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# The Attorney-Client Relation In Louisiana

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## Comments

### The Attorney-Client Relation In Louisiana

An attorney at law is a person duly authorized to conduct cases before the courts and act in both representative and advisory capacities regarding legal matters.<sup>1</sup> In the conduct of

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1. 1 THORNTON, ATTORNEYS AT LAW § 10 (1914); LA. R.S. 37:212 (1950). A person in Louisiana need not be represented in court by an attorney at law, for he may appear either through an attorney at law, or in person to prosecute or defend a suit in which he is involved. LA. R.S. 37:212 (1950): "Nothing in this Section prohibits any person from attending to and caring for his own business, claims, or demands." See also Robert and Williams v. Commercial Bank, 13 La. 528 (1839).

This rule is generally followed in the United States. 7 C.J.S., *Attorney and Client*, § 63 (1937). See also 6 C.J.S., *Appearances*, § 2 (1937); May v. Williams, 17 Ala. 23 (1849).

litigation he is considered an officer of the court. An attorney in fact is merely the agent of another, appointed to perform a particular act or to carry on business in general for him and in his place.<sup>2</sup> One acting solely in the capacity of an attorney in fact may not, as such, represent his principal before the courts.<sup>3</sup> This Comment deals only with the relation between the Louisiana attorney at law and his client; problems involving the relation between the attorney in fact and his principal are beyond its scope.<sup>4</sup>

The attorney-client relation is fiduciary in nature. It imposes upon the attorney the duty of dealing with his client only on the basis of strict fidelity and honor, and involves the highest personal trust and confidence by the client in his attorney,<sup>5</sup> but of course the attorney is not compelled to act for every person who may desire his services.<sup>6</sup> In spite of the highly fiduciary nature of the relation, an attorney may represent both parties to a suit if there is express consent of all concerned after a full

2. LA. CIVIL CODE art. 2985 (1870); 1 THORNTON, ATTORNEYS AT LAW § 19 (1914).

3. If the attorney in fact is also a member of the bar, he may appear in court for his principal if duly authorized, but he does so in his capacity as an attorney at law, not as an attorney in fact. In the past, Louisiana cases have held that a suit could be brought or defended by an authorized attorney in fact, even though he was not a licensed attorney at law. *Wright's Estate v. Waterbury*, 146 La. 49, 83 So. 374 (1919); *Adamietz v. Pontiff*, 146 La. 48, 83 So. 373 (1919); *Brown v. Guillot*, 146 La. 46, 82 So. 373 (1919); *Howell v. Mundy*, 145 La. 291, 83 So. 274 (1919). The holding in the *Mundy* case, which was the precedent for the other decisions, was based on LA. R.S. § 122 (1870): "The parties to any suit pending before any court of this state, shall have the right to appear and plead in person, or by their attorney at law or in fact." However, this provision was repealed by La. Acts 1932, No. 202, § 10, and the area is now covered by LA. R.S. 37:212, 213 (1950). That a suit could be brought by a properly authorized attorney in fact was held to be strongly implied by the language of LA. CODE OF PRACTICE art. 320 (1870); *Reisz v. Kansas City Southern Ry.*, 148 La. 929, 933, 88 So. 120, 121 (1921).

However, it would seem that today, under the provisions of LA. R.S. 37:212-213 (1950), an attorney in fact could not represent his principal in court. LA. R.S. 37:212 (1950): "The practice of law is defined as follows: (1) In a representative capacity, the appearance as an advocate, or the drawing of papers, pleadings or documents, or the performance of any act in connection with proceedings, pending or prospective, before any court of record in this state." LA. R.S. 37:213 (1950): "No natural person, who has not been first duly and regularly licensed and admitted to practice law by the Supreme Court of this state . . . shall . . . (5) Render or furnish legal services or advice."

These two provisions prohibit the *very acts* necessary for representation; they do not, as did the former statutes, prohibit appearance of an unlicensed person in the capacity of an attorney at law or the practice of law without a license.

4. Therefore, whenever the word "attorney" is used, it refers to an attorney at law, not to an attorney in fact.

5. *Searcy v. Novo*, 188 So. 490, 498 (La. App. 1939); *In re Clifton*, 115 Fla. 168, 155 So. 324 (1934).

6. 21 LA. R.S. ANN. 399, *Articles of Incorporation, Louisiana State Bar Association* art. 14, § 31 (West 1950). Under the LA. CIVIL CODE art. 2989 (1870), acceptance of the power of attorney may be either express or tacit.

disclosure of material facts;<sup>7</sup> this rule is in accordance with the general principles of agency regarding representation of conflicting interests.<sup>8</sup>

To facilitate the presentation of the major aspects of the attorney-client relation, this Comment, is divided into three parts: the creation of the relation and the method of proving its existence, its termination, and the scope of the attorney's authority to act during its existence.

## CREATION OF THE ATTORNEY-CLIENT RELATION AND PROVING THE ATTORNEY'S AUTHORITY

### *Creation of the Relation*

The relation of attorney and client is created only when there is an express or implied contract for the professional services of an attorney at law. This contract is usually called a "retainer" and may be either general or special in scope. A "general retainer" covers the services of a particular attorney or firm of attorneys for any future situation where legal advice or service may be necessary or desirable; whereas, a "special retainer" provides for the attorney's or firm's services in regard to one particular problem or case.<sup>9</sup> Although either type of retainer may be gratuitous, such contracts usually provide for compensation to the attorney.<sup>10</sup>

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7. 21 LA. R.S. ANN. 391, *Articles of Incorporation, Louisiana State Bar Association* art. 14, § 6 (West 1950): "It is unprofessional to represent conflicting interests, except by express consent of all concerned after a full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

*Cf.* LA. CIVIL CODE arts. 3016-3017 (1870) (broker may represent both parties and negotiate matters between them). See also 6 COBBIN, *CONTRACTS* § 1457 (1951).

8. MECHEM, *OUTLINES OF THE LAW OF AGENCY* § 502 (4th ed. 1952); *RESTATEMENT, AGENCY* §§ 23, 381, Comment (d), 392 (1933).

9. 1 THORNTON, *ATTORNEYS AT LAW* §§ 133-134 (1914). For general forms of contracts, see 1 AM. JUR., *Legal Forms Ann.*, 1801-1804 (1953). For jury instruction on the creation of the attorney-client relations, see 2 AM. JUR., *Pleading and Practice Forms* 1203-1204 (1956).

10. *Gurley v. New Orleans*, 41 La. Ann. 75, 78-79, 5 So. 659, 660-61 (1889); LA. CIVIL CODE art. 2991 (1870). With one exception a necessary condition to the recovery of compensation either under contract or on a quantum meruit, due to termination of the contract, is that the attorney must prove the creation of the relation of attorney and client by showing an express or implied contract for his services. *Succession of Morvant*, 46 La. Ann. 301, 14 So. 922 (1894); *Wailles and Mathews v. Succession of Brown*, 27 La. Ann. 411 (1875); *Cooley and Lacoste*

The fact situations in which a retainer will be implied are numerous. For example, payment of part of the attorney's fee by the alleged client and the acceptance by him of the benefits of the attorney's efforts,<sup>11</sup> or correspondence between the attorney and client indicating an intention that the attorney should represent the client in a particular matter,<sup>12</sup> are evidence of a retainer.<sup>13</sup>

### *Proving the Attorney's Authority*

As a general rule an attorney at law who institutes a suit is presumed to have authority to act for his client and to represent him in court.<sup>14</sup> The oath of the attorney is enough to give rise to a presumption that he has authority to appear.<sup>15</sup> Authority has been presumed for an attorney to appear for a corporation,<sup>16</sup> to conduct a cross examination on a deposition,<sup>17</sup> and to act for

v. Cecile, 8 La. Ann. 51 (1853); *Roselius v. Delachaise*, 5 La. Ann. 481 (1850). See also 2 THORNTON, ATTORNEYS AT LAW § 507 (1914). The exception to his rule arises when the client knowingly acquiesces in his attorney's unauthorized acts or knowingly accepts the benefits thereof; in this instance the attorney may be allowed compensation without being required to prove a prior contract for his services. 2 THORNTON, *op. cit. supra*, at §§ 507-508. See particularly p. 715 *infra*.

11. *Massey v. Murray*, 17 La. App. 319 (1931) (where attorney was not allowed to collect the balance of his fee from a stockholder for services rendered in the organization and operation of the company); *Kennedy v. Consumers Ice Co.*, 7 La. App. 446 (1928) (where president of a corporation had employed attorney without approval of the board of directors for the purpose of liquidation of the company).

12. Succession of Hardesty, Manning's Unreported Cases 111. *Cf. Milligan v. Alabama Fertilizer Co.*, 89 Ala. 322, 7 So. 650 (1890).

13. Evidence is inadequate to imply a contract between an attorney and client where the attorney's testimony as to his appointment conflicts with that of the only other person present at the time. Succession of LeBlanc, 2 La. App. 364 (1925). Where an attorney attempted to collect his fee from a brother of the accused in a criminal prosecution, the attorney's failure to mention his intention to collect his fee from the brother and his attempt to collect from the accused first was considered to bar him from establishing a contract with the brother. *Landry v. White*, 146 So. 509 (La. App. 1933). For other examples of when contracts will be implied, see 2 THORNTON, ATTORNEYS AT LAW §§ 513-517 (1914).

14. *Interdiction of Erichson*, 149 La. 895, 90 So. 235 (1921); *Postal Telegraph Cable Co. v. Louisville, New Orleans and Texas Ry.*, 43 La. Ann. 522, 9 So. 119 (1891); *Simpson v. Lombas*, 14 La. Ann. 103 (1859); Succession of Patrick, 20 La. Ann. 204 (1868); *Tipton v. Mayfield's Curator*, 10 La. 189 (1836); *Bonnefoy v. Landry*, 4 Rob. 23 (La. 1843); *Rowlett v. Shepherd*, 7 Mart.(N.S.) 513 (La. 1829); *Hayes v. Cuny*, 9 Mart.(O.S.) 87 (La. 1820).

15. One case states that "the mere affirmation of a reputable attorney that he is the retained counsel in a cause has the sanctity of an oath. . . . The record and the allegations of counsel import absolute verity as respects the authority to represent their clients." *Brigot's Heirs v. Brigot*, 47 La. Ann. 1304, 1307, 17 So. 825, 826 (1895).

