

LOUISIANA BAR JOURNAL

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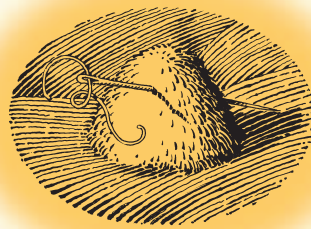
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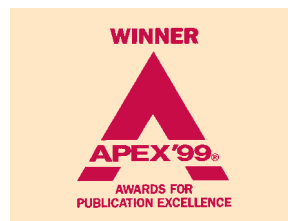
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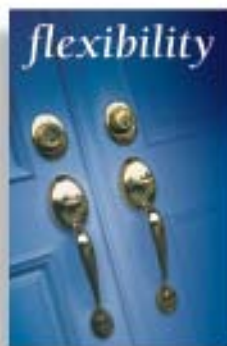
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Attorney Volunteers Needed at Call Center and Disaster Recovery Centers

Hurricanes Katrina and Rita may have been relegated to the history books, but the legal problems experienced by survivors in the aftermath of those storms are still fresh, as evidenced by the more than

200 phone calls a day coming into the Louisiana Legal Assistance Call Center, operating at its new location at Louisiana State University's Paul M. Hebert Law Center, and by the numbers of people seeking assistance at the 36 FEMA disaster recovery centers (DRC) statewide.

Attorney volunteers are needed to provide free legal advice for both endeavors. Of particular need are attorneys who can offer a physical presence at the Call Center to provide immediate answers to legal concerns, but attorneys throughout the state can participate by offering to take on the non-fee-generating cases from the Call Center.

For DRC service, attorney volunteers are asked to work in two-hour shifts, either answering quick questions or taking information, which is then sent to the Call Center for referral to handling attorneys.

The Call Center is being staffed Monday through Saturday, 8 a.m. to 8 p.m., and can be reached at 1-800-310-7029.

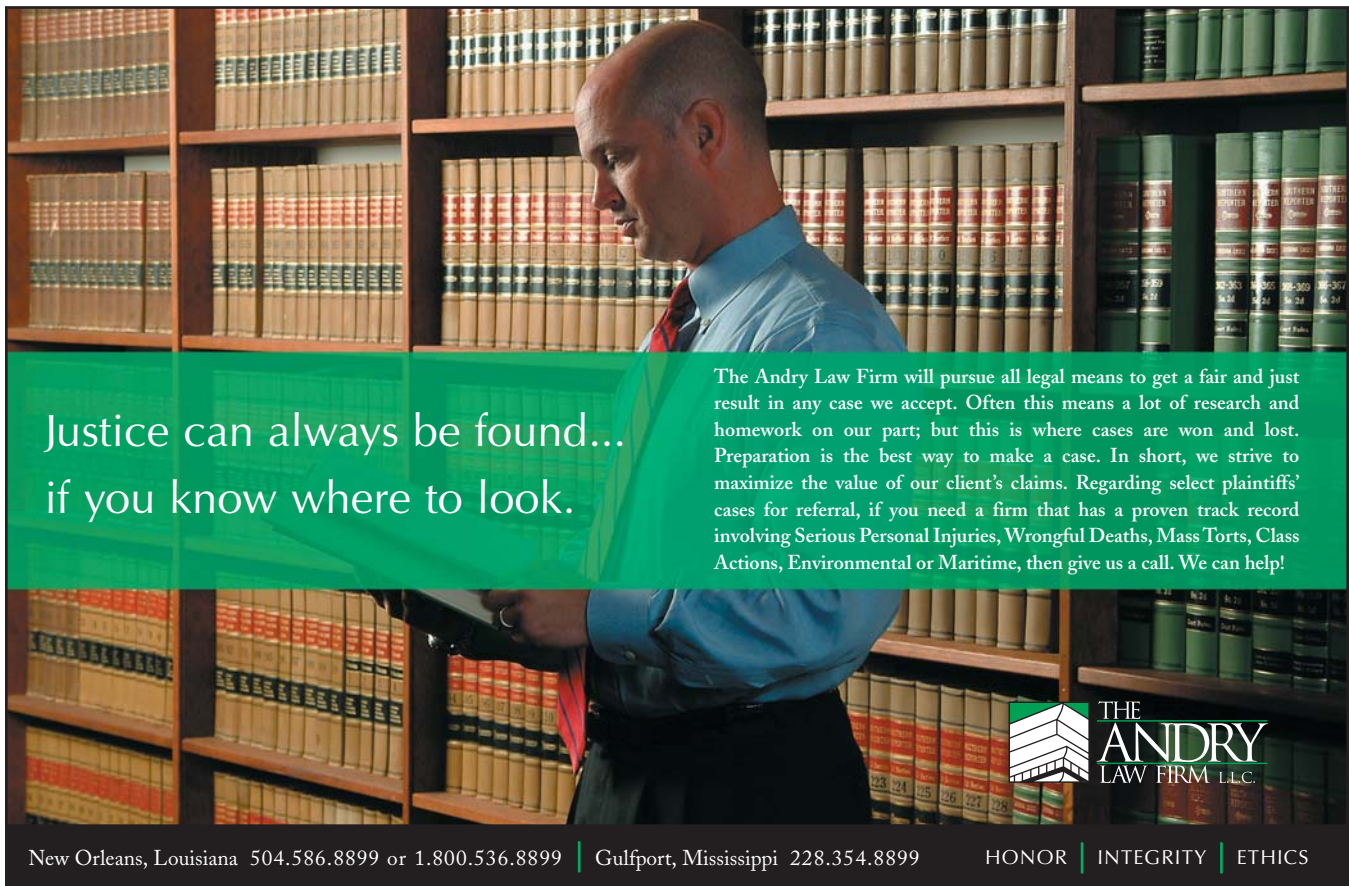
To volunteer for both projects, go to: <http://www.lsba.org/home1/pdfvolunteer.pdf>. For DRC service, return the form by fax or e-mail to Susan Simon at ssimon@ln-law.com, fax (337)233-9450, or call (337)237-7000 (office) or (337)654-4507 (cell).

