainly inviting a post-conviction writ of habeas corpus as to his effectiveness), once he takes the appeal he cannot thereafter withdraw on the grounds that he believes it frivolous. This is because: "Louisiana's limitation of appellate courts to patent error review precludes allowing counsel to withdraw on filing a no merit brief. Substantial equality and fair process can only be obtained by counsel remaining of record."[25] A good discussion of what it takes to prove ineffective assistance of counsel is found in *State v. Hartman*[26] and *State v. Buttner.*[27]

Malpractice

All but one of the twelve malpractice cases which were published during the past year involve the question of prescription. By far the most important of these decisions is *Rayne State Bank and Trust Co. v. National Union Fire Insurance Co.*,[28] decided by the Louisiana Supreme Court. Although the court did not formulate any new tort principles, it did remind us that in Louisiana, "prescription does not begin to run until damage is sustained."[29] The mere fact that the client discovers or should have discovered a wrongful act does not commence the running of prescription, because two things are required to commence the running of prescription: a wrongful act and resultant damages. Accordingly, although one of the attorneys involved was successful in

24. 386 U.S. 738, 87 S. Ct. 1396, (1967).
25. State v. May, 482 So. 2d 759 (La. App. 1st Cir. 1985).
26. 479 So. 2d 948 (La. App. 3d Cir. 1985).
27. 489 So. 2d 970 (La. App. 4th Cir. 1986).
28. 483 So. 2d 987 (La. 1986).
29. Id. at 995.

his plea of one year prescription, the second attorney was not. The determination that "damage was sustained" was not a determination on the merits, but arose when the validity of certain mortgages in question was attacked. Conceivably, said the court, even though the mortgages might have been defective, if the mortgage debtors continued to pay the obligation, no damage would ever have been incurred by the plaintiff-bank. In the other cases involving prescription,[30] the courts found no contractual guarantee of results and applied the one year prescriptive period. In *McNary v. Sidak*,[31] faced with the alleged malpractice of a court-appointed attorney, the court concluded that, although an attorney appointed to represent a nonresident or an absentee has the same general duty, responsibility and authority as if he had been counsel retained by the client himself, where the relationship is not based on mutual consent but merely upon an order of court, there can be no contractual relationship, and consequently the attorney's negligence can only give rise to an action in tort which prescribes in one year. In *Riddick & Miller Investment Co. v. Denicola*,[32] the first circuit followed *Rayne State Bank* and reversed the trial court's decision that prescription of one year had accrued, because although the alleged negligent preparation of an act of sale had taken place in 1971, no damage was sustained or even discovered until a temporary restraining order was filed against the purchaser.

In a case not involving prescription, the fourth circuit held that the petition stated a cause of action when it alleged that the attorney negligently failed to record a counter letter in connection with a simulated sale of property, and the property was foreclosed on while in the hands of the apparent vendee.[33]

One cause of action which was found to have prescribed will surely give pause to succession lawyers.[34] Plaintiffs alleged that the attorney was negligent because he failed to investigate donations made by the decedent to children of his first marriage, causing the children of the decedent's second marriage to lose their right to demand collation.

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30. Bellamy v. Janssen, 477 So. 2d 928 (La. App. 4th Cir. 1985), cert. denied, 484 So. 2d 667 (La. 1986); Albares v. Exnicios, 480 So. 2d 473, (La. App. 5th Cir. 1985); Shushan, Meyer, Jackson, McPherson & Herzog v. Machella, 483 So. 2d 1156 (La. App. 5th Cir. 1986); Varnado v. Insurance Corp. of America, 484 So. 2d 813 (La. App. 1st Cir. 1986); Svebek v. Melichar, 486 So. 2d 302 (La. App. 3d Cir. 1986); American Title Ins. Co. v. Seago, 486 So. 2d 938 (La. App. 1st Cir. 1986); Ragsdale v. Sanders, 488 So. 2d 250 (La. App. 3d Cir. 1986); and Gifford v. New England Reinsurance Corp., 488 So. 2d 736 (La. App. 2d Cir. 1986).