16. *Postal Telegraph Cable Co. v. Louisville, New Orleans and Texas Ry.*, 43 La. Ann. 522, 9 So. 119 (1891); *Community Chest of Caddo & Bossier Parishes v. Union Mission Ass'n*, 30 So.2d 131 (La. App. 1947) (rehearing denied).

17. *Kelly v. Benedict*, 5 Rob. 138 (La. 1843).

both members of a partnership in a bankruptcy proceeding although his acts were specifically authorized by only one of the partners.<sup>18</sup> An attorney from another state however is not presumed to have authority to appear for his client in the Louisiana courts.<sup>19</sup>

The presumption as to the attorney's authority to appear and represent his client is, in Louisiana, as in most jurisdictions, rebuttable. The issue may be raised by any party to a suit<sup>20</sup> by exception supported by an affidavit alleging facts sufficient "to render it probable that the [attorney's] action is unauthorized."<sup>21</sup> The effect of this procedure is to shift the burden of proving the attorney's authority to the party seeking to sustain it, rather than compelling the party challenging such authority to disprove

18. *Meridian Fertilizer Factory v. Collier*, 193 La. 815, 192 So. 358 (1939). The court is careful to indicate that both members of the partnership were benefited by the attorney's action. In dictum the court has also indicated that an appearance as attorney of record for a party in the place where he resides would give rise to a presumption that the attorney had been employed to represent the party. *Roselius v. Delachaise*, 5 La. Ann. 481 (1850).

19. *Wetmore v. Daffin*, 5 La. Ann. 496 (1850). See also LA. R.S. 37:214-216 (1950) (prohibiting practice of law in Louisiana by attorneys of other states, unless they are either licensed by the Louisiana Supreme Court, associated with a Louisiana attorney, or from a state allowing reciprocity to a Louisiana attorney). One reason for this rule is to protect the client, for although it may be inferred that he authorized his attorney to act for him in the state in which the attorney is licensed and familiar with the law, such authorization cannot be inferred for him to appear in a state where he is not familiar with the law or the jurisprudence. Another possible reason for the rule is to protect the Louisiana courts from delay or inconvenience which might be caused by attorneys not familiar with our law.

20. As very few Louisiana cases make any distinction as to which party is questioning the attorney's authority, and cases in each category are cited (occasionally with mention of the distinction) as authority in the other (see *New Orleans v. Steinhardt*, 52 La. Ann. 1043, 27 So. 586 (1900); *Bender v. McDowell*, 46 La. Ann. 393, 15 So. 21 (1894); *Dockham v. Potter*, 27 La. Ann. 73 (1875); *Plaquemines Parish School Board v. Davis*, 32 So.2d 391 (La. App. 1947); *Reconstruction Finance Corp. v. Cotonio*, 184 So. 252 (La. App. 1938) (distinction mentioned)), it appears that the rules developed by the Louisiana jurisprudence regarding such challenge are the same no matter which party questions the attorneys' authority. The Louisiana procedure is contrary to that in some jurisdictions which do not allow one party to compel the opponent's attorney to prove his authority (see 5 AM. JUR., *Attorneys at Law*, § 82, n. 6 (1936)). Generally speaking, however, the Louisiana rules on proving the authority of the attorney at law seem to be in harmony with those applied in most states (see 5 AM. JUR., *Attorneys at Law*, §§ 79-84 (1936); Annot., 88 A.L.R. 12, 15 (1934)).

For general forms relating to the attorney's authority, see 2 AM. JUR., *Pleading and Practice Forms*, No. 1171 (notice of motion to compel attorney to show authority); § 1172 (affidavit in support of motion); No. 1174 (attorney's affidavit as to authority) (1956).

21. *Bonnefoy v. Landry*, 4 Rob. 23, 25 (1843); *Gigand v. New Orleans*, 52 La. Ann. 1259, 27 So. 794 (1900); *New Orleans v. Steinhardt*, 52 La. Ann. 1043, 27 So. 586 (1900); *Dockham v. Potter*, 27 La. Ann. 73, 75 (1875); *Succession of Patrick*, 20 La. Ann. 204 (1868); *Dangerfield's Executrix v. Thurston's Heirs*, 8 Mart. (N.S.) 232, 236 (La. 1829); *Smith v. Maier*, 16 So.2d 682 (La. App. 1944). Cf. *Legere v. Richard*, 10 La. Ann. 669 (1855) (dictum).

its existence.<sup>22</sup> To be sufficient the affidavit must contain an oath that the facts stated are true. An affidavit either by an attorney,<sup>23</sup> or by a party to the suit<sup>24</sup> based on information, knowledge, and belief will be considered insufficient. The affidavit of a party will also be insufficient if he has failed to deny, within a reasonable time, the attorney's authority to appear for him.<sup>25</sup>

Although many cases seem to indicate that the presumption of the attorney's authority can be rebutted only by affidavit,<sup>26</sup> the contrary has been clearly held.<sup>27</sup> The degree of proof deemed sufficient varies, of course, with the facts of each case. In *Bender v. McDowell*<sup>28</sup> the party denying his attorneys' authority to appear for him in a prior case was able to show that he had never "employed" the attorneys, had never talked to them, and that he had no knowledge of the case until eight years after judgment had been rendered against him. This evidence was considered sufficient to rebut the former attorneys' presumed authority and the judgment was held to be a nullity. A presump-

22. *Police Jury of Tangipahoa Parish v. Begnaud*, 200 La. 1020, 9 So.2d 399 (1942); *Dockham v. Potter*, 27 La. Ann. 73, 74 (1875); *Johnson v. Brandt*, 10 Mart.(O.S.) 638, 639 (1821); *Dangerfield's Executrix v. Thurston's Heirs*, 8 Mart.(N.S.) 232, 236 (La. 1829) ("the party who has been represented without his consent, or contrary to his wishes, is sufficiently protected by allowing him to deny the authority of the attorney on oath; and on his doing so requiring from his adversary proof of it" (emphasis added)).

23. *Police Jury of Tangipahoa Parish v. Begnaud*, 200 La. 1020, 9 So.2d 399 (1942); *Boykin v. Holden*, 6 La. Ann. 120 (1851); *Plaquemines Parish School Board v. Davis*, 32 So.2d 391 (La. App. 1947).

24. *Bonnefoy v. Landry*, 4 Rob. 23, 25 (La. 1843). As the reason for their holding the court states: "If it were sufficient merely to swear to an impression or belief, the existence of which in the mind of the party could never be disproved, the presumption in favor of the authority of attorneys at law would be entirely done away with, as such an affidavit might be made by every party whose object was delay."

25. *Mason v. Stewart*, 6 La. Ann. 736 (1851). It appears to be virtually a uniform rule that where the party is guilty of *laches* he will not be allowed to deny the authority of the attorney who appeared for him. Annot., 88 A.L.R. 12, 62 (1934).

26. See note 21 *supra*.

27. *Wadsworth v. Alexius*, 234 La. 187, 99 So.2d 77, 82 (1958) ("However, any presumption resulting from the appearance of counsel in plaintiff's behalf was completely overcome by direct evidence that plaintiff neither employed counsel to represent her nor authorized the employment" (emphasis added)); *Hill v. Bowden*, 3 La. Ann. 258 (1848) ("We have repeatedly held, that the acts of attorneys [sic] will be presumed to have been authorized by their clients, unless the latter, by their own affidavit or otherwise, show that the attorney transcended his authority" (emphasis added)); *Fisher v. Moore*, 12 Rob. 95, 98 (La. 1845) (where plaintiff had not denied attorney's authority on oath, and where a judgment which upheld his authority was reversed on the ground that "the circumstances disclosed by the record, throw some doubt on the fairness of the trial below, and the authority of the counsel who undertook to conduct it on the part of the warrantors").

28. *Bender v. McDowell*, 46 La. Ann. 393, 15 So. 21 (1894).

tion of "employment" was overcome in *Roselius v. Delachaise*<sup>29</sup> by a showing that the defendant had retained other lawyers to manage the case on which plaintiff (attorney) sought to collect his fee, and that the attorney had been engaged by others with an interest in the case.<sup>30</sup> In the foregoing examples the attorney's authority to represent his client in a prior action was in question; however, his authority may certainly be challenged while the action is still pending.<sup>31</sup>

Where an attorney at law acts as an agent, but not in a professional capacity, his authority to so act will not be presumed, but must be proved as in other cases of agency.<sup>32</sup> Where there is specific authorization given an attorney in a recorded authentic act, evidence of private correspondence revoking his authority is of no effect against third persons entitled to rely on the public records.<sup>33</sup>

*Effect of an unauthorized appearance.* In most jurisdictions a judgment rendered as a result of an appearance by an unauthorized attorney will not bind a defendant who can show that he had a valid defense to the action.<sup>34</sup> In Louisiana, if the defendant can prove that the attorney's appearance was unauthorized, a judgment rendered in the suit will not be binding on him regardless of whether or not he had a valid defense.<sup>35</sup>

29. 5 La. Ann. 481 (1850).

30. But evidence of an attorney's former withdrawal from a case, as attorney for one of two plaintiffs therein, has been held insufficient evidence to destroy the presumption of his authority, because, as the court pointed out, he may have reentered the case after his withdrawal. *Interdiction of Erichson*, 149 La. 895, 90 So. 235 (1921).

31. See, e.g., *New Orleans v. Steinhardt*, 52 La. Ann. 1043, 27 So. 586 (1900); *Wood & Roane v. Wood*, 32 La. Ann. 801 (1880); *Hill v. Bowden*, 3 La. Ann. 258 (1848).

32. *Succession of Barr*, 8 La. Ann. 458 (1853).

33. *Girard v. Hirsch*, 6 La. Ann. 651 (1851). For a discussion of what evidence is considered sufficient or insufficient in other jurisdictions to repel the presumption of the attorney's authority to appear, see Annot., 88 A.L.R. 12, 62-68 (1934).

34. *Shelton v. Tiffin*, 47 U.S. (6 How.) 162, 186 (1848); Annot., 88 A.L.R. 12, 62-68 (1934).

35. *Marvel v. Manouvrier*, 14 La. Ann. 3 (1859) (affidavit that attorney was without authority was filed in the action to set aside former judgment). See also *Bender v. McDowell*, 46 La. Ann. 393, 15 So. 21 (1894) (no affidavit filed); *Barnes v. Profilet*, 5 La. Ann. 117 (1850); LA. CIVIL CODE art. 3010 (1870).

