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Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

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ATTORNEY-CLIENT RELATIONSHIP

Typically lawyers do not worry very much about defining their relationships with clients. They are much too busy doing the work for which they were retained. Nevertheless, one eminent authority on professional responsibility has said: "[T]he relationship of the lawyer and the client is, of course, the heart of the law of legal ethics. It is also an enormously complex topic, the ramifications of which have not been fully explored."[1] Precisely what the relationship is and whether or not it exists can be tremendously important where the attorney is sued for malpractice, where he or the client dies, where the attorney-client privilege is invoked, where the possible tort liability of the attorney is involved, and where the attorney is attempting to collect a fee from a former "client." As early as 1889, our supreme court adopted the French view espoused by Troulong that the relationship between lawyer and client is one of mandate and cannot be considered a contract of hiring labor.[2] This characterization has persisted to the present time and fits well with the Code of Professional Responsibility.

Justice Tate, dissenting in *Saucier v. Hayes Dairy Product, Inc.*,[3] discussed the relationship between attorney and client at some length and concluded that it is not merely a commercial contract. Justice Tate defined the relationship as involving a fiduciary duty of a personal nature that imposes on the lawyer exceptional responsibilities of confidentiality and fidelity to his client's interest.

A crack in this line of jurisprudence set out in *Saucier* and also in *Dupre v. Marquis*[4] appears in the recent case of *Board of Commissioners, Fifth Louisiana Levee District v. Commission on Ethics for Public Employees*.[5] In *Board of Commissioners*, the plaintiff attempted to

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1. L. Ray Patterson, Legal Ethics: The Law of Professional Responsibility 39 (2d ed. 1974).

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

3. 373 So. 2d 102, 107 (La. 1979).

4. 467 So. 2d 65 (La. App. 3d Cir. 1985).

5. 457 So. 2d 802 (La. App. 1st Cir. 1984).

obtain a declaratory judgment as to whether it had the right to pay attorney fees to an attorney who had performed legal services for it. The defendant contended that the Board had no right of action, the action lying with the attorney. In the course of discussing the relationship between attorney and client, the court said

> The contract between an attorney and his client may be one of mandate, La.R.S. 37:212(A)(1); La. C.C. art. 2985 et seq., *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102, 107 (La. 1978) (dissenting opinion by Justice Tate); C. Sklar, The Attorney-Client Relation in Louisiana, 18 La.L.Rev. 690 (1958), or may be one for lease of the attorney's skill and labor, La.R.S. 37:212(A)(2); La. C.C. art. 2675 and arts. 2745 et seq. In either instance, the attorney agrees to perform a service for the client and the client agrees to compensate the attorney. If the contract is terminated (or nullified) as to one of the parties it is terminated as to the other. The right to contract of one cannot be affected without also affecting the right of the other.

The statute referred to by the court, Louisiana Revised Statutes (La. R.S.) 37:212(A), defines the practice of law in Louisiana. The first Civil Code article referred to, article 2985, deals with mandate. Article 2675 provides: "To let out labor or industry is a contract by which one of the parties binds himself to do something for the other, in consideration of a certain price agreed on by them both." It would not appear to the writer that this article or the articles following it, "2745 et seq.," have any conceivable application because they deal with laborers, carriers, watermen, and workmen.

It does seem that the Legislature has made a distinction in its definition of the practice of law. La. R.S. 37:212(A)(1) defines it as: "[i]n 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 pending or prospective proceedings before any court of record in this state;" whereas in 37:212(A)(2), the words "in a representative capacity," are not repeated and it is merely said: "For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect." The following subsections enumerate things which a lawyer would normally do in his office.

Going a step further, we may well ask ourselves whether this relationship is purely contractual as indicated by the language in *Board of Commissioners*.[6] If we take that position, we are immediately confronted with cases such as *Saucier*[7] and *Leenerts Farms, Inc.*

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6. Id. at 804.
7. 373 So. 2d 102 (La. 1979).

v. Rogers[8] which make it clear that the Code of Professional Responsibility is written into each contract. Accordingly, whether the lawyer-client relationship is considered as one relationship or as several, the status of one of the parties to that contract, the lawyer, makes the relationship subject to the rules of professional ethics.

Two cases which follow the prevailing view that the relationship is one of principle and agent are *Dupre v. Marquis*[9] and *Kinsey v. Dixon*.[10] In *Dupre*, the question was whether or not the attorney was liable for having filed a malpractice action against a doctor without the authorization of his client. Although the matter was actually decided on an exception of prescription, the court said that the attorney, having gone beyond the scope of his mandate, became solely responsible for the consequences of his action in suing the doctor. In *Kinsey*, the question was whether a contingency fee contract terminated on the death of the client. The second circuit held that the contract had terminated since a contingency fee contract could not be construed as a mandate "coupled with an interest," thus falling under an exception to the general rule that a contract of mandate terminates by operation of law upon the death of the principal or mandatary.