31. 478 So. 2d 712 (La. App. 3d Cir. 1985).

32. 486 So. 2d 186 (La. App. 1st Cir. 1986).

33. Richards v. New England Ins. Co., 488 So. 2d 1247 (La. App. 4th Cir. 1986).

34. *Svebek*, 486 So. 2d 302.

Although collation is made only to the succession of the donor,[35] it can be demanded only by a co-forced heir and not by the executor, a creditor or other type of heir. It seems doubtful, at least to the writer, that the succession lawyer has any duty to explore the lifetime donations of the decedent unless there is a reduction problem involved. As the particular matter was decided on the exception of prescription, the court never reached the question of the lawyer's duty.

Conflict of Interests

Canons 4, 5 and 9 are usually involved when there is a conflict of the client's interest with (1) the self-interest of the lawyer, (2) the interest of another client, or (3) the interest of a former client. The lawyer's self-interest may be a proprietary interest in the case or the subject matter, or his interest as a potential witness. Other areas where conflicts may arise are influence over the attorney by those other than his client and where both husband and wife are attorneys.

Lupo v. Lupo[36] illustrates the self-interest (proprietary) of an attorney conflicting with an interest of his own client. Mr. Lupo had been Mr. Guzzardo's attorney for more than forty years when Mr. Lupo asked Mr. Guzzardo to sign a bond for him in his domestic litigation with his wife. According to the decision, Mr. Lupo assured his client that there would be no responsibility or liability resulting from the signing of bonds totaling $121,300. The court found that the bond was null because it had been induced by fraud. The importance of the case from our standpoint is the court's emphasis that "[i]n no other agency relationship is a greater duty of trust imposed than in that involving an attorney's duty to his client or former client."[37] Ethical consideration 5-1 provides that the professional judgment of a lawyer should be exercised within the bounds of the law solely for the benefit of his client and free of compromising influences and loyalties.

The only other conflicts case found within the past year is *Divincenti v. Redondo*[38] which involved a lawyer as a witness. The trial court had apparently held that the Canons of Professional Responsibility are not the law, but are purely guidelines. The court of appeal avoided that problem by finding that the attorney had not been called to testify on behalf of his client, but on behalf of an adverse party, and that his testimony did not prejudice his client. Accordingly, there was no violation of DR 5-102 of the Louisiana Code of Professional Responsibility.

35. La. Civ. Code art. 1242.
36. 475 So. 2d 402 (La. App. 1st Cir. 1985).
37. Id. at 405.
38. 486 So. 2d 959 (La. App. 1st Cir. 1986).

Discipline

Whether prompted by poor economic times, simple dishonesty, or negligence, the disciplinary cases involving attorneys who convert their clients' funds to their own personal use continue to increase. Three disbarments during the prior year all involved some form of commingling and conversion of the client's funds.[39] In addition there were two disbarments by consent.[40]

Varying suspensions were meted out in the other disciplinary cases heard by the supreme court.[41] *Bosworth* involved a matter which was touched upon in last year's symposium,[42] that is, whether a lawyer can ever borrow money from a client without thereby compromising his professional judgment in future representation. Specifically, the court considered disciplinary rule 5-104 (A), which provides that a lawyer shall not enter into a business transaction with a client if they have differing interests and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure. In *Bosworth* the attorney had borrowed $50,000 from his client at a time when a 1.1 million dollar settlement was being made. It was conceded that a contract of loan was a business transaction and that the interests of the creditor and the debtor are inherently adverse. In addition, the testimony of the client indicated that she expected the attorney to protect her interest in the matter of the $50,000 loan. The resolution of the propriety of the attorney's action, then, turned on whether he had made full disclosure to her prior to the transaction.[43] The court said that, at the very least, in matters of this sort the attorney should advise the client to seek outside counsel who would probably have advised her either not to make the loan or to make sure she had adequate security. Having found a clear violation of Canon 5, the supreme court ordered a suspension from the practice of law until six months after proof was furnished that restitution of the entire amount of the loan had been made.