One Louisiana case applied the old common law rule that in unauthorized appearance cases "the judgment is not null and void by reason of want of authority of the attorney who filed the plea, but . . . is still regular, leaving to the party his action at law against the officer for damages, and his right in equity to enjoin the execution of the judgment establishing a meritorious defense." *Walworth v. Hinderson*, 9 La. Ann. 339, 340 (1854), citing *Cox v. Nichols*, 2 Yeates 546 (Pa. 1800). However, this case dealt with an application of Mississippi law, and it was held that it could have no application to a case arising in Louisiana courts. *Marvel v. Manouvrier*, *supra* at 4.



*Necessity of written evidence of attorney's authority.* Since a contract for legal services is usually considered a mandate or a hiring,<sup>36</sup> it may be either written or verbal.<sup>37</sup> However, the general rule of agency that, where a contract is required by law to be in writing, the power of the agent to execute it must be in writing, applies to contracts between attorney and client in Louisiana.<sup>38</sup>

#### TERMINATION OF THE RELATION AND COMPENSATION OF THE ATTORNEY

A number of Louisiana cases have dealt with the question of whether the attorney-client relation constitutes a *hiring of labor* or a *mandate*. The importance of this question lies in the fact that if the contract is considered a "hiring" and is terminated by the client without cause, the attorney may recover the balance of any compensation due him under the terms of the contract,<sup>39</sup>

36. See p. 692 *supra*.

37. If the contract is considered a mandate, LA. CIVIL CODE art. 2992 (1870) provides: "A power of attorney may be given, either by a public act or by a writing under private signature, even by letter.

"It may also be given verbally, but of this testimonial proof is admitted only conformably to the title: *Of Conventional Obligations*." In *Searcy v. Novo*, 188 So. 490 (La. App. 1939), the court, by admitting parol evidence of the authority of an agent to retain an attorney at law, implied that a contract with an attorney at law authorizing him to conduct litigation may be made verbally.

If the contract is considered a hiring, neither the general articles on *Lease* (LA. CIVIL CODE arts. 2668-2675 (1870)), nor those on *hiring* (*id.* arts. 2745-2750) require it to be in writing. It may therefore be inferred that a contract of hiring may be made orally, as is the common practice, and as is permitted for the lease of a thing (*id.* art. 2683).

38. If the attorney is given the power to alienate immovables, the agreement granting him this power must be in writing. *Id.* art. 2992 (testimonial proof of an oral contract is admissible only as permitted for conventional obligations).

*Lake v. LeJeune*, 226 La. 48, 53, 74 So.2d 899, 901 (1954); *Bordelon v. Crabtree*, 216 La. 345, 43 So.2d 682 (1949); *Milburn v. Wemple*, 156 La. 759, 101 So. 132 (1924). See cases cited note 97 *infra*. *But cf.* *Etie's Heirs v. Cade*, 4 La. 383 (1832) (where an attorney at law at the request of plaintiff's agent, had immovables sold to pay debts of a succession, and plaintiffs had actual notice and knowledge of the sale and had placed titles in agent's hands, plaintiffs were estopped from denying the agent's authority to have the immovables sold).

Although LA. CIVIL CODE art. 3071 (1870) states: "[T]his Contract [of Compromise] must be reduced to writing," it has been held that "the authority of the agent to compromise for his principal should be in writing, though this is not indispensable save when title to real estate is involved." *Van Vleet Mansfield Drug Co. v. Anders*, 157 So. 166, 167 (La. App. 1934).

In common law jurisdictions contracts for the employment of attorneys will be governed by principles of the Statute of Frauds as modified by state statutes. For a brief note on attorney's employment contracts, not intended to be performed within a year, see Annot., 15 L.R.A.(N.S.) 326 (1908).

39. LA. CIVIL CODE art. 2749 (1870): "If without serious ground of complaint, a man should send away a laborer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived."

but if the contract is considered a "mandate," it is revocable at the will of the client, and he need pay the attorney only the reasonable value of his services to the moment of termination.<sup>40</sup> It appears that three factors are considered in determining the nature of the relationship: (1) the term of the contract, (2) the character of the fee, and (3) the nature of the attorney's services.

#### *Termination in General*

The general rules as to termination of agency, or mandate, apply to the attorney-client relation except in the situation where the contract is treated as one of a hiring of labor. Generally speaking, an agency may be terminated: (1) by an act of either or both parties, or (2) by operation of law. Termination may take place in the former instance either: (a) according to the original agreement between the parties, such as by the passing of a stipulated time, the happening of a certain event, or the accomplishment of the object of the agency, or (b) it may occur by an act of either or both parties subsequent to their original agreement, such as revocation by the principal, renunciation by the agent, or mutual consent of both parties. Termination by operation of law occurs as a result of death, bankruptcy, interdiction, or seclusion of either the principal or agent.<sup>41</sup>

#### *Power of the Client to Terminate the Relation*

When the attorney is engaged on a contingent fee basis, the client's termination of the relation may prevent the attorney's completion of the case. In such event the problem arises whether termination of the attorney's power to represent the client also terminates his right to recover compensation under the terms of the contract, and if so, whether the attorney may recover for services rendered up to the time of revocation other than under the contract. Under the jurisprudence, the solution to this problem depends on whether the contract is considered one of hiring or mandate.

The major function of a mandatary is to perform juridical acts that affect the principal's legal relations with third parties.

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40. LA. CIVIL CODE art. 3028 (1870): "Except in the case of irrevocable powers of attorney, as described in the preceding article, the principal may revoke his power of attorney, whenever he thinks proper."

41. *Id.* art. 3027. For a comprehensive discussion of termination of agency in Louisiana by act of the parties, see Comment, 22 TUL. L. REV. 623 (1948). For termination by operation of law, see Comment, 25 TUL. L. REV. 249 (1951).

By virtue of the provisions of the Code his services are gratuitous unless otherwise stipulated, and any compensation which he receives is considered an honorarium, not a salary. On the other hand, an employee's function is not to perform juridical acts in the name of his employer, binding him to third persons, but merely to work for him, for which he receives a salary as compensation.<sup>42</sup> Following this reasoning in *Gurley v. New Orleans*,<sup>43</sup> the Louisiana Supreme Court held that an attorney at law acting as assistant counsel for the city was to be considered a mandatary because he was vested with the power to represent the party for whom he acted. Thus, as a general proposition, a contract for legal services is considered a mandate under Civil Code Article 3028<sup>44</sup> because of the power of the attorney at law to represent his client in dealings with third persons. The result of so classifying the attorney-client relationship is to make it revocable at the will of the client.<sup>45</sup> If the power of the attorney is revoked, he may recover the reasonable value of services rendered up to the time revocation takes place.<sup>46</sup> However, this general principal does not apply:<sup>47</sup> where the retainer constitutes a hiring of labor within the provisions of Article 2749; where the attorney is appointed in a will; where the power of the attorney is coupled with an interest; and where the contract between the parties stipulates that neither the attorney nor the client may dispose of the case without the consent of the other.<sup>48</sup> These four exceptions will be discussed in the remaining paragraphs of this section.

To be considered a hiring under the provisions of Civil Code Article 2749 and thus not revocable at the will of the employer,<sup>49</sup> a contract for services must be for a certain time and for a fixed salary. When an attorney is retained for a definite period at a fee of a certain amount, the contract will constitute a hiring

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42. 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL §§ 3019-3020 (4th ed. 1952); LA. CIVIL CODE art. 2991 (1870).

43. 41 La. Ann. 75, 5 So. 659 (1889). This holding is weakened to some extent by an alternative holding used to support the court's decision.

44. See note 40 *supra*.

45. Succession of Robinson, 188 La. 742, 178 So. 337 (1937); *Gurley v. New Orleans*, 41 La. Ann. 75, 5 So. 659 (1889); *Crane v. Sladovich*, Docket No. 7680, Teissier's Digest of Unreported Decisions 25 (La. App. 1923).

46. *Foster, Hall, Barret & Smith v. Haley*, 174 La. 1019, 142 So. 251 (1932); Succession of LeBlanc, 2 La. App. 364 (1925).

47. Irrevocable powers of attorney, as enumerated in Article 3027 of the Louisiana Civil Code, are not considered in this Comment.

48. This stipulation must comply in all respects with LA. R.S. 37:218 (1950). For the provisions of this statute, see note 69 *infra*.

49. See note 39 *supra*.

if the attorney is not required to act in a representative capacity.<sup>50</sup> Thus, an annual retainer to advise and counsel in return for a stipulated annual fee has been considered a hiring rather than a mandate.<sup>51</sup> If the client terminates such a contract without cause before the time stated therein has elapsed, he must pay the attorney any balance due under the terms of the contract. No cases have been found where an attorney was retained at a stated fee per month, the retainer to continue for an indefinite period. If an attorney under such a contract were later discharged during the course of any month, having been paid up to the first of the month, the problem would arise whether he could recover only the reasonable value of services rendered during the month, or the whole of the monthly fee stipulated in the contract.<sup>52</sup> As previously indicated, if the contract is considered one of hiring, he may recover the stipulated fee; if considered one of mandate, then recovery will be limited to the reasonable value of the services rendered for which no compensation has been paid. If the attorney is not acting in a representative capacity, it could well be argued that such a contract is a hiring. This result might be rationalized by considering the period of one month to be, in effect, a definite term, or by drawing an analogy to the lease of a thing by the month.<sup>53</sup>

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50. The question of whether an attorney-client contract for a certain time and a fixed fee would be considered a hiring if the attorney were engaged to act in a representative capacity appears to be unsettled. However, following the principle recognized in the *Gurley* case that one acting in a representative capacity is a mandatary, it would seem that if an attorney were required to act in such a capacity the contract would be properly considered a mandate even though it was for a definite period and at a stated fee, certain in amount.

51. *Orphan Asylum v. Mississippi Marine Ins. Co.*, 8 La. 181 (1835); *Advisory Opinion No. 5*, 5 TUL. L. REV. 605, 607 (1931). The question in the *Orphan Asylum* case was whether an attorney under a retainer for one year at \$500 was to be considered a hired servant under the provisions of LA. CIVIL CODE art. 2718 (1825) (LA. CIVIL CODE art. 2747 (1870)) or a laborer hired for a fixed term under LA. CIVIL CODE art. 2720 (1825) (LA. CIVIL CODE art. 2749 (1870)). The court held the attorney's contract to be within Article 2720 of the Civil Code of 1825, the general rule, not within Article 2718, which was held to be an exception to the general rule.

