Louisiana Law Review

Volume 43 | Number 2
Developments in the Law, 1981-1982: A Symposium
November 1982

Professional Responsibility

Warren L. Mengis

PROFESSIONAL RESPONSIBILTY

*Warren L. Mengis**

In a recent case involving a conflict of interests, Judge Charles A. Marvin stated, "The Code of Professional Responsibility, since Watergate, is a required course in the nation's law schools. Members of the profession have the duty to maintain competency in all areas of the law, including this area, for the good of the client and of the profession."[1] Since *Saucier v. Hayes Dairy Products*,[2] there has been little doubt as to the importance of the Code of Professional Responsibility. As the court said in that opinion:

> The Code of Professional Responsibility which regulates attorneys' practices has been recognized as having the force and effect of substantive law. As a result, these rules set forth by virtue of the Court's exercise of its prevailing judicial authority override legislative acts which tend to impede or frustrate that authority; only legislative enactments in this area which aid the court's inherent powers will be approved.[3]

Even with such emphasis, the system of justice and lawyers in general are held in low esteem. The finding that John W. Hinckley, Jr. was not guilty by reason of insanity in the attempted murder of President Reagan did not help matters at all. As pointed out by Richard F. Knight, who reviewed the work of the courts during the 1980-1981 term,[4] the Supreme Court of Louisiana continues to seek that delicate balance needed to protect the public from the actions of irresponsible or careless attorneys while, at the same time, not unduly penalizing or punishing an attorney who has demonstrated an understanding of his prior wrongdoing and has taken those measures that convince the court that his future conduct will be consistent with the high standards of his profession.

DISCIPLINE

Only three full-scale disciplinary proceedings were reported dur-

* Professor of Law, Louisiana State University.

1. Boyette v. Auger Timber Co., 403 So. 2d 800, 806 (La. App. 2d Cir. 1981) (Marvin, J., concurring).

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

3. 373 So. 2d at 115. *See* Note, *The Concept of an "Earned Fee" in the Regulation of Attorney's Fees by the Louisiana Supreme Court*, 42 LA. L. REV. 1181 (1982).

4. Knight, *Developments in the Law, 1980-1981--Professional Responsibility*, 42 LA. L. REV. 609 (1982).

ing this term. In *Louisiana State Bar Association v. Levy*,[5] the respondent attorney was convicted by a jury in a federal district court of five counts of violating and conspiring to violate the Travel Act, 18 U.S.C. § 1952, and was sentenced to serve concurrently two years on each conviction. In due course and in accordance with article 15, section 8 of the Articles of Incorporation of the Louisiana State Bar Association, proceedings were instituted by the Committee on Professional Responsibility to suspend or disbar Mr. Levy. The court found that a serious crime had been committed, justifying a substantial punishment to avoid deprecation of the offense and to provide a meaningful deterrent to other potential offenders. A suspension of 18 months was ordered after the court considered mitigating circumstances. The court stated, "The purpose of lawyer discipline proceedings is to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice from lawyers who have demonstrated in their conduct that they are unable or likely to be unable to discharge their professional duties."[6]

Following the same precept is *Louisiana State Bar Association v. Heymann*.[7] In this case, the attorney had been convicted of transporting falsely made and counterfeit securities.[8] The commissioner, in his report to the supreme court, concluded that the respondent suffered from a psychological or emotional disorder consisting of a compulsive or addictive gambling habit or disease, but, since the offense, he had made a determined effort to overcome the problem. The court concluded that the respondent attorney had been convicted of two felonies involving deceit and dishonesty and that his criminal conduct violated the Code of Professional Responsibility. A two-year suspension was therefore deemed appropriate, even though the respondent seemed a good candidate for rehabilitation.