ASSISTANCE OF COUNSEL

In criminal matters, it is well settled that the right to assistance of counsel is fundamental and therefore essential to ensure a fair trial.[11] Given this broad statement it seems rather strange for the court to conclude that a person charged with a criminal offense may waive the assistance of counsel.[12] The only problem is that the waiver must be clear and unequivocal, and it must be a knowing and intelligent waiver. In *State v. Nevels*,[13] a conviction for felony theft was reversed and remanded, not because the judge did not advise the defendant of his right to be represented, but because the court did not attempt to assess the defendant's literacy, competency, understanding, and volition. In *State v. Walpole*,[14] the defendant sought supervisory review of an order revoking her probation based on a conviction of driving while intoxicated. In her application for review, the defendant contended that her guilty plea to the second DWI offense which triggered the revocation order

8. 421 So. 2d 216 (La. 1982).
9. 467 So. 2d 65 (La. App. 3d Cir. 1985).
10. 467 So. 2d 862 (La. App. 2d Cir. 1985).
11. Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1972); State v. Lafleur, 391 So. 2d 445 (La. 1980).
12. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975).
13. 457 So. 2d 1254 (La. App. 1st Cir. 1984).
14. 459 So. 2d 172 (La. App. 2d Cir. 1984).

was invalid because she had not properly waived the right to assistance of counsel. The defendant had been advised *en masse* that she and others present had the right of counsel. In addition, she had signed a specific waiver. In spite of this, the court set aside the order revoking her probation. The court held that neither the *en masse*[15] procedure nor the execution of the written waiver constituted a valid waiver of counsel. The court pointed out that the record was void of any attempt by the trial judge to *personally* assess the defendant's literacy, competency, understanding, and volition prior to his acceptance of the waiver.

If the accused did not waive his right to counsel and in fact had the assistance of counsel during the critical stages of his prosecution, he may still assert that his lawyer was "ineffective." Justice O'Connor pointed out in *Strickland v. Washington*: "[T]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command."[16] According to Justice O'Connor, the bench mark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. To be successful in upsetting a conviction on this basis, the accused must first prove that counsel's performance was deficient, and second, that the deficient performance prejudiced the defense. The Court refused to be any more specific in setting guidelines other than to hold that the proper standard for attorney performance is that of reasonably effective assistance.

How an accused raises a claim of ineffective counsel was answered in *State v. Sheppard*[17] and *State v. Dauman*.[18] The appropriate avenue is through a post conviction application for a writ of habeas corpus in the trial court, where a full evidentiary hearing may be conducted. In the *Sheppard* case, however, trial counsel had been replaced by another attorney who handled the appeal. The new counsel briefed and argued ineffectiveness of the trial counsel on appeal. In the interest of judicial economy and because the record disclosed sufficient information to decide the issue, the court, citing *Strickland*, found trial counsel's conduct to have been reasonably effective.[19]

Assistance of counsel which falls below the constitutional requirement may occur either at the trial phase or at the sentencing phase. In *State*

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15. The court cited LaBlanc v. Watson, 378 So. 2d 427 (La. 1979) in support of the invalidity of the *en masse* procedure.

16. 104 S. Ct. 2052 (1984).

17. 466 So. 2d 493 (La. App. 1st Cir. 1985).

18. 468 So. 2d 2 (La. App. 2d Cir. 1985).

19. Other decisions in Louisiana which have applied *Strickland* are State v. Robinson, 461 So. 2d 403 (La. App. 4th Cir. 1984); State v. Briscoe, 471 So. 2d 264 (La. App. 4th Cir. 1985).

v. Fuller,[20] the Louisiana Supreme Court pointed out that ineffective assistance of counsel in the sentencing phase of capital cases is a recurring problem. In *Fuller* the court found that sufficient facts had not been developed by trial counsel in the penalty phase for the court to determine whether the sentence was excessive or not. Accordingly, the matter was remanded to determine the competency of counsel for not having brought out additional facts.

Finally, in *Chapa v. Chapa*,[21] a Virginia domiciliary sought to set aside a Louisiana divorce judgment granted to her husband. The complaint was based upon the failure of the Louisiana attorney who had been appointed to represent her, to follow her instructions and the instructions of her Virginia attorney. The court, although agreeing with Mrs. Chapa that her appointed attorney had the same general obligations toward her as would a retained counsel, refused to set aside the divorce decree because of the specific language of article 5098 of the Louisiana Code of Civil Procedure which provides generally that the failure of the appointed attorney to perform any of his duties will not affect the validity of any proceedings, trial, judgment, seizure, or judicial sale of any property in the action or proceeding or in connection therewith.

CONFLICT OF INTEREST

In *Wuertz v. Craig*,[22] the supreme court was confronted with an adoption decree in which the attorney who represented the surrendering mother had been hired by the mother's grandmother. Without stating why, the court found that the interests of the grandmother and the mother conflicted and therefore, the representation given to the surrendering parent was ineffective, the adoption decree was invalid. In the court of appeal decision,[23] it was made clear that the grandmother demanded that the child be surrendered for adoption and threatened the mother with criminal prosecution for child abuse if she did not give up the child. Although the decision was apparently 6 to 1 in favor of finding the adoption null and void, four of the Justices concurred, presumably believing that grounds other than those stated in the majority opinion justified setting the adoption aside.