There seem to be no other Louisiana cases exactly in point. *Hand v. West*, 28 La. Ann. 145 (1876) (action by minor's tutor for balance due on a contract of indenture) and *Shoemaker v. Bryan*, 12 La. Ann. 697 (1857) (action by a steamboat pilot to recover wages) are *not* authority for the contention that the attorney-client relation is a hiring of services, notwithstanding the statement to this effect in *Comment*, 22 TUL. L. REV. 623, 633, n. 88 (1948).

Cases in many common law jurisdictions also hold that the client is not privileged to terminate at will the employment of an attorney retained at a specified compensation and for a definite period. *Annot.*, 43 A.L.R.2d 677, 679 (1955).

52. As an illustration of this situation, suppose the attorney is retained on January 1, at \$100 per month, no term being agreed upon. If he is dismissed on March 15, having been paid for January and February, what compensation is he entitled to recover for March?

53. See LA. CIVIL CODE art. 2685 (1870).

On the other hand, if the attorney is representing his client, the contract should be considered a mandate. Recent cases have dealt only with situations where the contract between attorney and client was properly considered one of mandate, and it is possible that the court would apply the same reasoning to the contract presented here, whether the attorney was acting in a representative capacity or not.

When a contract, not complying with R.S. 37:218, is for the rendition of particular legal services requiring that the attorney act in a representative capacity for an indefinite time, the relation comes within the general rule, being considered a mandate which the client may revoke upon paying the attorney the reasonable value of his services rendered prior to the time of revocation. This rule applies where the attorney is retained on a contingent fee,<sup>54</sup> or for a stated sum,<sup>55</sup> or where the fee consists of fixed amounts which are dependent upon the degree of success in litigation.<sup>56</sup>

However, there are two cases which cannot be reconciled with the foregoing analysis. In *United Gas Public Service Co. v. Christian*,<sup>57</sup> on a contract providing for a contingent fee, and in *D'Avricourt v. Seeger*,<sup>58</sup> on a fixed fee contract, recovery was allowed on the grounds that the client's action in breaching the contract prevented the attorney from performing thereunder,

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54. *Planters' Lumber Co. v. Sugar Cane By-Products Co.*, 162 La. 123, 110 So. 172 (1926); *Louque v. Dejan*, 129 La. 519, 56 So. 427 (1911); *Woodley v. Robinson*, 100 So.2d 255, 257 (La. App. 1958); *Thalheim v. City of Gretna*, 171 So. 591 (La. App. 1937); *Gosserand v. Crispo*, Docket No. 7829, *Teissier's Digest of Unreported Decisions* 25 (La. App. 1923). *But see* *Bermudez v. Heath*, 20 La. Ann. 172 (1868) (impliedly overruled in *Louque v. Dejan*, *id.* at 523, 56 So. at 428).

55. *Shiro v. Macaluso*, 13 La. App. 88, 126 So. 244 (1930) (cert. denied); *Advisory Opinion No. 5*, 5 TUL. L. REV. 605 (1931). *But cf.* *Angeloz v. Rivollet*, 2 La. Ann. 652 (1847) (recovery is allowed under contract, but it is not shown whether plaintiff is an attorney at law); *Hennen v. Bourgeat*, 12 Rob. 522 (La. 1846) (court does not state whether contract is considered a hiring or a mandate; recovery of the stipulated fee appears to be under the contract; but it might have been on a *quantum meruit*, as the attorney's failure to take action was considered to his client's advantage in this instance. This case was superficially distinguished in *Shiro v. Macaluso*, 13 La. App. 88, 91, 126 So. 244, 246 (1930).

56. *Succession of Mariana*, 177 So. 464 (La. App. 1937) (*quantum meruit* recovery for entire fee as all required services had been rendered). This holding may possibly explain *Hennen v. Bourgeat*, 12 Rob. 522 (La. 1846), discussed note 55 *supra*.

57. 186 La. 689, 173 So. 174 (1937) (fee was stipulated as "one half interest in any judgment that may be obtained." Although the court seemed to consider this contingent fee as a power coupled with an interest, such a holding would be clearly contrary to the jurisprudence. See note 68 *infra*. The decision was based upon breach of contract by client).

58. 169 La. 620, 125 So. 735 (1929) (fixed fee of \$10,000).

and that therefore under the provision of Civil Code Article 2040,<sup>59</sup> the contract was to be considered as having been performed by the attorney. These two decisions are based on a general principal of contract law as enunciated in *Lloyd v. Dickson*,<sup>60</sup> a case which did not involve the attorney-client relation. Although justice to the parties appears to have been achieved by allowing full recovery on the contract by the attorneys in each of these cases, it is submitted that these decisions are out of harmony with the vast majority of cases involving the attorney-client relation, and that it would be better to apply the general rule of mandate in such cases.<sup>61</sup>

The second exception to the rule that the relationship constitutes a mandate terminable at will appears where an attorney at law is designated in a testament as the attorney to settle the estate. In such a case a special relation arises between the heirs and the attorney, which is considered neither a hiring nor a mandate, with the result that the heirs are powerless to revoke the attorney's authority.<sup>62</sup>

The third exception to the general rule occurs when, although there has been no compliance with the contingency fee statute, the attorney's power to represent his client is coupled with a present interest in the subject matter with which the relation is concerned. A power coupled with an interest is more than a mere power over the subject matter of the agency, but consists of "a property in the thing which is the subject of the agency."<sup>63</sup>

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59. "The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it."

60. 116 La. 90, 40 So. 542 (1906).

61. For a very recent decision in accord with this recommendation, see *Woodley v. Robinson*, 100 So.2d 255 (La. 1958). Here the contract between attorney and client, drawn in accordance with the provisions of L.A. R.S. 37:218 (1950) (statute is set out in full in note 69 *infra*), stipulated that neither party could dismiss the case without the consent of the other. Because the contract was not filed with the clerk of court as required by the statute, client's dismissal without attorney's consent was held effective; however, attorney was allowed to recover on a *quantum meruit* for his services to the date of dismissal.

Client's action was a clear breach of the non-dismissal stipulation of the contract. This provision is binding as between the parties whether the contract is filed or not, for the purpose of filing, as required by the statute, is to give third persons notice of attorney's interest in the suit, not to provide a party to the contract a means of avoiding the very provision to which he has consented.

62. *Rivet v. Battistella*, 167 La. 766, 120 So. 289 (1929); *Untermier v. Ernest*, 2 La. App. 163 (1925). See also *Shiro v. Macaluso*, 13 La. App. 88, 91, 126 So. 244, 246 (1930) (cert. denied) (provision in will "was equivalent to an onerous legacy").

63. *Marchand v. Gulf Refining Co.*, 187 La. 1002, 1007, 175 So. 647, 649 (1937), quoting from *Fowler v. Phillips*, 159 La. 668, 672-73, 106 So. 26, 28 (1925); *Tennant v. Russell*, 214 La. 1046, 1052, 39 So.2d 726, 728 (1949); *Com-*

In Louisiana, if the attorney's power of representation is to be irrevocable, both the power of representation and the property interest in the subject matter must exist in the attorney at the same time.<sup>64</sup> Thus, where a present interest in mineral rights is transferred to an attorney in consideration for his services, and the transfer is not contingent, the attorney has a power coupled with an interest, and may continue the suit to secure his interest, although the client may dismiss the action as to himself, thus terminating his attorney's power of representation.<sup>65</sup>

If a client were to give his attorney an interest in property, not in payment of his fee, as above, but merely as security to guarantee payment thereof, it would appear that the client could revoke the attorney's power of representation, but that the attorney's interest in property would still be irrevocable.<sup>66</sup> If an attorney has taken a case on a contingent fee basis, but has not complied with the contingency fee statute, he is not vested with a sufficient interest to constitute a mandate coupled with an interest,<sup>67</sup> and, therefore, the client may terminate the relation at will.<sup>68</sup>

In order to protect the attorney's interest in a contingent fee from the client's power of termination, the Legislature developed the fourth exception to the general rule. Under the provisions of R.S. 37:218 the parties may stipulate in a written contract which provides for a contingent fee that neither party may dismiss, set-

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ment, 6 LOYOLA L.J. 90, 95 (1925), citing *Hunt v. Rousmanier*, 21 U.S. (8 Wheat.) 174 (1823).

64. *Marchand v. Gulf Refining Co.*, 187 La. 1002, 175 So. 647 (1937). See also Annot., 28 A.L.R.2d 1243, 1253 (1953).

65. *McClung v. Atlas Oil Co.*, 148 La. 674, 87 So. 515 (1921). Cf. *Mizer v. Tennant*, 195 La. 1035, 197 So. 748 (1940).

66. RESTATEMENT, AGENCY §§ 138-139 (1933); MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 265-271 (4th ed. 1952).

67. The attorney engaged on a contingent fee basis does have a sufficient interest to carry out necessary legal processes such as requiring the recusation of a judge related to him within the proscribed degrees (*White v. McClanahan*, 133 La. 369, 63 So. 61 (1913), where judge was father of attorney for plaintiff), or suing under LA. CIVIL CODE art. 3547 (1870) for the renewal of a judgment which he has obtained (*Martinez v. Succession of Vives*, 32 La. Ann. 305 (1880)).

68. *Tennant v. Russell*, 214 La. 1046, 39 So.2d 726 (1949); *Gravity Drainage Dist. No. 2 v. Edwards*, 207 La. 1, 20 So.2d 405 (1944); *Succession of Rice*, 147 La. 834, 86 So. 282 (1920); *Succession of Carbajal*, 139 La. 481, 71 So. 774 (1916); *Inman v. Gonzales*, 89 So.2d 914 (La. App. 1956). See also Annot., 28 A.L.R.2d 1, 243, 1276 (1953).