The last of the three disciplinary proceedings was *Louisiana State Bar Association v. O'Halloran*.[9] In this case, the respondent attorney was convicted of evading taxes in two successive years and of willfully filing a false return for the third year. Disciplinary proceedings were instituted under the provisions of article 15, section 8 of the Articles of Incorporation of the Louisiana State Bar Association, and the respondent attorney was suspended for a period of three years by the supreme court. The court stated that a lawyer owes a professional duty to refrain from illegal conduct involving moral turpitude, conduct involving dishonesty, fraud, deceit, misrepresentation, or con-

5. 400 So. 2d 1355 (La. 1981).
6. 400 So. 2d at 1358.
7. 405 So. 2d 826 (La. 1981).
8. The attorney's conduct violated 18 U.S.C. § 2314 (1976).
9. 412 So. 2d 523 (La. 1982).

duct that is prejudicial to the administration of justice. If there is any doubt in the minds of attorneys that income tax evasion or filing false returns is a crime involving "moral turpitude," this case should remove it.[10]

These three disciplinary proceedings represent only a part of the overall problem of attorney misconduct. Another attorney was disbarred by consent[11] and two others were suspended under the provisions of article 15 section 8(4).[12] In a rather curious order, a third suspension under article 15 section 8(4) was declined and the matter was referred back to the committee for further proceedings in *Louisiana Bar Association v. Dozier*.[13]

In addition to these matters, the court considered the applications for reinstatement of seven attorneys who previously had been disbarred. Three applications were denied,[14] one was referred back to the Committee on Professional Responsibility of the Louisiana State Bar Association,[15] and three were granted.[16]

CONFLICTS OF INTEREST

There were several very interesting cases involving those conflicts of interest which confront the practicing attorney. In *Boyette v. Auger Timber Co.*,[17] a conflict resulted from the filing of a third party petition by the three defendants against one of the plaintiffs. The suit arose out of a collision between a tractor-trailer rig and an automobile. The driver of the automobile, a guest passenger, and the mother of a deceased guest passenger joined in filing suit against the owner of the tractor-trailer rig, its liability insurer, the driver of the rig, and the Louisiana Department of Transportation and Development. All of the defendants then filed a third party demand against the driver of the automobile—Mr. Harvey Lowe—and his insurer, seeking contribution in the event that the defendants were cast in judgment. The attorney for Mr. Lowe's insurer, however, took the position before the jury that Lowe had been negligent in the operation of his vehicle and that his negligence was the sole cause of the acci-

10. *See also* L.S.B.A. v. Ponder, 340 So. 2d 134 (La. 1976).

11. L.S.B.A. v. Johnson, 412 So. 2d 1087 (La. 1982).

12. L.S.B.A. v. Marcal, 400 So. 2d 897 (La. 1981); L.S.B.A. v. Shapiro, 412 So. 2d 990 (La. 1982).

13. 404 So. 2d 1258 (La. 1981).

14. L.S.B.A. v. Stoker, 407 So. 2d 723 (La. 1981); L.S.B.A. v. Schmitt, 413 So. 2d 499 (La. 1982); L.S.B.A. v. Russell, 414 So. 2d 1250 (La. 1982).

15. L.S.B.A. v. Philips, 409 So. 2d 676 (La. 1982).

16. L.S.B.A. v. Loridans, 412 So. 2d 1102 (La. 1982); *In re* Hennigan, 412 So. 2d 1102 (La. 1982); *In re* Shaheen, 414 So. 2d 782 (La. 1982).

17. 403 So. 2d 800 (La. App. 2d Cir. 1981).

dent. This position obviously would have benefited Continental Insurance, the insurer of Mr. Lowe, because if true, the main demand would have fallen as to all defendants, which necessarily would have terminated the third party demand against Continental and Lowe. One can imagine the confusion of the jury as Mr. Lowe's original attorney argued that he was free from negligence and Mr. Lowe's other attorney, representing his liability insurer, argued that he was negligent. On the second day of trial, Mr. Lowe's original attorney moved for a mistrial, arguing surprise at the position taken by Continental's counsel, which he felt was prejudicial to his client. The trial court denied the motion, commenting that each attorney would represent Lowe to the best of his ability according to his position in the case. The jury found no negligence on the part of the defendants other than the Department of Transportation, and the trial judge found no negligence on the part of that defendant. The suit was dismissed and the plaintiffs appealed. The majority opinion of the court of appeal found that the position taken by Continental's counsel was highly prejudicial to the plaintiff and that the trial should not have been allowed to proceed. However, after a review of the entire record, the court concluded that the decision according to the law was correct and it affirmed. In his concurring opinion, Judge Marvin highlighted this extraordinary conflict of interest. In the first place, the driver of the automobile and the guest passengers should not have been represented by the same attorney, particularly when a third party action later asserted the negligence of that driver as the cause of the accident.[18] In addition, Judge Marvin especially concurred in the statement of the majority that the trial of the case should not have been allowed to proceed when Continental's attorney, who was also Mr. Lowe's attorney, took a position contrary to Mr. Lowe's own interest. Judge Marvin's concurring opinion and the citations contained therein should be carefully studied by all trial lawyers.