A second conflict of interest case, *Hero Lands Co. v. Borello*,[24] involved a tort action against a court reporter for allegedly losing a transcript of trial testimony. The court reporter sought to disqualify the plaintiff's attorneys in as much as they had represented the same party

20. 454 So. 2d 119 (La. 1984).
21. 471 So. 2d 986 (La. App. 1st Cir. 1985).
22. 458 So. 2d 1311 (La. 1984).
23. 449 So. 2d 673 (La. App. 4th Cir. 1984).
24. 459 So. 2d 658 (La. App. 4th Cir. 1984).

in the prior suit and, therefore, "ought to be called as witness on behalf of his client," which required the withdrawal of the individual attorney and the firm under DR 5-102.[25] The plaintiff argued that the exceptions to DR 5-101 and 5-102 applied since its attorney of record in the incident suit did not personally participate in the earlier litigation although he was a member of the firm that did. In addition, the plaintiff contended that, any testimony by the attorney would be routine and pertain primarily to the value of legal services rendered in the earlier case. The court did not agree, however, and concluded that it must apply the provisions of the Code of Professional Responsibility as written. Since it was not apparent that the testimony of plaintiff's counsel would be uncontested, the exceptions to DR 5-101 and 5-102 disqualification did not apply. Additionally, the court concluded that the trial judge was in a better position to rule on disqualification, and since it had disqualified counsel for plaintiff, the appellate court would not interfere.

MALPRACTICE

Legal malpractice cases continued to increase during the past year. There were five reported cases against attorneys or law firms and one against a notary public. A clear statement of what is necessary to state a claim in such a matter is found in *Evans v. Detweiler,*[26] wherein Judge Armstrong of the fourth circuit said:

> To state a claim for legal malpractice plaintiff must allege that there was an attorney-client relationship, that the attorney was negligent in his representation of the client and that this negligence caused plaintiffs some loss. An attorney is negligent in handling a case if he fails "to exercise at least that degree of care, skill and diligence which is exercised by prudent practicing attorneys in his locality." *Ramp v. St. Paul Fire and Marine Insurance Co.*, 263 La. 774, 269 So. 2d 239 (1972). An attorney is negligent if he accepts employment and fails to assert timely a viable claim or causes the loss of opportunity to assert a claim for recovery. *Jenkins v. St. Paul Fire and Marine Insurance Co.*, 422 So. 2d 109 (La. 1982).[27]

In *Evans*, the exception of no cause of action was sustained because the plaintiffs failed to adequately allege that they suffered a loss due to defendant's negligence. More specifically, the petition failed to allege that there were no other remedies available under state law which were

25. La. R.S. 37, ch. 4, art. 16, DR 5-102 (1974).
26. 466 So. 2d 800 (La. App. 4th Cir. 1985).
27. Id. at 802.

at least as good as the remedy found to have prescribed in the federal court.

In *St. Amant v. Talley*,[28] the plaintiffs contended that their former attorney had been negligent in not advising them of a foreclosure proceeding instituted by the bank financing the construction of a house which the plaintiffs had agreed to buy. The court, speaking through Judge Ponder, found no negligence on the part of the attorney in as much as he knew that the rights of his clients were protected by the recorded purchase agreement, at least insofar as they could be, because the bank's construction mortgage primed the purchase agreement. The court noted that the attorney had no notice or reason to suspect that the bank had initiated the foreclosure proceeding. Although many, if not most, attorneys in Baton Rouge read *The Daily Legal News*, there appears to be no duty to the client to do so.

For some time now prescription has been a problem with legal malpractice cases, and the circuits have been split on whether such a cause of action is prescribed in one year as a tort action or in ten years as a contract action. Until *Rayne State Bank and Trust Co. v. National Union and Fire Insurance Co.*,[29] the third circuit had consistently held that a malpractice action may state a claim both *ex delicto* and *ex contractu* which, for all practical purposes, led to a ten year prescriptive term. The First, Second, and Fourth Circuit Courts of Appeal, on the other hand, held that a legal malpractice claim was normally a tort action with the applicable one year prescriptive period and that the ten year prescriptive period did not apply unless the attorney expressly warranted a particular result or guaranteed his work product or ultimate legal effort. In *Rayne State Bank*, the third circuit, in an opinion written by Judge Domengeaux, concluded that the reasoning and holding of the first circuit in *Cherokee Restaurant*[30] is the better and more modern method of determining whether a legal malpractice case sounds in tort or in contract. The court went on to hold that as to one of the law firms involved, there was no negligence from a factual standpoint, and as to the other law firm the action had prescribed by the passage of one year.