Some cases avoid this rule by finding the client has prevented performance by the attorney; therefore, the contract is considered as having been performed under the provisions of Article 2040 of the Civil Code, and the attorney may recover the fee stipulated in the contract. See *United Gas Public Service Co. v. Christian*, 186 La. 689, 173 So. 174 (1937) (discussed note 57 *supra*); *D'Arvicourt v. Seeger*, 169 La. 620, 125 So. 735 (1935).

tle, or otherwise dispose of the case without the consent of the other.<sup>69</sup> This statute modifies the general principle that the client retains the power of dismissal. Accordingly, the courts have construed the statute strictly, and have required a full compliance with all its formalities.<sup>70</sup> Most particularly, the exact stipulation that neither party shall have the right to dispose of the case must be written into the contract. Where there is no such provision, it will be presumed to have been intentionally left out of the contract.<sup>71</sup> Furthermore, a copy of the contract must be served on the opposing litigant and another copy filed with the clerk of court.<sup>72</sup>

### *Power of the Attorney to Terminate the Relation*

Generally speaking, upon adequate notice to his client, the attorney may withdraw when he has good cause, if he can do so without injury to his client.<sup>73</sup> In the event of such a withdrawal the attorney may recover on a *quantum meruit* for the services he has rendered.<sup>74</sup> When the attorney withdraws without good

69. LA. R.S. 37:218 (1950) provides: "By written contract signed by the client, attorneys at law may acquire as their fee an interest in the subject matter of the suit, proposed suit, or claim, in the prosecution or defense of which they are employed, whether the suit or claim be for money or for property. In such a contract of employment, 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. Either party to the contract may, at any time, file it with the clerk of the district court in which the suit is pending or is to be brought and have a copy made and served on the opposing party and due return made as in case of petitions in ordinary suits. After such service, any settlement, compromise, discontinuance, or other disposition made of the suit or claim 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 or discontinuance had been made."

The interest which the attorney acquires in the subject matter of the suit under a contract drawn in accordance with the provisions of this statute is insufficient to make him a party to the suit. *Roe v. Caldwell*, 145 La. 853, 83 So. 43 (1919); *Smith v. Lyon Cypress Co.*, 140 La. 507, 73 So. 312 (1916); *Nix v. Lancaster and Wight*, 3 La. App. 402 (1926).

70. *Stiles v. Bruton*, 134 La. 523, 64 So. 399 (1914); *Acadian Production Corp. v. Land*, 153 F.2d 151 (5th Cir. 1946) (compromise without attorney's consent); *Acadian Production Corp. v. Land*, 136 F.2d 1 (5th Cir. 1943) (attorney gave written consent to dismissal by client).

71. *Tennant v. Russell*, 214 La. 1046, 39 So.2d 726 (1949).

72. LA. R.S. 37:218 (1950); *Succession of Carbajal*, 139 La. 481, 71 So. 774 (1916); *Woodley v. Robinson*, 100 So.2d 255 (La. App. 1958) (client allowed to dismiss case where a properly drawn contract had not been filed with the clerk of court).

73. It has been held that the attorney may withdraw without injury to his client, if he does so after a decision in the district court, although an appeal is pending at the time (*Fishman v. Conway*, 57 So.2d 605 (La. App. 1952)).

74. *Brown v. Green*, 132 La. 1090, 62 So. 154 (1913) (necessity of ratification); *Fishman v. Conway*, 57 So.2d 605 (La. App. 1952); *Dowling v. Peyroux*, 12 La. App. 551, 126 So. 270 (1930). See also 2 THORNTON, ATTORNEYS AT LAW § 453 (1914).



cause, it is generally held that he is not entitled to compensation.<sup>75</sup> The attorney is considered as having good cause to withdraw when he is unable to collect his fee after repeated attempts to do so,<sup>76</sup> when the client acts in an obnoxious manner and expresses dissatisfaction with the attorney's services,<sup>77</sup> and when the client insists on unjust action in the conduct of his case or the urging of frivolous defenses.<sup>78</sup>

### *Termination by Operation of Law*

Termination of the attorney-client relation by operation of law appears to have caused very little litigation. Contrary to the general rule that death of the principal terminates the authority of the agent, where an attorney has been engaged to prosecute a suit and the client dies while the suit is in progress, the attorney has the authority to continue with the suit, unless forbidden to do so by one having authority to terminate the relation.<sup>79</sup> But the attorney has no authority to appeal from a final judgment rendered after his client's death without obtaining the consent of the heirs or the legal representative of the deceased.<sup>80</sup>

## SCOPE OF ATTORNEY'S AUTHORITY

### *In General*

The authority of an attorney at law to act for his client may be conferred upon him by the client, or may be inferred from the attorney's exercise of his professional functions in the pursuit of his delegated powers.<sup>81</sup> The power delegated by the client may be limited to the performance of one specific act, for example, the collection of a particular debt, or it may be general in scope, for example, a general retainer to handle all the client's legal affairs.<sup>82</sup> The delegation of a general power "confers only a

75. 2 THORNTON, ATTORNEYS AT LAW § 558 (1914). No Louisiana cases were found on this point, although the rule may be implied from statements in cases cited in note 74 *supra*.

76. Dowling v. Peyroux, 12 La. App. 551, 126 So. 270 (1930).

77. Fishman v. Conway, 57 So.2d 605 (La. App. 1952).

78. 21 LA. R.S. ANN. 402-403, *Articles of Incorporation, Louisiana State Bar Association* art. 14, § 42 (West 1950). See also 1 THORNTON, ATTORNEYS AT LAW § 139 (1914); Note, 18 N.C.L. REV. 338 (1940).

79. *In re Succession of Labauve*, 34 La. Ann. 1187 (1882); *Succession of Liles*, 24 La. Ann. 490 (1872).

80. *Graham & Anderson v. Hendricks*, 24 La. Ann. 477 (1872).

81. LA. CIVIL CODE arts. 2997, 3000 (1870). For cases dealing with the attorney-client relation when treated as other than a mandate see note 51 *supra*.

82. LA. CIVIL CODE art. 2994 (1870). The client may also delegate to an attorney at law express or general powers of attorney, enabling him to act as an

power of administration."<sup>83</sup> Express power must be conferred for the attorney to have authority "to alienate or give a mortgage, or do any other act of ownership,"<sup>84</sup> as enumerated in Article 2997 of the Civil Code.<sup>85</sup>

Under the provisions of Article 3000, certain powers need not be specifically granted to a person who is engaged in a profession, but may be implied. Although this implied power is restricted regarding other transactions, it is broadly construed with regard to the conduct of litigation.<sup>86</sup> It has been held to include the printing of appeal briefs at the client's expense,<sup>87</sup> and the receiving of payment of a major heir's share of succession funds.<sup>88</sup> On the other hand, the attorney has no implied authority to sell his client's real estate,<sup>89</sup> to enter into an extra-judicial partition of a succession,<sup>90</sup> or to acknowledge a debt of his client.<sup>91</sup> It is worthy of note that in the above instances, where it was found the attorney had no implied authority, the attorney's acts constituted more than mere administration, and thus required express authority under the provisions of the Code.<sup>92</sup>

Louisiana follows the well-settled rule that the attorney has no implied authority to engage associate counsel and to bind his

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attorney in fact, but the delegation of such power is not considered in the discussion above.

83. *Id.* art. 2996.

84. *Ibid.*

85. *Id.* art. 2997: "Thus the power must be express and special for the following purposes: To sell or to buy. To incumber or hypothecate. To accept or reject a succession. To contract a loan or acknowledge a debt. To draw or indorse bills of exchange or promissory notes. To compromise or refer a matter to arbitration. To make a transaction in matters of litigation; and in general where things to be done are not merely acts of administration, or such as facilitate such acts."

Lake v. LeJeune, 226 La. 48, 74 So.2d 899 (1954) (attorney's "acceptance" of offer to sell real estate held not binding on client where attorney had only general authority).

86. See p. 709 *infra*.

87. G. F. Weiss & Co. v. New Orleans, 10 La. Ann. 46 (1855). This case was decided under LA. CIVIL CODE art. 2969 (1825), the forerunner of LA. CIVIL CODE art. 3000 (1870). The court stated that the client could be charged only for the number of briefs usually required in such cases.

88. Succession of Czarnowski, 15 La. 1093, 105 So. 76 (1925).

89. Lake v. LeJeune, 226 La. 48, 74 So.2d 899 (1954); Bordelon v. Crabtree, 216 La. 345, 43 So.2d 682 (1949). However, such acts have been upheld, in effect, by estoppel. Etie's Heirs v. Cade, 4 La. 383 (1832).

90. Milburn v. Wemple, 156 La. 759, 765, 101 So. 132, 134 (1924). This case does not cite Article 3000 but avoids the contention that authority should be inferred by treating the extra-judicial partition as a compromise, and citing Article 2997, which requires the attorney to have express power to enter into a compromise. See discussion of the authority of the attorney to compromise, *infra*.

91. Durnford v. Clark's Estate, 3 La. 199, 203 (1831).

92. LA. CIVIL CODE art. 2997 (1870).

client for his fee.<sup>93</sup> The client may be bound if he consents to, or ratifies, such action by his words or conduct.

### *Authority to Compromise and Make Other Agreements*

An attorney at law, like other agents, must have express and special authority to effect a compromise binding upon his client.<sup>94</sup> Although the attorney's authority to compromise must be express, it appears that such authority need not be in writing unless a transfer of immovables is involved.<sup>95</sup> The Civil Code provides that a transaction or compromise must be reduced to writing,<sup>96</sup> and the general rule is that where the contract made by an agent must be in writing, the power of the agent to execute it must be in writing.<sup>97</sup> Therefore, although most cases deal only with immovables, the rule that the attorney must have written authority to compromise presumably would apply to any compromise whether it involved immovables or movables.<sup>98</sup>

Even though the attorney has no express authority to compromise his client's claim, the client may be bound by his attor-

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93. *Voorhies v. Harrison*, 22 La. Ann. 85 (1870). See also Annot., 90 A.L.R. 265, 266 (1934).

94. LA. CIVIL CODE art. 2997 (1870); *Succession of Landry*, 117 La. 193, 41 So. 490 (1906); *Phillips-Jones Corp. v. Caskey*, 13 La. App. 675, 127 So. 46 (1930) (cert. denied); *Hotard v. Perrilloux*, 8 La. App. 476 (1928). Where client has vested in his attorney authority (even exclusive authority) to compromise his claim, client retains the power to bind himself by compromise with a third party who has no knowledge of client's contract with his attorney. There can be no valid compromise where the third person has knowledge of the client's agreement; however, the agreement is effective as between the client and attorney. *Smith v. Vicksburg, S. & P. Ry.*, 112 La. 985, 36 So. 826 (1904); *Succession of Jones*, 193 La. 360, 190 So. 581 (1939). See also Comment, 14 TUL. L. REV. 282, 285 (1940).