In *State v. Franklin*,[19] a conviction and sentence were reversed because the defendant's attorney had a serious conflict of interest at the time of the trial. The East Baton Rouge Parish Public Defender's Office was appointed to represent both the defendant in this case and his sister, who was charged on a separate bill of information with a separate offense. It was not until the day before the trial that the public defender and the court learned that the offenses arose out of the same transaction and that the two defendants were related. The sister pleaded guilty and was to be granted immunity from armed

18. *See* L.S.B.A. Comm. on Professional Responsibility, Op. 102 (appeared in the Lawyers Desk Book, at 0-3, prior to the removal of older opinions when the new Code of Professional Responsibility was adopted).

19. 400 So. 2d 616 (La. 1981).

robbery or other related offenses if she agreed to testify against her brother. On the morning of the trial and prior to the swearing in of any of the witnesses, the public defender moved to withdraw in both cases because of his prior representation of both brother and sister. The trial judge recognized the conflict and relieved the public defender from representing the sister, but refused to relieve him from representing the brother. The court held that the mere possibility of a conflict is insufficient to reverse a criminal conviction. However, if a defendant establishes that an actual conflict of interest adversely affected his lawyer's performance, he has demonstrated a violation of his sixth amendment rights under the United States Constitution and his rights under article I, section 13 of the Louisiana Constitution of 1974. If an actual conflict exists, there is no need for a defendant to prove that he was also prejudiced thereby. Showing of an actual conflict mandates reversal, and the court found in this case that there was, in fact, an actual conflict.

In *Teel v. Teel*,[20] the husband filed a motion to recuse his wife's attorney because that attorney had represented the husband both personally and through his corporation over a period of eight years and had gained intimate knowledge of all of the husband's affairs. Since the wife was seeking to obtain a partition of the community property, an inventory of the community property, and an injunction against the husband to prevent him from disposing of or alienating any community property, the husband contended that the prior relationship and the confidentiality required in connection therewith would be violated by the present representation of the wife by the same attorney. The trial judge required the withdrawal of the wife's attorney, and application was made for supervisory writs. The appellate court concluded that the order of withdrawal was correct, citing Canon 4 that "a lawyer should preserve the confidences and secrets of a client" and Canon 5 that "a lawyer should exercise independent professional judgment on behalf of a client."[21] Although conflicts are sometimes difficult to perceive, the court in this case noted that a conflict was apparent.

In a somewhat similar case, *Rollo v. Dison*,[22] the trial judge was recused in a civil suit because he had previously served in the capacity of a first assistant district attorney in criminal matters arising out of the same circumstances that gave rise to the civil suit. The court noted that article 151(2) of the Louisiana Code of Civil Procedure man-

20. 400 So. 2d 357 (La. App. 4th Cir. 1981).

21. LA. CODE OF PROFESSIONAL RESPONSIBILITY, Canons 4 & 5 (found in ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS'N art. XVI; LA. R.S. 37 Ch. 4 app.) [hereinafter cited as CODE OF PROFESSIONAL RESPONSIBILITY].

22. 402 So. 2d 122 (La. App. 2d Cir. 1981).

dated recusal in such a situation, even though the judge's personal contact with the criminal proceedings had been minimal while he was an assistant district attorney.