Disaster Training Manual Published

The Louisiana State Bar Association, under the leadership of Lafayette lawyer Susan Simon with the assistance of countless volunteers, has published a disaster training manual for attorneys to use to provide legal services to individuals in the aftermath of Hurricanes Katrina and Rita. Go to www.lsba.org for this manual and others from the American Bar Association and other state bars.


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To ensure that the courts, their clients and other lawyers will be able to communicate with them in the aftermath of Hurricanes Katrina and Rita, displaced LSBA members are urged to go to <http://www.lsba.org/home1/memberslogin.asp> to update their contact information. Attorneys should use the format MM/DD/YYYY for their dates of birth. Those having problems logging in should call (504)566-1600 or e-mail rmeyers@lsba.org.

Supreme Court Issues Response about CLE Carryover Hours

In response to questions about continuing legal education carryover hours, Louisiana Supreme Court Chief Justice Pascal F. Calogero, Jr. issued the following statement:

“On Sept. 26, 2005, the court promulgated an emergency rule which waived the requirement, for calendar year 2005 only, that attorneys complete the annual minimum legal education requirement of 12.5 hours. The presently existing rules

which allow attorneys to carry forward up to eight (8) hours of CLE credit earned in excess of the minimum have not changed. Accordingly, any attorney may carry forward up to eight (8) hours of continuing legal education earned or credited for calendar year 2005 in excess of the 12.5 hour annual minimum, pursuant to Louisiana Supreme Court Rule XXX, Rule 5(b), and Regulations 3.5 and 5.5.”

For the original court order, go to: <http://www.lsba.org/home1/SCO09292005.pdf>.

Lawyers Assistance Program Offering Counseling Help by Phone

Lawyers Assistance Program, Inc. (LAP) Director William R. Leary announced that LAP has contacted trauma and critical incident therapists who have volunteered to help lawyers and their families by telephone.

The process offers an informal opportunity for participants to discuss the impact of the hurricanes.

Go to: <http://www.lsba.org/home1/NewsDetails.asp?NewsID=24> (Letter from William Leary, LAP Director) for the list of therapists' names and “800” phone numbers. Use the “800” numbers for the initial call, then call LAP at (866)354-9334 for follow-up. Leary said LAP will follow up beyond the crisis with appropriate referrals and the formation of mental health support groups across the state.