The fifth circuit addressed the issue in *Blanchard v. Reeves*,[31] almost simultaneously with the third circuit's decision in *Rayne State Bank*. In this writer's opinion, *Blanchard* is the most important of the series of malpractice cases because it holds that a client's action against an attorney for malpractice *does not begin to prescribe until the cessation of*

28. 454 So. 2d 153 (La. App. 1st Cir. 1984).
29. 469 So. 2d 409 (La. App. 3d Cir. 1985).
30. 428 So. 2d 995 (La. App. 1st Cir. 1983).
31. 469 So. 2d 1165 (La. App. 5th Cir. 1985).

the attorney-client relationship. This holding opens up some new questions concerning the termination of the attorney-client relationship. Language used by the court in *Board of Commissioners*[32] is pertinent: "If the contract is terminated (or nullified) as to one of the parties, it is terminated as to the other. The right to contract of one cannot be affected without also affecting the right of the other."[33] Judge Boutall, writing for the fifth circuit in *Blanchard,* recognized the split between the circuits and adopted the reasoning of the first circuit in *Cherokee Restaurant,* stating that the court did not believe that the appellant's case was an exception to the one year prescriptive period as there was no convincing evidence to support the plaintiff's allegation that his former attorney had guaranteed a result. Initially, the attorney, Mr. Reeves, had represented the plaintiff, Mr. Blanchard, in a medical malpractice case which was dismissed as prescribed. Mr. Reeves had appealed the dismissal and writs were eventually denied by the supreme court on September 23, 1983. The attorney malpractice suit was filed within one year of the denial of writs but more than one year from the trial court judgment dismissing the medical malpractice case.

The court pointed out that in as much as the attorney could have filed the medical malpractice suit timely, that a crisis arose when the suit was dismissed by the trial court. A conflict of interest was created between the attorney and the client as to the cause of dismissal of the clients claim, and although appealing the issue of prescription benefited both client and attorney, the court noted that it was the duty of the attorney to disclose the conflict, stating:

> The record does not disclose that he did. Had he done so, the client could have made a knowing choice as to whether to continue the relationship or to seek other legal counsel. On the other hand, if Reeves was not aware of the conflict of interest, he would have us impose upon his client a greater burden of legal knowledge than he possessed. His continued representation without disclosure requires us to impose the principle of *contra non valentum.* We find that the attorney's conduct induced the plaintiff-client to delay filing the legal malpractice suit and prescription did not begin to run until denial of writs and cessation of the attorney-client relationship.[34]

Another interesting opinion out of the fourth circuit, authored by Chief Judge Redmann, is *Elzy v. ABC Insurance Co.*[35] In this case, the plaintiff's former attorney had been retained to file a personal injury

32. 457 So. 2d 802 (La. App. 1st Cir. 1984).
33. *Board of Comm'rs,* 457 So. 2d at 804.
34. *Blanchard,* 469 So. 2d at 168 (footnotes omitted).
35. 472 So. 2d 205 (La. App. 4th Cir. 1985).

suit against supervisory officers of the client's employer. Unsuccessful efforts were made to determine the names of these officers, and on the last day of the prescriptive year, the attorney filed a petition for damages against the employer's unnamed and otherwise unidentified "officers and directors." As a consequence, the personal injury claim prescribed in one year and this action followed, but the plaintiff was again met with an exception of prescription in as much as more than one year had passed since the client had learned of the dismissal of his first action. On appeal from the judgment sustaining the exception of prescription, the client argued first, that the jury which he had prayed for and not the judge, should have decided whether the claim had prescribed; second, that a ten year prescriptive period applied in as much as the lawyer had guaranteed results; third, that even if the prescription period was one year, it had not accrued since plaintiff had not been fully aware of his malpractice claim until well within one year from its institution; and fourth, that the doctrine of *contra non valentum* applied to prevent prescription from running because of the great difficulty he had in obtaining a lawyer who was willing to handle the malpractice claim. Judge Redmann rejected the first argument because one entitled to a jury trial is entitled only to have facts relative to the merits of the case decided by the jury, and matters raised by exception are not part of the merits. He then found that the former attorney had not warranted any results, and that the plaintiff had knowledge of his malpractice claim more than one year prior to filing. This brought the court to the last two contentions: that *contra non valentum* applied and that the prescriptive period should be ten years. *Contra non valentum*, the principle that one should not be able to take advantage of his own wrongful act, might well apply to a lawyer who has concealed his fault from the client or to a lawyer who has otherwise prevented the client from bringing suit. However, the principle is not applicable merely because some lawyers refuse to bring the malpractice action for the plaintiff. The court concluded:

> Whatever the reasons of the five lawyers who declined to accept employment by plaintiff to bring this suit, there is no evidence whatever that their refusal was influenced in any way by the former lawyer, now judge, rather than by all the usual considerations that influence any other decision by a lawyer to accept or to refuse employment to bring a lawsuit.[36]

After a review of the developing jurisprudence, Judge Redmann concluded that the question before the court was whether the lawyer's behavior constituted nonperformance of his contract and thus a simple

36. Id. at 208

breach of contract governed by a ten year prescriptive period or whether the behavior constituted malperformance of the contract governed by the one year prescriptive period. In other words, where the lawyer does absolutely nothing after being hired to perform certain legal services and his client is injured thereby, the prescriptive period is ten years. If on the other hand, as in this case, some action is taken but that action does not measure up to the standard often quoted from *Ramp v. St. Paul Fire*[37] then the prescription is one year.