ADVERTISING AND SOLICITATION

There was only one decision by the supreme court in the advertising and solicitation area: *In re Fabacher*.[23] Mr. Fabacher sought to restrain the Louisiana State Bar Association from enforcing Disciplinary Rule 2-105. Apparently, Mr. Fabacher took issue with this disciplinary rule and with the committee's practice of forbidding an attorney from advertising that he practiced in a specific area of the law. The court denied the application "since under today's adoption by this court of the Committee on Professional Responsibility's proposed amendments to Disciplinary Rules 2-101(D) and 2-105, relator may advertise that he practices in a specific area of the law." It should be noted that the code still provides that a lawyer shall not state or imply that he is a specialist, except that a lawyer admitted to practice before the United States Patent Office may use the designation "Patent Attorney" or a substantially similar designation. The code goes on to provide that the lawyer recognized as a specialist under a plan approved by the Louisiana State Bar Association may indicate that speciality, but no such plan has been put into effect by the bar association as of this date.[24] It also should be noted that the code provides that a lawyer's specification that his practice "is limited to" or "concentrated in" particular fields implies formal recognition as a specialist and is likewise not permitted. This change in the Louisiana Code of Professional Responsibility makes it unnecessary to consider the effect of the United States Supreme Court decision, *In re R.M.J.*,[25] decided on January 25, 1982.

MALPRACTICE

The question of whether a malpractice action is in tort or contract was raised again in *Cummings v. Skeahan Corp.*,[26] wherein the plaintiff sought recovery of damages against his attorney for failing to discover a mineral lease and include it in his title opinion. The defendant attorney filed an exception of prescription of one year, relying on the jurisprudence pertaining to medical malpractice. A majority of the court held that a malpractice action against an attorney partakes of elements both *ex contractu* and *ex delicto* and, since the plaintiff in this case had clearly alleged a breach of contract, the prescrip-

23. 409 So. 2d 635 (La. 1981).
24. *See* CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-105(A)(1) & (2).
25. 102 S. Ct. 929 (1982).
26. 405 So. 2d 1146 (La. App. 1st Cir. 1981).

tion applicable was ten years; the holding of the trial court sustaining the prescription of one year was reversed. In a concurring opinion, Judge Edwards pointed out the conflict existing in the First Circuit Court of Appeal's prior decisions of *Jackson v. Zito*[27] and *Vessel v. St. Paul Fire & Marine Insurance Co.*[28] In the former decision, no distinction was made between different types of malpractice actions and it was set forth that the action could be maintained in contract as well as tort. However, in *Vessel*, where there was no dispute as to the client-attorney relationship, as the issue was solely one of whether the attorney failed to meet the standard of professional expertise, the action lay in tort only.

In two cases, the court found no contract existing between the plaintiff and the attorney sued. In *Deville v. Zaunbrecher*,[29] the plaintiff filed suit against an attorney who had handled a case *against* him for a client. More than one year had passed, and the court held that while it was questionable that the plaintiff had stated a cause of action in his petition, in any event it would be classified as an offense or quasi-offense arising under article 2315 of the Civil Code and was, therefore prescribed.

In *Bill Nolan Livestock, Inc. v. Simpson*,[30] the attorney against whom suit was filed had been appointed by the court to represent a nonresident defendant. The plaintiff contended that his court-appointed attorney had committed malpractice by breaching his professional and contractual duties in allegedly failing to take any steps to contact Nolan Livestock and inform it of potential defenses. An exception of prescription of one year was filed by the defendant attorney; this exception was sustained in the lower court and affirmed in the court of appeal. The court found that this was not the usual situation in which the attorney and client come together voluntarily and there is a meeting of the minds as to the purpose of the relationship. Instead, this relationship was based upon the court's order that the attorney represent the nonresident client. This being true, there was no contractual relationship to justify a ten-year prescriptive period.