95. *Phelps v. Hodge*, 6 La. Ann. 524 (1851) (it is to be noted that in this case, a lower court decision was affirmed because of an equally divided court); *Van Vleet Mansfield Drug Co. v. Anders*, 157 So. 166, 167 (La. App. 1934). *But see* *Milburn v. Wemple*, 156 La. 759, 765, 101 So. 132, 134 (1924) (where an extra-judicial partition of both movable and immovable property of a succession was considered a compromise and held ineffective because authority of the attorney to compromise was not in writing, the court would not give effect to the partition *even as to the movables involved*).

96. LA. CIVIL CODE art. 3071 (1870). But it has been held that a receipt signed by the person receiving payment under a compromise is sufficient evidence to be a written contract as required by this article. *Zibilich v. Rittenberg*, 18 La. App. 628, 633, 139 So. 309, 312 (1932), citing *Kelly v. Homer Compress Co.*, 110 La. 983, 985, 35 So. 256, 257 (1903).

97. *Hackenbourg v. Gartskamp*, 30 La. Ann. 898 (1878); *Badon v. Badon*, 4 La. 166 (1832); *Muggah v. Greig*, 2 La. 593 (1831). *Cf.* *Silverstein v. Koppel*, 166 La. 1075, 118 So. 224 (1928). This rule is established with regard to contracts involving the transfer of immovables but would seem to apply to other contracts which the Civil Code requires to be in writing.

98. *Milburn v. Wemple*, 156 La. 759, 101 So. 132 (1924). See also *Phelps v. Hodge*, 6 La. Ann. 524, 528 (1851) (dissenting opinion of Preston, J., where equally divided court upheld a compromise made by attorney not having written authority to compromise).

ney's act if he ratifies it by his conduct or silence.<sup>99</sup> Ratification has been found where the client, with knowledge of the compromise, retained the payment made thereunder,<sup>100</sup> where the client dismissed his suit based upon the compromise,<sup>101</sup> and where (having full knowledge) he failed to express disapproval of the compromise within a reasonable time and continued normal correspondence with his attorney.<sup>102</sup>

If an attorney is engaged to collect a debt or is given the power to sue therefor, he has the implied authority to accept partial payments in *pro tanto* discharge of the debt.<sup>103</sup> But the authority to collect a debt is insufficient to empower an attorney to compromise it,<sup>104</sup> and if he exceeds his implied authority by accepting a partial payment in satisfaction of the whole debt, the compromise will not bind the client in the absence of ratification. However, the payment will discharge the debt *pro tanto*.<sup>105</sup>

The authority of an attorney at law to acknowledge a debt or to confess judgment against his client must be express and cannot be implied from his professional capacity,<sup>106</sup> nor may an attorney allow claims against a succession which the legal representative did not allow or know about.<sup>107</sup> However, a client may be estopped to deny his attorney's authority to acknowledge a debt or to confess judgment.<sup>108</sup>

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99. *Milburn v. Wemple*, 156 La. 759, 766, 101 So. 132, 134 (1924). For a close fact situation involving an agreement by a creditor of an insolvent to participate in a composition, see *Phillips-Jones Corp. v. Caskey*, 13 La. App. 675, 127 So. 46 (1930) (cert. denied).

100. *Culverhouse v. Marx*, 39 La. Ann. 809, 2 So. 607 (1887). Similarly where such funds were returned under like circumstances, it has been held that there was no ratification. *Phillips-Jones Corp. v. Caskey*, 13 La. App. 675, 127 So. 46 (1930); *Succession of Jones*, 193 La. 360, 190 So. 581 (1939).

101. *Zibilich v. Rittenberg*, 13 La. App. 628, 139 So. 309 (1932).

102. *Dupre v. Splane*, 16 La. 51 (1840).

103. *Liquidators of Joseph David Co. v. Berthelot Bros.*, 118 La. 380, 42 So. 971 (1907); *Pickett v. Bates*, 3 La. Ann. 627 (1848).

104. *Van Vleet Mansfield Drug Co. v. Anders*, 157 So. 166 (La. App. 1934); *Dupre v. Splane*, 16 La. 51 (1840).

105. *Liquidators of Joseph David Co. v. Berthelot Bros.*, 118 La. 380, 42 So. 971 (1907); *Pickett v. Bates*, 3 La. Ann. 627 (1848). The debt is discharged *pro tanto* although the client never actually receives the partial payment (e.g., if the attorney absconded with the funds). But where there has been a partial payment the client retains his right to sue for the balance of the debt.

106. *Edwards v. Edwards*, 29 La. Ann. 597 (1877); *Hill v. Barlow*, 6 Rob. 142, 149 (La. 1843); *Richard v. Bird*, 4 La. 305 (1832); *Durnford v. Clark's Estate*, 3 La. 199 (1831); LA. CIVIL CODE art. 2997 (1870).

107. *Succession of Winn*, 30 La. Ann. 702 (1878); *Succession of Poussin*, 27 La. Ann. 296 (1875).

108. The attorney's confessing judgment and obtaining a stay of execution thereon, pursuant to his client's instructions is sufficient to estop the client from denying the attorney's authority to confess judgment. *Maraist, Fournet & Co. v.*

The authority required to submit a question to arbitration appears to be similar to that required to compromise. It must be express and cannot be implied from the attorney's professional capacity, and the submission itself must be in writing.<sup>109</sup> The authority to compromise a matter in litigation does not include the authority to submit to arbitration.<sup>110</sup>

Except for the Louisiana statute allowing non-compromise provisions in certain contracts between the attorney and his client,<sup>111</sup> it appears that the Louisiana rules relating to compromise and other agreements made by the attorney are substantially in accord with the rules followed in most other jurisdictions.<sup>112</sup>

### *Authority to Commence and Conduct Litigation*

The attorney authorized to conduct litigation for his client is vested with broad implied powers. By virtue of this implied power, a defendant's attorney is presumed to have authority to waive service of plaintiff's petition,<sup>113</sup> and to accept service of all other process in the suit.<sup>114</sup> The Code of Practice provides that an attorney at law appointed curator *ad hoc* for an unrepresented minor or absentee may "waive service of citation and petition, but shall not waive time or any legal defense."<sup>115</sup>

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Caillier, 30 La. Ann. 1087 (1878) (judgment confessed on a promissory note; execution of judgment stayed for almost a year).

109. King v. King, 104 La. 420, 29 So. 205 (1901); LA. CIVIL CODE arts. 2997, 3071, 3100, 3101 (1870).

110. LA. CIVIL CODE art. 2998 (1870).

111. LA. R.S. 37:218 (1950).

112. Annot., 132 Am. St. Rep. 148, 153 (1910); Note, 3 ARK. L. REV. 473 (1949) (non-compromise provisions in attorney-client contracts); 5 AM. JUR., Attorneys at Law, §§ 96, 98, 99 (1936). *But see id.* §§ 100 (*Arbitration*), 101 (*Confession of Judgment*).

113. LA. CODE OF PRACTICE art. 177 (1870); Ingram v. Richardson, 2 La. Ann. 839 (1847) (*dicta*); Dangerfield's Executrix v. Thurston's Heirs, 8 Mart. (N.S.) 232, 235-36 (1829). Defendant may rebut this presumption by an adequate showing that the attorney did not have such authority. Taylor v. Sutton, 6 La. Ann. 709 (1851). The authority of an attorney to collect a debt due his client is insufficient to infer authority to defend a related action against the client. Barnes v. Profilet, 5 La. Ann. 117 (1850).

114. But, "it is only after citation or the appearance of a defendant through counsel that service of all other process in the suit may be accepted by his attorney of record." Wadsworth v. Alexius, 234 La. 187, 99 So.2d 77, 80 (1958). LA. R.S. 13:3471(15) (1950). See also LA. R.S. 13:3345 (1950) (where district court jurisdiction is concurrent with that of justices of the peace).

115. LA. CODE OF PRACTICE art. 116 (1870). An early case held that waiver of service by an attorney appointed to represent an absentee defendant could not be considered to interrupt prescription running on a debt owed to plaintiff—that such waiver could only be made by defendant personally, or an attorney employed by him. Hill v. Barlow, 6 Rob. 142 (La. 1843). Today, LA. CODE OF PRACTICE art. 116 (1870) has given effect to the rule of the *Hill* case by the provision that an attorney appointed by the court may not waive any legal defense. Although he may not *wave* any legal defense, service of notice of the

In addition, an attorney authorized to conduct litigation is presumed to have authority to dismiss his client's case or the appeal thereof;<sup>116</sup> to authorize the issuance of attachment on his affidavit when his client is absent from the parish both in cases where the debt or obligation owed his client is not yet due, and where the debt is already due;<sup>117</sup> to sign an attachment bond;<sup>118</sup>

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order of seizure and sale on the attorney appointed by the court to represent the absentee is sufficient to *interrupt* prescription running on a note secured by a mortgage. *Williams v. Douglas*, 23 La. Ann. 685 (1871). Appointment by the court to appear for particular unrepresented minors or absentee heirs gives the attorney the power to waive service and citation as to those particular persons, but he has no authority to waive such service for the heirs whom he does not represent. *Powell v. Larance*, 179 La. 751, 155 So. 13 (1934). *Cf. Wadsworth v. Alexius*, 234 La. 187, 99 So.2d 77 (1958).

116. Interdiction of Erichson, 149 La. 895, 90 So. 235 (1921) (evidence of the attorney's former withdrawal from the case considered insufficient to rebut presumption of authority); *Paxton v. Cobb*, 2 La. 137, 140-41 (1830). *But cf. Rogers v. Blitz*, 161 So. 613 (La. App. 1935) (attorney has no right to dismiss unless client is familiar with all the facts and agrees thereto).