The only other case is *Anderson v. Hinrichs*,[38] where the action was against a notary public. The court found that the jurisprudence dealing with legal malpractice was relevant and controlling. The actions alleged to be malpractice were the notary's failure to record an act of sale of property to the plaintiff and the failure to obtain a title insurance policy thereon. In view of the notary's legal duty to record within forty-eight hours, his failure constituted a malperformance, and the prescriptive period was one year. However, in as much as the notary had no legal obligation to obtain title insurance but did promise the plaintiff that he would obtain such a policy, this amounted to the guarantee of a particular result, and thus, the prescriptive period was ten years. The damage award against the notary was reduced to compensate the plaintiff only for the damages she sustained as a result of the notary's failure to deliver the title policy.

ATTORNEYS FEES

Much has been written,[39] and many things have happened since *Leenerts Farms v. Rogers*[40] was decided by the Supreme Court of Louisiana. The reader will recall that after the decision, the Louisiana Legislature amended article 1935 of the Civil Code in an attempt to overrule *Leenerts*.[41] Thereafter, the obligations revision was adopted, and the provisions of old article 1935 were incorporated into new Civil Code article 2000, but without the amendment which had been added to article 1935.[42] In the 1985 session of the Legislature, Act 137 was adopted which added the following to article 2000: "If the parties, by written contact [sic], have expressly agreed that the obligor shall also be liable for the obligee's attorney fees in a fixed or determinable amount, the obligee is entitled to that amount as well."

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37. 263 La. 774, 269 So. 2d 239 (1972).

38. 457 So. 2d 225 (La. App. 4th Cir. 1984).

39. Mengis, Developments in the Law 1982-1983—Professional Responsibility, 44 La. L. Rev. 489 (1983); Mengis, Developments in the Law 1983-1984—Professional Responsibility, 45 La. L. Rev. 523, 531 (1984).

40. 421 So. 2d 216 (La. 1982).

41. 1983 La. Acts No. 483.

42. 1984 La. Acts No. 331.

Significantly, section 2 of the same Act provides that the provisions of Act 137 shall be applied retrospectively and prospectively to any delay in performance of an obligation which has as its object a sum of money arising prior to, on, or after the Act's effective date.

Hopefully, section 2 will make it unnecessary to divide a problem with a stipulated attorney fee into four periods: Prior to *Leenerts*; between *Leenerts* and the amendment to article 1935 of the Civil Code; between the amendment to article 1935 and the adoption of the obligations revision; and from the adoption of the obligations revision to the passage of Act 137 of 1985.

The courts of appeal, prior to the enactment of Act 137 had been in disagreement over whether the 1983 amendment to article 135 was retroactive. The second circuit, in *City Bank and Trust Co. v. Hardage Corp.*,[43] held the Act was substantive in nature and was therefore not retroactive. This conclusion was reaffirmed in *Brass v. Minnieweather.*[44] The first circuit, on the other hand, in *Graham v. Sequoya Corp.*,[45] held that the 1983 Act was curative and therefore was to be applied retroactively. The constitutionality of the 1983 Act was raised in *Graham*, but the court refused to consider the argument because it was not raised at the trial level. Writs have been granted in the *Graham* case.[46] The fifth circuit also discussed the matter in *Caplan v. Latter & Blum, Inc.*[47] There, the court said there was no question that *Leenerts Farms* had been legislatively overruled. However, the lease which was being interpreted had been breached prior to the *Leenerts Farms* decision. Consequently, the court upheld a provision in the lease providing for fifteen percent attorney fees. The *Caplan* decision was reversed on other grounds by the supreme court, which found that the landlord had unreasonably withheld consent to a proposed sublease and consequently, the question of attorneys' fees never rose.[48]

The best explanation of the issue is by Judge Hall in *Brass v. Minnieweather.*[49] He concluded that the holding in *Leenerts* is that courts may inquire into the reasonableness of attorneys' fees because it is the judiciary's duty, conferred by the Louisiana Constitution, to regulate the practice of law. Judge Hall did not say so, but this is sort of a super imposition of the Code of Professional Responsibility on the

43. 449 So. 2d 1181 (La. App. 2d Cir. 1984).
44. 468 So. 2d 611 (La. App. 2d Cir. 1985).
45. 468 So. 2d 849 (La. App. 1st Cir. 1985).
46. 472 So. 2d 907 (La. 1985).
47. 462 So. 2d 229 (La. App. 5th Cir. 1984), cert. granted, 462 So. 2d 1255 (La. 1985).
48. 468 So. 2d 1188 (La. 1985).
49. 468 So. 2d 611 (La. App. 2d Cir. 1985).

attorney-client relationship. In an earlier case, *Almerico v. Katsanis*,[50] the fifth circuit also took the view that any dispute relative to an attorney-client relationship is subject to the close scrutiny of the courts and is to be resolved under the provisions of the Code of Professional Responsibility.