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39. LSBA v. Williams, 479 So. 2d 329 (La. 1985); LSBA v. Mitchell, 481 So. 2d 583 (La. 1986) and LSBA v. Krasnoff, 488 So. 2d 1002 (La. 1986).

40. LSBA v. Heymann, 478 So. 2d 134 (La. 1985); LSBA v. Murphy, 474 So. 2d 1295 (La. 1985).

41. LSBA v. Vesich, 476 So. 2d 811 (La. 1985); LSBA v. Meyer, 478 So. 2d 1211 (La. 1985); LSBA v. Bosworth, 481 So. 2d 567 (La. 1986); LSBA v. Robinson, 485 So. 2d 501 (La. 1986); LSBA v. Hinrichs, 475 So. 2d 749 (La. 1985), aff'd on rehearing, 486 So. 2d 116 (La. 1986).

42. Mengis, Developments in the Law 1984-1985—Professional Responsibilty, 46 La. L. Rev. 637, 649 (1986).

43. Even full disclosure might not protect the attorney from civil liability where a fiduciary duty is breached. Goldman v. Cain, 329 N.E. 2d 770 (Mass. App. 1975).

In *Louisiana State Bar Association v. McGovern*,[44] a due process question was presented as well as allegations of negligent handling of matters by the attorney. The commissioner who had been appointed by the court, after taking evidence, recommended the finding of additional violations which had not been alleged by the Bar Association in its petition. The Association later filed a further pleading praying that the supreme court adopt all the commissioner's recommendations. This presented almost the identical question which the Supreme Court of the United States faced in *In re Ruffalo*,[45] where a lawyer had been disbarred based on a charge which was not filed until after he and his witness had testified without notice of the charge. In *Ruffalo*, the United States Supreme Court found that this was a trap for the unwary; in *McGovern*, the Louisiana Supreme Court, in order to protect the respondent from an unconstitutional deprivation of due process, refused to consider the additional charges. Nevertheless, the court further found clear and convincing evidence that McGovern neglected several legal matters which had been entrusted to him and in addition charged a clearly excessive fee. A suspension of one year was ordered, with readmission conditioned on the refund of fees which the court found excessive.

Finally, on rehearing in *Lousiana State Bar Association v. Hinrichs*,[46] the supreme court, through Justice Dennis, expressed concern over inconsistencies among previous sanctions imposed for violations of DR 9-102 (conversion of client's funds), and set forth some general guidelines for evaluation of that kind of disciplinary case. According to Justice Dennis, a disbarment should result where the lawyer acts in bad faith and commits fraudulent acts in connection with his violation, the damage and inconvenience to the client is great and the lawyer either fails to make restitution or does so tardily after extended pressure of disciplinary or legal proceedings. A three year suspension should result where there is no bad faith but a high degree of negligence, no other fraudulent acts, no severe damage to the client and full reimbursement is made without the necessity of disciplinary action. An eighteen month to two year suspension should result where the same factors for three years are present, but there are significant mitigating and extenuating factors. And finally, a one year suspension should result where there is no gross negligence, no other fraudulent acts, no serious damage to the client and full restitution is made without any disciplinary pressures. If these guidelines result in punitive consistency, they are certainly worth the court's effort.

44. 481 So. 2d 574 (La. 1986).
45. 390 U.S. 544, 88 S. Ct. 1222 (1968).
46. 486 So. 2d 116 (La. 1986).

Two other disciplinary matters arose due to convictions of the attorneys for serious crimes.[47] In *Vesich* the attorney was suspended from practice for a period of two years for endeavoring to obstruct justice and committing perjury before a grand jury. In *Meyer* the attorney was suspended for two and a half years for making false statements to a federally insured bank and defrauding the United States in connection with various postal money orders. In each case there were mitigating and extenuating factors, the most important of which seemed to be a past clear record on behalf of both attorneys.