In *Nelson v. Appalachian Insurance Co. of Providence*,[31] the plaintiff brought suit directly against his attorney's malpractice insurer, contending that he had been injured by his attorney's failure to perfect an appeal. The court reiterated the rule that in order to prevail in

27. 314 So. 2d 401 (La. App. 1st Cir. 1975).
28. 276 So. 2d 874 (La. App. 1st Cir. 1973).
29. 401 So. 2d 643 (La. App. 3d Cir. 1981).
30. 402 So. 2d 214 (La. App. 1st Cir. 1981).
31. 399 So. 2d 711 (La. App. 1st Cir. 1981).

a legal malpractice suit involving alleged mishandling of a suit, a plaintiff must show that because the prior suit was mishandled, the plaintiff lost the original suit or had his position otherwise impaired. The court then considered the alleged mishandling and found that the decision of the trial court was, in fact, correct and that an appeal would not have helped the plaintiff. Accordingly, the court affirmed the dismissal of the plaintiff's suit.

In *Fontenot v. Memphis Farms, Inc.*,[32] the attorney was brought into the litigation by a third party demand of the defendant lessor, who contended that if he had breached the lease with Fontenot, who had originally brought suit for damages, such breach was due to the fault of the third party defendant attorney. Essentially, the third party demand against the attorney was based on alleged oral representations by the attorney that financing would be no problem. However, the evidence showed that the attorney never guaranteed that the loan would be approved nor did he give any opinion on the likelihood of its approval. In addition, it appeared that the third party plaintiff acknowledged in his deposition that at no time was the attorney representing him and at no time was he ever under the impression that the attorney had been representing him. In view of this uncontradicted testimony, the summary judgment granted below was affirmed, insofar as the third party defendant attorney was concerned.

Finally, comes the decision of *Viccinelli v. Causey*.[33] This case actually got to the merits of conduct which had fallen below acceptable professional standards. Defendant attorney represented Mrs. Simoneaux in separation and divorce proceedings and, finally, in the community property settlement which gave rise to this malpractice action. In the partition agreement, Mrs. Simoneaux was to receive the family home and assume payment of the first mortgage thereon. Mr. Simoneaux assumed all other community debts. At the time of the community partition, a judgment in the amount of $2,495 was of record against Mr. Simoneaux. Defendant attorney admitted under cross-examination that he was aware of the judgment, which effected a judicial mortgage against the property being conveyed to his client, but he did not advise her of the effect of it, although he testified that he did discuss it with her. All of this took place in 1971. Mrs. Simoneaux testified that she first learned of the judgment in 1977 when she sold her home and was forced to pay off a total amount of $4,452, which was the amount demanded in the suit against Mr. Simoneaux and Mr. Causey. The court found, after a complete review of the evidence, that Mr. Causey's representation of his client fell

32. 411 So. 2d 1257 (La. App. 3d Cir. 1982).
33. 401 So. 2d 1243 (La. App. 1st Cir. 1981).

below any reasonable standard of care, diligence, and skill and that he was guilty of professional malpractice. Accordingly, the judgment of the trial court against him was affirmed. In concurring, Judge Cole pointed out that the attorney noticeably never conveyed to his client knowledge elementary to even the most unskilled counsel; that is, a money judgment creates a judicial mortgage against the judgment debtor's immovable property. "This failure to fulfill his duty and responsibility as an attorney, whether the result of negligence or by design, cost his client [$4,452] and is the very essence of malpractice."[34]

FEES AND MISCELLANEOUS MATTERS

The Code of Professional Responsibility makes it quite clear that attorneys are entitled to and should charge a reasonable fee;[35] however, almost every attorney from the young to the old will have difficulty from time to time in determining what is a reasonable fee under the circumstances. The factors set forth in Disciplinary Rule 2-106(B) are of course helpful, and many attorneys are now using a written contract arrangement so that there will be no misunderstanding in regard to the fee being charged. Attorneys who work on an hourly basis are training themselves to keep meticulous time records; even so, disputes arise, and the past term was no exception.