117. LA. CODE OF PRACTICE arts. 216, 217 (1870). The provision which is now the second paragraph of Article 216 first appears in La. Acts 1839, No. 53, § 16. In the following year the word "attorney," as used in the phrase "agent or attorney" in the above act, was held to mean *attorney at law*. *Clark v. Morse*, 16 La. 575 (1840). This interpretation has been followed by subsequent cases. *Hardy v. Colvin*, 43 La. Ann. 851, 9 So. 745 (1891) (an attorney at law has implied authority to give affidavit for attachment under the provisions of the Louisiana Code of Practice Article 216, which provisions control the statements in Article 244 that attachment may be granted on the oath of the creditor or "his agent or attorney in fact"); *Fulton v. Brown*, 10 La. Ann. 350 (1855) (attorney at law has authority without special procuration); *Trowbridge Dwight & Co. v. Weir*, 6 La. Ann. 706 (1851); *Alexander v. Burns*, 6 La. Ann. 704 (1851); *Austin v. Latham*, 19 La. 88 (1841) (attorney at law who gave affidavit for attachment need not state he was attorney in fact). *Cf. First National Bank v. Drexler*, 184 So. 607, 613 (La. App. 1938). *But see Rockholt Lumber Co. v. Mississippi Valley Constr. Co.*, 66 So.2d 359, 361 (1953) (dictum); LA. CODE OF PRACTICE art. 244 (1870) (this article applies where the debt is not yet due; under the holding in *Hardy v. Colvin*, *supra*, this article may well include attorneys at law as well as attorneys in fact); LA. R.S. 13:3954 (1950) (this statute applies where the debt is already due and states that the oath authorizing the issuance of attachment "may be made by the agent or attorney of the creditor").

In giving his affidavit for attachment the attorney need not affirmatively state that his client is absent from the parish; his absence may be proved on trial. *Moore v. Gordon*, 153 So. 485 (La. App. 1934), noted in 8 TUL. L. REV. 599 (1934) (this note provides a discussion of the attorney's authority to give affidavits and a more detailed historical background of Article 216 of the Code of Practice). However, the affidavit of an attorney at law is insufficient to obtain a writ of mandamus. *Porteau v. Gluck*, 149 La. 651, 89 So. 886 (1921).

118. The authority to sign an attachment bond may be implied when the attorney is given a general power to collect a debt, as well as when he is authorized to collect a debt through court action. The signing of an attachment bond is held to be merely an act of administration necessary in the client's attempting to obtain payment; for this reason it is well established that the attorney at law does not need special authority to execute such a bond for his client. *Fulton v. Brown*, 10 La. Ann. 350 (1855); *Trowbridge Dwight & Co. v. Weir*, 6 La. Ann. 706 (1851); *Alexander v. Burns*, 6 La. Ann. 704 (1851); *Austin v. Latham*, 19 La. 88 (1841); *Craig v. Yorke*, Gunby's Dec. 44 (La. App. 1885) (stating that the term "attorney in fact" in LA. CODE OF PRACTICE art. 245 (1870) means "attorney at law"). This decision seems correct in the light of the cases in the preceding footnote. See LA. CODE OF PRACTICE art. 245 (1870).

to request a continuance, on his affidavit;<sup>119</sup> and to consent to delays in favor of the opposing attorney.<sup>120</sup> But it appears that he has no implied authority to execute an injunction bond and may do so only when specifically authorized by his client, or when the client is not present to do so.<sup>121</sup>

There seems to be some conflict in the cases as to whether an attorney authorized to conduct litigation has implied authority to release an obligation which another person owes his client. Two early cases held that an attorney has no implied authority to release an obligation of warranty owed to the client by a witness in order to enable the witness to testify for the client.<sup>122</sup> The view taken was that the attorney must have special authority to bind his client by such a release. On the other hand, in *Lagonda Corp. v. Cancasci*,<sup>123</sup> a later case, the attorney for a lessor made a voluntary remission (in open court) of the lessee-defendant's obligation to pay rent for the period remaining under the lease after the lessee had abandoned the premises. This remission was held binding on the lessor. As the attorney in this case did not have any express power to alienate his client's rights, the remission must have been considered within the scope of the powers implied from his authority to conduct litigation. These decisions may possibly be reconciled on their facts. In the early cases the obligations which the attorney attempted to release were only incidental to the client's claim and were not

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119. The court has great discretionary powers as to when a continuance should be granted. However, an affidavit reciting that a material witness is absent in spite of diligent attempts to summon him prior to trial is sufficient to obtain a continuance. *Penne v. Tourne*, 2 La. 462 (1830). *But cf.* LA. CODE OF PRACTICE art. 466 (1870). However, merely reciting that new evidence has been discovered is inadequate to justify the court's granting a continuance without some showing that the client was not at fault in failing to discover such evidence earlier. *Marie v. Avart's Heirs*, 10 Mart. (O.S.) 25 (La. 1821); LA. CODE OF PRACTICE art. 464 (1870).

120. Consenting to such delays is often a matter of professional courtesy, and the attorney clearly has the authority to make such concessions, thereby binding his client. The client has no right to demand that his attorney "be illiberal" regarding such matters. *Brooks v. Cavanaugh*, 11 La. Ann. 183 (1856); 21 LA. R.S. ANN. 396 (*Articles of Incorporation, Louisiana State Bar Association*, art. 14, § 24) (West 1950).

121. *Gauthier v. Gardenal*, 44 La. Ann. 884, 11 So. 463 (1892); *Bank of Louisiana v. Wilson*, 19 La. Ann. 1 (1867). An applicant for either a temporary restraining order (LA. R.S. 13:4064 (1950)) or for a preliminary injunction (LA. R.S. 13:4068 (1950)) must furnish an adequate bond. The Revised Statutes on injunction supersede the related provisions in LA. CODE OF PRACTICE art. 304 (1870).

122. *Succession of Weigel*, 18 La. Ann. 49 (1866); *Succession of Stocking*, 6 La. Ann. 229 (1851) (witness in each case had transferred to client-plaintiff the claim he was seeking to enforce).

123. 4 So.2d 775 (La. App. 1941).

at issue in the case; whereas, in the *Cancasci* case the obligation released was at issue before the court and was part of the claim that the plaintiff-client had authorized his attorney to enforce. It is submitted that a voluntary remission, such as that in the *Cancasci* case is too broad an extension of the attorney's implied powers derived from his authority to conduct litigation. Such a remission should not properly come within the attorney's implied powers, for (as the court indicated) the remission was unnecessary to the client's case, and he could in no way benefit from such remission.<sup>124</sup> It appears that the deprivation of a right of the client without any foreseeable benefit to him is not the type of function to come properly within the attorney's implied powers.<sup>125</sup> On the other hand, the early cases seem to restrict these powers too much, for releasing an interested witness' incidental obligation to the client in order that the witness may testify is clearly to the client's benefit and may be a necessary part of proving the client's case. For these reasons it would seem that a release such as involved in the early cases is properly within the attorney's implied powers.

It is clear that the implied powers of an attorney of record do not cease with the rendition of judgment, for he not only has the authority to receive service of notice of judgment, but such service is required by law. Thus, service of notice of judgment in district and city courts must be made "to all the parties to the suit, through their attorneys of record, or on the parties, if not represented by attorneys."<sup>126</sup> This provision has been held to mean that service on the party himself, where he is represented by an attorney of record, is insufficient and will justify the annulment of a default judgment thereby obtained.<sup>127</sup>

In a few instances the attorney's authority to conduct litiga-

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124. *Id.* at 777.

125. The authority of an attorney to alienate a right of his client by means of his powers implied under Civil Code Article 3000 should be strictly construed. The basis for this contention is that the Code specifies that the power to alienate must be expressly given (Articles 2996, 2997), and even a delegation of general power gives only a power of administration (Article 2996). As an administrator the attorney should act only for his client's benefit. Where the express power to alienate is given, the attorney may deprive his client of property, even though such action may not be to his benefit. To allow the attorney under his implied power to dispose of his client's rights where such action in no way benefits the client is to vest in him, by virtue of his implied powers, a full power to alienate. It would appear that a better course of action would be to restrict the attorney's implied powers to those acts which he could perform under a general power rather than extending them to acts for which the Code requires express power to be given.

126. LA. R.S. 13:3344 (1950).

127. *Alonso v. Bowers*, 222 La. 1093, 64 So.2d 443 (1953).



tion, in effect, gives him an implied power to deprive his client of property. It has been held that an attorney, by virtue of his implied authority, may remit the portion of a judgment in his client's favor which is excessive either because of an error in calculation of damages prayed for by plaintiff's attorney, or because the jury award exceeds the damages which plaintiff requested.<sup>128</sup> Here the attorney's power is implied to avoid injustice to the other litigants.<sup>129</sup> However, the general rule is that an attorney must have special authority to alienate, either by assignment or sale, a judgment in favor of his client.<sup>130</sup> The implied authority of the attorney to request a stay of execution on a judgment rendered against his client has long been recognized.<sup>131</sup>

The attorney's authority to appeal from a judgment rendered against his client and to take the steps necessary to perfect the appeal may be implied from his authority to conduct litigation. Thus, today, contrary to the former rule, the attorney of record for any party may accept service of citation of appeal whether his client resides in the state or not,<sup>132</sup> and may execute an appeal bond for his client.<sup>133</sup> This rule also applies to an attorney who has been appointed curator *ad hoc* for an absentee.<sup>134</sup> But an attorney who has been discharged has no authority to

128. *Guay v. Andrews*, 8 La. Ann. 141 (1853); *Morgan Dorsey & Co. v. Their Creditors*, 19 La. 84 (1841); *Mead v. Buckner*, 2 La. 282 (1831).

129. In these examples the judgment rendered in the client's favor might be considered property vested in the client and the partial remission by the attorney therefore a deprivation of his client's property. However, such a remission by the attorney is actually more an act to correct an injustice through a procedural error than it is a real deprivation of the client's property.

130. *Walden v. Grant*, 8 Mart. (N.S.) 565 (La. 1830). Where an assignment is made without special authority and without the client's knowledge, the purchaser does not acquire title to the judgment, nor does the client's receipt of money paid to the attorney ratify the transfer. *Campbell v. McKnight, Gunby's Dec. 44* (La. App. 1885).

131. *Maraist, Fournet & Co. v. Caillier*, 30 La. Ann. 1087 (1878).

132. *Wiltz v. Home Building & Loan Ass'n*, 24 So.2d 204 (La. App. 1945) (La. R.S. 13:3471(15) (1950) supersedes LA. CODE OF PRACTICE art. 582 (1870), when a party is represented by an attorney of record who has not formally withdrawn from the case).

Older cases achieved the same result by the presumption that the attorney of record had authority to accept service of petition and order of appeal. *Wood & Roane v. Wood*, 32 La. Ann. 801 (1880); *Hill v. Bowden*, 3 La. Ann. 258 (1848); *Conrey v. Brenham*, 1 La. Ann. 397 (1846). *But see Leglise v. His Creditors*, 4 Mart. (N.S.) 238 (La. 1826).