Miscellaneous

There are not many cases on unauthorized practice of law these days, mainly because of the overlapping of various professions such as banking, accounting, real estate sales, insurance and so forth. Nevertheless, the second circuit was presented with a case wherein a non-lawyer entered into a contingent fee arrangement with a young man who was injured in an automobile accident and, pursuant to that contract, adjusted and settled his claim against the insurance company.[48] The matter probably would never have been brought to the attention of a court except that the young man was unhappy with his settlement after various expenses were deducted and instituted suit to rescind the contingency fee contract. The trial court found the contract to be valid, not constituting unauthorized practice of law, because at no time did the defendant ever hold herself out as an attorney at law. The court of appeal reversed on the ground that settling a personal injury case on behalf of someone else calls for an educated ability to relate the general body and philosophy of law to a specific legal problem of a client. This clearly comes within the definition of "practice of law" as defined in La. R.S. 37:212. Since the defendant was not authorized to practice law in this state, the contract had an unlawful cause and was consequently null and void. The court concluded by stating that it is only by preventing such conduct that the general public will be protected from laymen dabbling into areas in which they are incompetent, and the fact that the defendant never held herself out to be a lawyer did not mean that she was not engaged in the unauthorized practice of law.

In *Elmer v. Copeland*,[49] a bar applicant and his parents brought a defamation action against an attorney, his law firm and various clients based on a letter written by the attorney to the Conference of Bar Examiners which questioned the applicant's qualifications. The letter was

47. LSBA v. Vesich, 476 So. 2d 811 (La. 1985); LSBA v. Meyer, 478 So. 2d 1211 (La. 1985).

48. Duncan v. Gordon, 476 So. 2d 896 (La. App. 2d Cir. 1985).

49. 485 So. 2d 171 (La. App. 2d Cir. 1986).

sent to the National Conference of Bar Examiners in response to an enquiry by the Conference relating to the admission of the particular applicant, Marx Elmer. Ethical consideration 1-3 of the Code of Professional Responsibility states that a lawyer should not become a self-appointed investigator or judge of applicants for admission, but he should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant. Unfortunately, the court found that the letter was defamatory per se thus creating a presumption of falsity and malice. Thus, even though Mr. Elmer had executed a broad release, this could not protect the defendant from damages for an intentional tort or actions taken in bad faith or with malice. After reviewing the evidence, however, the court found that the defendants had reasonable grounds to believe that what they said in the letter was correct, and a consideration of this together with the attorney's duty under the Code of Professional Responsibility precluded any award of damages.

Conclusion

> Many people are impatient with moral philosophy because it does not deliver the goods—clear answers that we can act upon with complete confidence. But, unfortunately, moral choice is often inherently dilemmatic and moral philosophy does not deal with realms as contained as those of the physical sciences. There is no clearly right course to choose, because of either the ambiguity of facts or the ambiguity of our values, no matter how sincerely we attempt to think about them. If, for example, a lawyer reveals secrets of a client in order to remedy the harm done by a client's lie, the lawyer inflicts harm on his or her client in the process. If, on the other hand, the lawyer does not disclose, in order to protect the client, harm is done to another person. Neither solution is clearly and intuitively correct, and both solutions cause harm. Too much of the popular and professional discourse about morality is bombastic triumphalism—a kind of self-congratulatory, one-dimensional moralizing. Missing is much sensitivity for the intractability of moral dilemma: moments of crisis when, viewed honestly, the paths of right and wrong conduct do not clearly stretch out from one's feet. It would be comforting, although perhaps in a merely escapist sort of way, if moral quandaries were merely legislative interpretation problems requiring only a carefully worded rule to resolve them. They are not.[50]

50. C.W. Wolfram, Modern Legal Ethics 71 (1986).