In *Coon v. Landry*,[36] the attorney and her clients entered into a written "retainer agreement" which fixed the plaintiff's fee on a contingency basis. In addition, the agreement stated that the clients agreed to pay all costs and expenses necessary to prosecute the claim to a proper conclusion. A judgment was duly obtained against one James A. Knight, but it was apparently uncollectable as Mr. Knight had left the state. The attorney subsequently made claim against her clients for out of pocket expenses amounting to $482, which her clients refused to pay; whereupon, this suit followed. Later, the attorney amended her petition to seek $1,000 as reasonable attorney's fees for services rendered on a quantum meruit basis. The defendants in this suit contended that neither the fee nor the expenses were owed because nothing had been collected on the judgment and, consequently, the case had not been brought to a "proper conclusion." The attorney argued that Disciplinary Rule 5-103 of the Code of Professional Responsibility, which provides that clients remain ultimately liable for expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, made it clear that the clients owed for these

34. 401 So. 2d at 1245.
35. *See* CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-16, EC 2-17, EC 2-18, DR 2-106.
36. 400 So. 2d 1144 (La. App. 1st Cir. 1981).

expenses, regardless of any collection on the judgment. The court held that although the ethical considerations in the disciplinary rules of the Louisiana State Bar Association Code of Professional Responsibility are intended to govern the conduct and practice of law by attorneys, they are not binding on clients and, consequently, the law between the parties in this case was the retainer agreement. It then found that the language in the contract was vague and that the words to bring "a case to a proper conclusion" were too indefinite and subject to too many interpretations to enforce. Accordingly, the court found that the defendants did not bind themselves in any fashion for payment of expenses unless there was recovery in their lawsuit. Since there was no recovery, no expenses were owed to the plaintiff and, of course, no attorney fee was granted. Judge Elmo Lear dissented and was of the opinion that the trial court's decision in favor of the clients was clearly wrong. He was of the opinion that the case had been brought to a proper conclusion by the obtaining of the judgment which had become executory and that, therefore, under the language of the retainer agreement, the expenses and costs which the attorney had advanced became due. Judge Lear did not believe that the defendants could have reasonably expected the attorney to advance and lose the expenses incurred if an actual monetary recovery was not possible. From a practical standpoint, it would seem that Judge Lear was correct, although every practicing attorney knows that in situations of uncollectable judgments or lost law suits, the chance of recovering expenses and costs is slim at best.

In the consolidated cases of *Theus, Grisham, Davis & Leigh v. Dedman* and *Coenen v. Dedman*,[37] two different law firms sued Mrs. Dedman for legal services rendered to her in the course of contested separation and divorce proceedings. The principle issues in these cases were whether the records kept on a daily basis by the attorneys showing time and expenses were objectionable as not the best evidence, or were inadmissible as hearsay, or were both. The court concluded that even though there might be cancelled checks and receipts to support the records of the attorneys, their existence did not make applicable the best evidence rule so as to exclude other evidence of the expenditures, the other evidence being the detailed daily record of each attorney. In addition, the court found that the records kept by an attorney on a daily basis to aid in the evaluation and the accounting of his services to his clients in the ordinary course of the attorney's business are admissible under the business records exception to the hearsay rule, and recovery was allowed both law firms.

In *Clark v. Aetna Life Insurance Co.*,[38] an attorney terminated in

37. 401 So. 2d 1231 (La. App. 2d Cir. 1981).
38. 410 So. 2d 1187 (La. App. 3d Cir. 1982).

a worker's compensation matter filed a petition for intervention wherein he sought to be dismissed as counsel of record and further sought attorney's fees and costs according to his contract of employment and quantum meruit. A default judgment was obtained in this facet of the case, from which the plaintiff appealed and filed a peremptory exception, wherein he alleged that a succeeding attorney is an indispensable party to any action by a terminated attorney to collect a contingent fee and the failure to join the succeeding attorney rendered the proceedings fatally defective, requiring remand. Relying on *Saucier v. Hayes Dairy Products*,[39] the court agreed and found that "a terminated attorney is obligated to name the succeeding attorney as an indispensable party in any action to recover attorney's fees inasmuch as the issue of attorney fees was to be resolved by allocation between the attorneys of the highest ethical contingent fee to which client had agreed."[40] Accordingly, the judgment of the trial court was reversed and the matter remanded for further proceedings.