133. *Bank of Louisiana v. Wilson*, 19 La. Ann. 1, 3 (1867) (dictum); *Trowbridge Dwight & Co. v. Weir*, 6 La. Ann. 706 (1851) (dictum). But a wife's attorney is not presumed to have the authority to execute an appeal bond in the husband's name where he is not a party to the suit. *Gibson v. Hitchcock*, 35 La. Ann. 1201 (1883).

134. *Bach v. Ballard*, 13 La. Ann. 487 (1858).

give bond and to prosecute an appeal,<sup>135</sup> and where his client dies after a final judgment in an inferior court, the attorney at law may appeal only after obtaining the consent of the heirs or the legal representative of the deceased.<sup>136</sup> Following the general rules applicable to the attorney's authority, an attorney at law having only general authority cannot bind his client by a gratuitous waiver of the client's right to appeal.<sup>137</sup>

### *Authority to Receive Payment*

Where the services of an attorney at law are retained to collect a debt, he has implied authority to receive payment in money, and such payments to him will discharge the debtor.<sup>138</sup> As previously indicated, the attorney also has the implied authority to accept partial payments in *pro tanto* satisfaction of his client's claim.<sup>139</sup> But he has no implied authority to extend the time for payment of a note placed in his hands,<sup>140</sup> or to compromise his client's claim.<sup>141</sup>

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135. *Planters' Lumber Co. v. Sugar Cane By-Products Co.*, 162 La. 123, 110 So. 172 (1926); *Ikerd v. Borland*, 35 La. Ann. 337 (1883).

136. *Stith v. Winbush*, 3 La. 442 (1831).

137. *S. H. Keoughan & Co. v. Equitable Oil Co.*, 116 La. 773, 41 So. 88 (1906). See page ... *supra*. For a contract form emphasizing the requirement of consent of both parties as a requirement to the prosecution of an appeal, see 1 AM. JUR., *Legal Forms Ann.* 1803 (1953).

138. The attorney has such authority to receive payment where he is authorized to sue to collect the debt. *Succession of Czarnowske*, 158 La. 1093, 105 So. 76 (1925); *Mayor v. Hennen*, 18 La. 428 (1841); *Nolan v. Rogers*, 4 Mart. (N.S.) 145 (La. 1826); LA. CIVIL CODE art. 2143 (1870). But authority to defend a client is insufficient to imply authority to receive proceeds of the client's property sold in satisfaction of judgment in the suit. *Germaine v. Mallerich*, 31 La. Ann. 371 (1879). Cf. *Lambeth v. Mayor*, 6 La. 731 (1834). He also has such authority where the holder of a promissory note places it in his hands for collection.

*Woodrow v. Hennen*, 6 Mart. (N.S.) 156 (La. 1827) (authority to collect may be supported by evidence of actual collection); *Spengler v. Drouet*, 6 La. App. 624 (1927).

Where payment is made to the attorney by check payable to client, it is doubtful whether the attorney has the implied authority to endorse the instrument. "Authority to receive an instrument payable to the order of the client does not imply the authority of the agent to endorse his name. The modern rule seems to be that if it is necessary for the attorney in effectuating the main authority conferred, to make an endorsement, such authority will be implied." *Witherspoon, May an Attorney Endorse Client's Name*, 58 Com. L.J. 213 (1953). See also Note, 27 So. CALIF. L. REV. 463 (1954).

139. *Liquidators of Joseph David Co. v. Berthelot Bros.*, 11 La. 380, 42 So. 971 (1907); *Pickett v. Bates*, 3 La. Ann. 627 (1848).

140. *Roberts v. Smith*, 3 La. Ann. 205 (1848); *Millaudon v. M'Micken*, 7 Mart. (N.S.) 34 (La. 1828). Such an extension of time, if valid, would release the sureties on the note and would be more than an act of mere administration.

141. *Dupre v. Splane*, 16 La. 51, 54 (1840). See page ... *supra*.

Although the attorney authorized to collect a debt need not have express power to receive payment in legal tender,<sup>142</sup> he must be given express power to receive, or to agree to receive, payment in other than legal tender.<sup>143</sup> Express power must be given to authorize the attorney to accept a note in payment of a debt or judgment in his client's favor.<sup>144</sup>

### *Ratification of Attorney's Unauthorized Acts*

A client will be bound by the unauthorized acts of his attorney if the court finds that he has ratified such acts either by his silence or by his conduct.<sup>145</sup> For the client to have ratified his attorney's unauthorized acts in either manner, he must have had adequate knowledge of the transaction at the time of ratification.<sup>146</sup> The client has been held bound by the unauthorized acts of his attorney where, with adequate knowledge, he has remained silent for an unreasonable time,<sup>147</sup> has silently accepted for a long period the benefit of his attorney's acts,<sup>148</sup> has re-

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142. Succession of Czarnowski, 158 La. 1093, 1097, 105 So. 76, 77 (1925); Davis v. Lee, 20 La. Ann. 248 (1868); Garthwaite, Wheeler & Co. v. Wentz, 19 La. Ann. 196 (1867); Railey & Campbell v. Bagley, 19 La. Ann. 172 (1867); Phelps v. Preston, 9 La. Ann. 488 (1854); Nolan v. Rogers, 4 Mart.(N.S.) 145, 146 (La. 1826); Williams v. Metropolitan Bank, 3 Orl. App. 471, 473 (La. App. 1906). See also LA. CIVIL CODE art. 2143 (1870).

143. Davis v. Lee, 20 La. Ann. 248 (1868); Railey & Campbell v. Bagley, 19 La. Ann. 172 (1867); Phelps v. Preston, 9 La. Ann. 488 (1854); Perkins v. Grant, 2 La. Ann. 328 (1847); Williams v. Metropolitan Bank, 3 Orl. App. 471, 473 (La. App. 1906) (writ of review refused).

144. Dunbar v. Morris, 3 Rob. 278 (La. 1842); Greenwell v. Roberts, 7 La. 63 (1834); Hicky v. Sharp, 4 La. 335 (1832); Millaudon v. M'Micken, 7 Mart.(N.S.) 34 (La. 1828); Nolan v. Rogers, 4 Mart.(N.S.) 145 (La. 1826). But the attorney may have the judgment debtor deduct the amount of the attorney's note to the extent of his fixed fee. Williams v. Metropolitan Bank, 3 Orl. App. 471 (La. 1906) (writ of review refused). Even where an attorney of record had authority to "make any arrangement for the debt which was for their [his clients'] interest," his authority was held insufficient to empower him to accept a note and mortgage in satisfaction of his clients' judgment. Greenwell v. Roberts, 7 La. 63, 65 (1834).

145. Milburn v. Wemple, 156 La. 759, 766, 101 So. 132 (1924); LA. CIVIL CODE arts. 3010, 3021 (1870). See also 5 AM. JUR., *Attorneys at Law*, § 71 (1936).

146. Blythe v. Hall, 169 La. 1120, 126 So. 679 (1930); Campbell v. McKnight, Gunby's Dec. 44 (2d Cir. 1885). Mere knowledge of the proceeding is insufficient to imply knowledge that an attorney appearing therein purports to represent all of the heirs in a partition suit. Wadsworth v. Alexius, 234 La. 187, 99 So.2d 77 (1958).

147. Brooks v. Poirier, 10 La. Ann. 512 (1855) (silent for eight years).

148. Mason v. Stewart, 6 La. Ann. 736 (1851) (oath of party insufficient to overcome five years' acceptance); Dupre v. Splane, 16 La. 51 (1840). Cf. Flower v. Jones & Gilmore, 7 Mart.(N.S.) 140 (1828) (acceptance of accounts rendered by agent for six years).

ceived and retained the proceeds from the unauthorized conduct,<sup>149</sup> or has invoked judicial process to confirm such action.<sup>150</sup>

Charles B. Sklar

## Land Occupier's Liability to Trespassers

In recent times, the traditional rule that a land occupier is liable to a trespasser only if the land occupier is guilty of flagrant misconduct has been considerably altered. Although the trespasser still cannot recover for many injuries for which a person lawfully upon the premises can recover, the courts have imposed certain duties upon land occupiers to avoid injuring trespassers. It is the purpose of this Comment to analyze these duties.<sup>1</sup>

The trespasser is a person whose presence upon land is without any claim of right secured by the permission of the occupier.<sup>2</sup> The occupier's permission may extend only to a portion of the premises. Thus a person, lawfully upon the premises by virtue of the occupier's consent, will nevertheless be considered a trespasser by entering into that part of the premises that he is not authorized to enter.<sup>3</sup>

The degree of care required of the occupier to trespassers is considerably less than what is owed to those lawfully on the premises.<sup>4</sup> This partial immunity from liability to trespassers

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149. *Simon v. Barnett*, 169 La. 642, 125 So. 743 (1930); *Culverhouse v. Marx*, 39 La. Ann. 809 (1887); *Beau v. Drew*, 15 La. Ann. 461 (1860); *Campbell v. McKnight*, Gunby's Dec. 44 (2d Cir. 1885).

150. *Housing Authority of New Orleans v. Henry Ericsson Co.*, 197 La. 732, 2 So.2d 195 (1941) (applied to court to confirm arbitration award); *Camors & Co. v. Losch*, Mannings Unreported Cases 95 (garnishment of proceeds paid to attorney under unauthorized settlement). *Cf. Zibilich v. Rittenberg*, 8 La. App. 628, 139 So. 309 (1932) (requested dismissal of original suit based on compromise).

1. However, this discussion will not treat liability of land occupiers under the attractive nuisance doctrine, which involves injuries to trespassing children due to defective conditions of the premises. For a treatment of this doctrine, see Comment, *The Attractive Nuisance Doctrine in Louisiana*, 10 LOUISIANA LAW REVIEW 469 (1950).

2. *Lynch v. American Brewing Co.*, 127 La. 848, 54 So. 123 (1911). See also RESTATEMENT, TORTS § 329 (1938).

3. *Gray v. Elgutter*, 5 La. App. 315 (1926) (maid entered into an unopened apartment she was not supposed to clean).

4. Those persons coming onto the land of another have been classified into three distinct groups by the courts, and the degree of the land occupier's obligation differs in each case. (1) The invitee is a person who comes upon the property for some reason beneficial to the land occupier and with the land occupier's express or implied invitation. See *Gosey v. Kansas City Southern Ry.*, 100 So.2d