In two other cases, the existence of the attorney-client relationship was brought into question. In *Scofield, Bergstadt, Gerard, Mount & Veron v. Cagle*,[51] the court held that the general rule is that an attorney is not entitled to receive compensation for his services from anyone other than his client and that the attorney seeking to recover a legal fee from a client has the burden of proving, by a preponderance of the evidence, the contract under which he seeks recovery. The court then concluded that the plaintiff had established the employment relationship as to Kenneth Cagle, Sr. who had initially employed the law firm to represent his son, Kenny Cagle, but the plaintiff had not established the relationship in so far as an uncle was concerned nor as to a partnership which existed among the family members. *Edleman v. McCann*[52] involved an oral contract between the plaintiff and a law firm which represented the client. The lower court dismissed the petition on a no cause of action exception, but the court of appeal reinstated it based on the existence of the alleged oral contract.

DISCIPLINE

1984-1985 saw a marked increase in the number of disciplinary proceedings which came before the Louisiana Supreme Court. Eleven proceedings went the whole route with five attorneys being disbarred,[53] one receiving a public reprimand,[54] and the others receiving suspensions of various duration.[55] Three of the disbarments resulted from convictions of serious crimes.[56] Hickman's disbarment was the result of the conversion of client funds and the failure to maintain appropriate records of various deposits and disbursements. *LSBA v. Nader*[57] presented an

50. 458 So. 2d 158 (La. App. 5th Cir. 1984).

51. 469 So. 2d 498 (La. App. 3d Cir. 1985).

52. 471 So. 2d 268 (La. App. 4th Cir. 1985).

53. LSBA v. Shapiro, 455 So. 2d 1382 (La. 1984); LSBA v. Pitard, 462 So. 2d 178 (La. 1985); LSBA v. Hickman, 471 So. 2d 696 (La. 1985); LSBA v. Frank, 472 So. 2d 1 (La. 1985); LSBA v. Nader, 472 So. 2d 11 (La. 1985).

54. LSBA v. Koerner, 457 So. 2d 633 (La. 1984).

55. LSBA v. Drury, 455 So. 2d 1387 (La. 1984); LSBA v. Miranne, 457 So. 2d 642 (La. 1984); LSBA v. Whittington, 459 So. 2d 520 (La. 1984); LSBA v. Perez, 471 So. 2d 685 (La. 1985).

56. *Shapiro*, 455 So. 2d 1382 (La. 1984); *Pitard*, 462 So. 2d 178 (La. 1985); *Frank*, 472 So. 2d 1 (La. 1985).

57. 472 So. 2d 11 (La. 1985).

unusual situation. Most lawyers, even if they don't know what the Code of Professional Responsibility provides, would not take criminal cases on a contingency basis. The Code, of course, flatly prohibits such conduct.[58] The Louisiana State Bar Association charged Mr. Nader with taking criminal cases on a contingency basis, neglecting those legal matters, solicitation, misrepresentation, and conduct prejudicial to the administration of justice. According to the findings of the Commissioner, in at least five cases, Mr. Nader agreed to refund a fee if he was not able to obtain a promised result. The Commissioner found this to be a violation of the prohibition on charging contingent fees in criminal cases, and the supreme court agreed.

> A guarantee relative to the outcome of the case coincident with receipt of a fee, carries with it the implied promise to refund the fee if the promised outcome is not achieved. It is thus clearly a contingent fee arrangement. Such practice in criminal matters is expressly prohibited by the foregoing Disciplinary Rules.[59]

According to the court, the Commissioner was also correct in finding that these actions were violative of both DR 1-102 (A)(4) (engaging in conduct involving misrepresentation), since no lawyer can guarantee the result of any judicial proceeding, and DR 1-102(A)(5) (engaging in conduct that is prejudicial to the administration of justice). In order for the latter violation to occur, the client must believe that the lawyer is using personal influence or something worse to manipulate the judicial system in order to obtain the promised result. The court also affirmed the Commissioner's finding that Mr. Nader had neglected several legal matters to such an extent that they amounted to a violation of DR 6-101(A)(3) which provides, "a lawyer shall not neglect a legal matter entrusted to him." Further, the court concluded that the record fully supported the Commissioner's determination that Mr. Nader had engaged in solicitation. Finally, the Commissioner found that on five occasions Mr. Nader had borrowed money from his clients. The Bar Association contended that this was a violation of DR 5-104(A) which provides generally that a lawyer shall not enter into business transactions with a client because it tends to detract from the exercise of independent professional judgement. The discussion of the court on this point, along with its citation of *In re Conduct of Montgomery*[60] is enlightening. One could argue against a lawyer ever borrowing money from a client because it is almost inevitable that when the lender-borrower relationship is created, differing interests will appear, and the professional judgment