Some of the factors in determining a reasonable fee were discussed in *McKernan v. Watson*,[41] wherein the attorneys had originally agreed to defend a person accused of armed robbery for the sum of $5,000. After the attorneys had done considerable work, but before trial, the accused discharged them and retained another attorney. He paid nothing to his original attorneys, who then filed suit for the sum of $2,500 alleging that the contract between the parties was for $5,000 but, because the plaintiffs did not handle the matter through trial, they were demanding only half of the original fee. The court considered the amount of time spent on the case by the attorneys, the seriousness of the charge, the diligence and skill of the representation afforded the defendant, and the degree of expertise involved in the case and concluded that a fee of $2,500 on a quantum meruit basis was reasonable.

Two cases, both decided by the first circuit, emphasized the limitation on an attorney's ability to bind his client without clear and express consent. In *General Electric Credit Corp. v. Coleman*,[42] it was held that an attorney could not sign a binding settlement agreement for and on behalf of his client without written authorization. In *Baker v. Purselley*,[43] the court held that a party's counsel did not have authority to compromise his client's claim without the client's clear and express consent. The same point was made by Judge Marvin in *Boyette v. Auger Timber Co.*, wherein he stated that an attorney could

39. 373 So. 2d 102 (La. 1979).
40. 410 So. 2d at 1188.
41. 407 So. 2d 434 (La. App. 1st Cir. 1981).
42. 408 So. 2d 376 (La. App. 1st Cir. 1981).
43. 411 So. 2d 553 (La. App. 1st Cir. 1982).

not ethically take a position contrary to the interest of his own client, particularly where the client resisted the attorney's course of action.[44]

During this term of court, not only have there been suits by clients against attorneys and attorneys against clients, there have been also suits by attorneys against attorneys. In both *Wattigny v. Lambert*[45] and *Freeman v. Cooper*,[46] the plaintiff attorney accused the defendant attorney of defamatory statements; the alleged statements were made in a petition in the former case and in a brief in the latter. In *Wattigny*, the court stated,"We have used all or part of the following provisions of the Code of Professional Responsibility to aid in our determination of this difficult question. The provisions utilized are Ethical Consideration 2-30; Disciplinary Rule 2-109; Ethical Consideration 7-4; Ethical Consideration 7-10; Ethical Consideration 7-22; and Disciplinary Rule 7-102."[47] Ethical Considerations 7-37 and 7-38, as well as Disciplinary Rule 7-106(C)(1)(5), might well have been added to the list. These provisions of the code essentially provide that, in adversary proceedings, the clients are the litigants and there should be no ill feelings between the attorneys, neither of whom should make any unfair, derogatory, or personal reference concerning the other.

In *Wattigny*, the alleged defamatory statements directed toward opposing counsel were characterized by the court as misstatements of fact. They accused the attorney and others of committing certain crimes, and the evidence clearly showed that those statements were false. In *Freeman*, the defendant attorney accused the plaintiff attorney of lying to the court in the prior litigation in which they were both involved. In addition, in his brief, the defendant attorney accused opposing counsel and his client of acting "above and beyond the law" and of "being outside of the law." Thus, the defendant attorney clearly imported, according to the court, that the attorney and his client acted in concert to place allegations before the court which they knew to be untrue.

Both courts made it clear that in Louisiana only a qualified privilege exists as protection for the attorney (and his client) in judicial proceedings. In order for this qualified privilege to apply, the statement must be material and must be made with probable cause and without malice. The supreme court, in *Freeman*, went on to say:

> One purpose of the privilege extended to attorneys for statements made in judicial proceedings is to discourage actions against persons who are merely performing their duties. Attorneys must be

44. 403 So. 2d at 805.
45. 408 So. 2d 1126 (La. App. 3d Cir. 1981).
46. 414 So. 2d 355 (La. 1982).
47. 408 So. 2d at 1135.

> free to represent their clients without constant fear of actions based on statement [sic] made in the zealous prosecution or defense of an action. Nevertheless, the privilege granted to an attorney is not a license to impugn the professional integrity of opposing counsel or the reputation of a litigant or witness.[48]

In both cases, it was concluded that the attorney seeking damages for defamation was not a public official nor a public figure, but a private individual who had relinquished no part of his interest in the protection of his good name and his professional reputation.

---

48. 414 So. 2d at 359.