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- ▶ "W" Hotel (800)777-7372
French Quarter
(504)581-1200
333 Poydras St.
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President's MESSAGE



CHALLENGING TIMES CREATE OPPORTUNITIES

By Frank X. Neuner, Jr.

Louisiana and the Louisiana State Bar Association (LSBA) are facing extraordinary challenges following the destruction caused by Hurricanes Katrina and Rita. These challenging times create opportunities for the LSBA to provide more services and to become more relevant to its members.

One way the LSBA is assisting its members is through the Disaster Relief Fund, jointly administered by the LSBA and the Louisiana Bar Foundation. The Grants Subcommittee of the Disaster Relief Task Force recently met and awarded 371 grants of \$500 each (\$185,500) to lawyers who were displaced as a result of Hurricanes Katrina and Rita. Many of these lawyers lost not only their offices but also their homes. While a \$500 grant will in no way compensate them for their losses, it hopefully will assist them in their efforts to recover their law practices and rebuild their lives.

The Grants Subcommittee is currently accepting applications for a second round of grant distributions for lawyers who have not previously applied. (See information on page 213.) The Grants Subcommittee is also exploring other ways to assist lawyers in the affected areas by setting up a business center in St. Bernard Parish and providing computers, phones, facsimile machines and copying services for lawyers at the LSBA office in New Orleans.

Additionally, a grant will be awarded to the New Orleans Bar Association to assist it in setting up an "Internet Café" at its offices in the Whitney Bank building and it is proposed that this facility will be

*There will continue
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open to all members of the LSBA. The Disaster Relief Task Force has raised almost \$400,000 to aid LSBA members, and donations have been received not only from lawyers in Louisiana but also from lawyers and bar associations throughout the United States.

Another way the LSBA is providing additional services to its members is through free seminars focused on recovering from the hurricanes and rebuilding law practices. The first seminar was held in Lafayette on Oct. 7 and more than 100 lawyers attended. Two more seminars are scheduled for the New Orleans and Lake Charles areas on Jan. 12 and Jan. 13, 2006. The topics covered in these seminars include recovery of data, setting up a law office, free legal research through Fastcase and counseling available through the Lawyers'

Assistance Program.

Finally, we are currently in the middle of a special legislative session, and the LSBA is the sponsor and lead lobbyist on House Bill No. 90, authored by Representatives Glenn Ansardi and Rick Gallot and Senator Art Lentini. The LSBA and its lobbyist, Larry Murray, have been working with the Louisiana Trial Lawyers Association, the Louisiana Association of Defense Counsel and attorneys for the Louisiana Association of Business and Industry to develop a bill which is acceptable to all parties and which the LSBA can support on behalf of its members. The intent of the bill is to ratify the Governor's Executive Orders KB-2005 32, 48 and 67 and extend their applicability until Jan. 3, 2006, with limited exceptions for litigants and lawyers in parishes inundated with flood waters. If this bill is passed by the Legislature, it will be a testament to the LSBA's ability to bring divergent interests together and facilitate the legislative process for the betterment of the citizens of Louisiana and the members of the LSBA.

There will continue to be many challenges for the citizens and lawyers in Louisiana, and as we face these challenges, we will all have an opportunity to make Louisiana a better place to live, work and raise our families.

A handwritten signature in black ink, appearing to be 'F. Neuner', written in a cursive style.

**Application Deadline
is Nov. 17:**

**LSBA/LBF Offering
Second Round of Disaster
Relief Fund Grants**

The Louisiana State Bar Association (LSBA) and the Louisiana Bar Foundation (LBF) are offering a second round of grants from the LSBA/LBF Disaster Relief Fund. The application deadline is 4:30 p.m. Thursday, Nov. 17. To apply online, go to: <http://www.lsba.org/home1/disasterreliefapplogin.asp>.

The LBF approved 371 grants of \$500 each recently in the first round of grant awards. Funds are available to attorneys in good standing with the LSBA who were displaced or had their practices disrupted by the hurricanes. The LBF is administering the fund, and the awarding of grants is at the sole discretion of the LBF's Board of Directors or its designee.