58. La. R.S. 37, ch. 4, art. 16, DR 2-106(c) (1974).
59. *Nader*, 472 So. 2d at 13.
60. 292 Or. 796, 643 P.2d 338 (1982).

of the lawyer must necessarily be compromised. The court, however, found that it did not have to decide whether Nader violated DR 5-104(A) (entering a business transaction with a client) for the reason that the Commissioner was clearly correct in determining such conduct was a violation of DR 1-102(A)(4) (engaging in conduct involving misrepresentation) and of DR 1-102(A)(6) (engaging in conduct which adversely reflects on fitness to practice law) and for the further reason that these latter violations, coupled with the other professional misconduct, were sufficient support the court's determination to disbar Mr. Nader.

One of the more unusual fact patterns which resulted in a suspension is found in *LSBA v. Drury*.[61] Mr. Drury was charged primarily with a federal mail fraud conviction. That conviction, however, was based at least in part on the attorney's violation of DR 5-107 which, in general, cautions lawyers to avoid influence by others than the client and forbids the lawyers to receive any compensation or any thing of value from any person other than his client unless his client had been fully advised and consents thereto. According to the decision, the charges against Drury arose out of his practice of sending most of his clients with personal injury claims to a particular doctor for treatment and evaluation and then, for reasons which were disputed, retaining fifteen percent of the amount of the various doctor bills, which had been sent to him rather than to the patient. The court found DR 5-107 is violated if an attorney, relative to his performance of legal services, accepts compensation or anything of value from someone other than his client without apprising the client of the situation and gaining the client's consent after the client fully understands the implications of representation and the advantages and risks involved. The underlying purpose of the rule is to avoid conflict of interest and, among other things, a situation in which some outside economic interest might adversely affect the representation of a client. The court then concluded that the arrangement with the doctor was indeed violative of the disciplinary rule. In a concurring opinion Justice Lemon wrote, "[s]ince this disciplinary matter essentially turns on proof of the violation of the disciplinary rule and not solely on the proof of the conviction, I concur in the decision."[62] This presents something of a problem inasmuch as title 37, chapter 4, article 15, section 8 (7) (d) provides that "[a]t the hearing based upon a respondent's conviction of a crime, the sole issue to be determined shall be whether the crime warrants discipline, and if so, the extent thereof."[63] In *LSBA v. Shaheen*,[64] the court would not permit Mr. Shaheen to retry his case

61. 455 So. 2d 1387 (La. 1984).
62. Id. at 1391.
63. La. R.S. 37, ch. 4, art. 15, § 8(7)(d) (1974).
64. 338 So. 2d 1347 (La. 1976).

and held that the certificate of conviction was conclusive evidence of the guilt of the crime, in spite of the dissenting opinion of Justice Dennis. The disciplinary proceedings against Mr. Drury were based on his federal mail fraud conviction, and it seems questionable whether his violation of DR 5-107 was of any relevance.

The suspensions in *LSBA v. Whittington*,[65] *LSBA v. Drury*,[66] and *LSBA v. Perez*[67] all involved commingling and conversion of client funds. The proceedings in *LSBA v. Miranne*[68] were based upon convictions of both Miranne Sr. and Miranne Jr. of "conspiracy, false statements and mishandling of funds" in connection with loans made by Security Homestead Association. The court concluded that both had been convicted of serious crimes which reflected adversely on their moral fitness to practice law, but the evidence of mitigating circumstances and prior excellent reputation justified suspension rather than disbarment.

Finally, in *LSBA v. Koerner*,[69] the court issued a public reprimand because only one of the three alleged acts of misconduct was proved. The respondent had admitted from the outset of the disciplinary proceedings that he had neglected his client's case and that this neglect had resulted in a judgment of dismissal in federal court with prejudice. He did not advise his client of this development but continued to assure his client that the matter was still pending. The attorney justified this action on the basis that he had filed a motion for a new trial which he thought would get the case reinstated. The Commissioner's report, annexed to the opinion, reveals that the other two specifications against the respondent concerned alleged misrepresentations to United States District Judge Frank Polozola. What is apparent from the report is that the opposing lawyers were not cooperating with each other, and that their relationship was "less than friendly."[70] This, combined with the respondent's other problems, such as his involvement in a long and complicated antitrust case out of state, apparently caused him to be somewhat less than careful in his dealings with the case and led to repeated efforts by Judge Polozola to get the case on track again. It may be that both lawyers overlooked Ethical Consideration 7-37 which provides that in adversory proceedings, clients are litigants and though ill feeling may exist between clients, such ill feelings should not influence a lawyer in his conduct, attitude, and demeanor toward opposing lawyers.

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65. 459 So. 2d 520 (La. 1984).
66. 455 So. 2d 1387 (La. 1984).
67. 471 So. 2d 685 (La. 1985).
68. 457 So. 2d 642 (La. 1984).
69. 457 So. 2d 633 (La. 1984).
70. Id. at 640.