Donations to the fund should be made payable to the LSBA/LBF Disaster Relief Fund and sent to the Louisiana Bar Foundation, 601 St. Charles Ave., 3rd Floor, New Orleans, LA 70130. A mail-in donation form in .pdf format is available at <http://www.lsba.org/home1/DonationForm.pdf>. Or to donate online, go to: <http://www.lsba.org/foundation/lbf/foundationhurricanefund.asp>.

The Relief Fund was created to help rebuild the state's legal infrastructure so lawyers can provide needed legal services to their clients and restore their damaged offices and records. Funds are being distributed as either direct grants to lawyers or to assist in re-establishing legal communities in the affected areas.



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www.lsba.org/lamp

Louisiana Appellate Practice and Procedure:

The appellate process begins in the trial court. Whether the appeal is from a final judgment or supervisory writs are taken during an ongoing proceeding, appellate practitioners should do certain things to ensure success. These materials were written from the perspective of an appellate practitioner and former Louisiana Supreme Court law clerk. They are intended to provide a brief overview of Louisiana appellate practice and procedure and to serve as a thumbnail reference guide for attorneys practicing in Louisiana state courts.

An Overview for Legal Practitioners

By Jonathan C. Augustine

Appellate Preparation Begins Before and During the Trial Proceeding: Be Sure to Make a Record

Applying for Supervisory Writs with the Court of Appeal

Under applicable law, “[s]upervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate jurisdiction.”

La. C.C.P. art. 2201; *see also* La. Const. art. V, § 10, ¶ (A) (delegating supervisory appellate jurisdiction to the respective courts of appeal on matters arising within their circuits).

Supervisory writs are typically taken during the course of a trial court proceeding and before a final judgment is issued. For example, pursuant to La. C.C.P. art. 2201, litigants may petition a circuit court of appeal to review and/or reverse a ruling on an exception. A supervisory writ application to the respective courts of appeal must be in conformity with the Uniform Rules Courts of Appeal (hereinafter URCA) 4-1, *et seq.*¹ More importantly, however, because the trial court litigation will be ongoing, a party seeking supervisory writs should strongly consider moving the trial court to stay the proceedings contingent on the appellate court’s review. Specifically, URCA 4-4 provides:

[w]hen an application for writs is sought, further proceedings may be stayed at the trial court's discretion. Any request for a stay of proceedings should be presented first to the trial court. The filing of, or the granting of, a writ application does not stay further proceedings unless the trial court or appellate court expressly orders otherwise.

The Louisiana 3rd Circuit interpreted URCA 4-4 in *Bankston v. Alexandria Neurosurgical Clinic*.² In *Bankston*, the plaintiff filed an application for supervisory writs from a district court judgment. The plaintiff did not, however, receive an order staying proceedings in the district court pending the supervisory application. The district court proceeded under its previously issued scheduling order. Because the *pro se* plaintiff did not appear for trial, the district court dismissed her claim. On appeal, the 3rd Circuit emphasized the district court's discretion as to whether a stay should be issued in any litigation where a party has filed an application for supervisory writs.³ The 3rd Circuit also ruled the district court did not abuse its discretion in dismissing the suit because there was no stay order in place.⁴ As therefore evident by the foregoing, a stay of trial court proceedings pending a writ application to a court of appeal is far from automatic.

Appealing a Final Judgment

Appellate courts can consider only matters that are in the record.⁵ Accordingly, a practitioner's pretrial preparation should include plans to develop an advantageous record to ensure success on appeal. Such preparations must include planning objections and possibly applying for supervisory writs when necessary.

Instances are arguably extremely rare where an appellate court may consider matters when no objection was raised at trial.⁶ Moreover, in considering a trial court objection, appellate courts usually consider only the grounds for the objection as raised.⁷ Louisiana law

clearly provides that a party must make a timely objection to evidence which he considers to be inadmissible and must state the specific ground for the objection.⁸ Practitioners should, therefore, constantly keep the appellate record in mind during the course of their trial court proceedings.