MISCELLANEOUS

This part of the jurisprudential review could be called "integrity of the process." In *Hoff v. Canal Refining Co.*,[71] a default judgment had been entered against the defendant, Canal Refining Co., in the trial court, and the trial judge had refused to grant a new trial when defendant's attorney contended that plaintiff's counsel had violated an agreement to extend the time for pleading. Appellant argued that the supreme court's holding in *Kem Search, Inc. v. Sheffield*[72] was controlling and that the judgment against his client should be reversed and annulled. However, *Sheffield* was distinguished by the appellate court since in this case, there had been no contact between opposing counsel but only between a paralegal in the defendant's law firm and an unknown person in the plaintiff's law firm. The court refused to adopt the ill-practices contention even though a letter confirming the extension of time had been mailed by the defendant's attorney.

In *State v. Duplessis*,[73] a conviction on two counts of armed robbery was reversed on the basis of the prosecutor's comment on evidence which was excluded from the record, together with the trial judge's voir dire restrictions. The court pointed out that it very seldom reversed convictions on the basis of prosecutorial argument because generally jurors are told over and over again that they are to decide the case on the basis of the evidence presented and not the arguments of counsel. However, in this case when the trial errors were cumulated, the court simply could not say that they were harmless. Judge Blanche dissented finding that the accused had received a fair trial, although the prosecutor's conduct was unprofessional and discourteous. In *State v. Rankin*,[74] the defendant's attorney attempted to call a witness's attorney to impeach the witness's assertion that his prior testimony had no self-serving interest or motivation. Defendant wanted to show that the witness's plea bargain in another case motivated his damaging testimony against the present accused. The court of appeal[75] held that testimony from the witness's attorney concerning any plea arrangement was inadmissible under the attorney-client privilege. The supreme court disagreed, holding that the attorney-client privilege does not attach to plea bargains since they are not made between defendants and their attorneys, but rather between defendants and prosecutors, and further, since agreements made in the presence of third parties are not entitled to the attorney-client privilege. However, the court found the error to be harm-

71. 454 So. 2d 188 (La. App. 1st Cir. 1984).
72. 434 So. 2d 1067 (La. 1983).
73. 457 So. 2d 604 (La. 1984).
74. 465 So. 2d 679 (La. 1985).
75. 454 So. 2d 880 (La. App. 4th Cir. 1984).

less and affirmed the conviction. A good discussion of the attorney-client privilege is found in the opinion.

Three cases decided by the fourth circuit court of appeal, *Lemeshewsky v. Dumaine*,[76] *McCall v. Bologna*,[77] and *Jacobs v. O'Bannon*,[78] deal with alleged defamation against attorneys. In *Dumaine*, the allegedly defamatory statements were made by defendant Dumaine in telephone conversations with a third party in which he referred to the plaintiff as "stupid," a "smartass," "young," and "inexperienced."[79] The court found the words to be defamatory and affirmed a $2,000 damage award in favor of the plaintiff. In *McCall*, the court adhered to the rule that an action for liable or slander arising out of allegations of statements made in a judicial proceeding cannot be brought by a party to the proceeding until it is terminated and a lawyer for either of the parties who has some control over the suit is bound by the same rule. Finally, in *Jacobs*, the court found that the statements which had been the cause of the defamation allegation were not proven to have been false *per se*, and in addition, the action was barred by the qualified privilege in favor of attorneys with respect to their pleadings and briefs. The court said: "The present case is a classic case of bitter litigation being conducted by an aggressive, zealous counsel. Unless a qualified privilege protects them and their clients against prosecution for words uttered and statements made in the heat of litigious battle law suits among them might never end."[80]

In *Foster v. Powdrill*,[81] the district attorney was accused of negligence which precipitated the false arrest of the plaintiff. The trial court found that the district attorney had requested that a bench warrant be issued for the plaintiff's arrest (even though the traffic ticket had been paid) and that the request amounted to a step in the prosecution. Nevertheless, as the plaintiff had not alleged any malice on behalf of the district attorney, his suit was dismissed. The court of appeal, after discussing the United States Supreme Court holding in *Imbler v. Pachtman*,[82] concluded that district attorneys may be sued in civil actions for malicious prosecution, if actual malice is alleged. Thus, the court refused to hold that the district attorney enjoyed absolute immunity against civil suits and chose to follow other appellate court decisions allowing a suit to be filed where malice is alleged.

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76. 464 So. 2d 973 (La. App. 4th Cir. 1985).
77. 465 So. 2d 115 (La. App. 4th Cir. 1985).
78. 472 So. 2d 180 (La. App. 4th Cir. 1985).
79. *Lemeshewsky*, 464 So. 2d at 975.
80. *Jacobs*, 472 So. 2d at 182.
81. 463 So. 2d 891 (La. App. 2d Cir. 1985).
82. 424 U.S. 409, 96 S. Ct. 984 (1976).