Post-trial Procedure to Perfect the Appeal

Post-Judgment Practice

Generally speaking, an "[a]ppel is the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court." La. C.C.P. art. 2082. For a party to seek an appeal, the trial court's judgment must first be signed and filed into the record. La. C.C.P. art. 1911 provides that "every final judgment shall be signed by the judge. For the purpose of an appeal . . . no appeal may be taken from a final judgment until the requirement of this Article has been fulfilled." Regardless, however, even if an appeal is made before the trial judge signs the court's final judgment, the defect can be cured and the appeal properly maintained.⁹

Furthermore, the Code of Civil Procedure specifically details matters that may be appealed in Louisiana state courts.¹⁰ After the trial court has issued its signed judgment, the party adversely affected has up to seven days, exclusive of legal holidays, to move the court for a new trial.¹¹ The delays for taking an appeal do not begin to run until the seven-day expiration of time to apply for a new trial.¹² Regardless, however, the untimely application for a new trial does not interrupt or extend the delay for taking a timely appeal.¹³

Upon expiration of the seven-day period, the adversely affected party must divest the trial court of jurisdiction by moving the court for an appeal within the delays allowed by law. La. C.C.P. art. 2088 provides that the "jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal and

the timely filing of the appeal bond" Article 2121 also notes that an order for appeal may be granted on oral or written motion but must show the return day for the appeal in the appellate court and the requisite security to be furnished for the appeal. After the order accompanying the motion for appeal is granted, the applicable court of appeal asserts jurisdiction and the trial court is divested of the same.¹⁴

Appealing a Final Judgment

As a general rule, there are two types of appeals in Louisiana state courts: devolutive and suspensive. A devolutive appeal under article 2087 does not suspend the effect or execution of the trial court's final judgment. Under the Code of Civil Procedure, such an appeal may be taken within 60 days of either the expiration of time to apply for a new trial or the date the clerk's office mailed the notice of the trial court's refusal to grant a timely application for a new trial. A suspensive



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appeal under article 2123 literally has the effect of suspending the effect or execution of the trial court's judgment. Under the Code of Civil Procedure, "[e]xcept as otherwise provided by law, *an appeal that suspends the effect or the execution of an appealable order or judgment may be taken*, and the security therefor furnished, *only within thirty days* [of the expiration of time to apply for a new trial or the clerk's mailing the notice of a refusal to grant a timely filed application for new trial." Regardless of which type of appeal is sought, the trial court shall fix a return date that is "thirty days from the date estimated costs are paid if there is no testimony to be transcribed and lodged with the record and 45 days from the date such costs are paid if there is testimony to be transcribed" ¹⁵ Furthermore, the clerk of the trial court is required to prepare the record for appeal and lodge it with the appellate court on or before the return day or any extension thereof. ¹⁶

Under La. C.C.P. art. 2133, an **appellee** also may seek to modify or reverse a judgment on appeal. In order to do so, however, the appellee must timely file an answer with the court of appeal. In relevant part, article 2133 provides as follows:

An appellee may not be obliged to answer the appeal unless he desires to have the judgment modified, revised, or reversed in part or unless he demands damages against the appellant. In such cases, he must file an answer to the appeal, stating the relief demanded, not later than fifteen days after the return day or the lodging of the record whichever is later. *The answer filed by the appellee shall be equivalent to an appeal on his part from any portion of the judgment rendered against him in favor of the appellant and of which he complains in his answer.* (Emphasis added.)

More importantly, when a party does not answer an appeal or file a cross-appeal, the appellate court is precluded from

awarding that party any relief subsequently requested. ¹⁷

Oral arguments must be requested at the court of appeal. Under URCA 2-11.4, if a party wants oral arguments, it must specifically request so within 14 days of the filing of the record in the court. Moreover, under URCA 2-12.12, decisions shall be reached on the parties' briefs and oral argument shall be forfeited if either party's brief is not timely filed.

The appellate court may consider only that which is in the record. As such, it is imperative that if an aggrieved party — appellant or appellee — intends to win on appeal, the party must ensure the record contains the correct and accurate information upon which it shall rely. La. C.C.P. art. 2132 allows a party to correct a record containing errors:

A record on appeal which is incorrect or contains misstatements, irregularities or informalities, or which omits a material part of the trial record, may be corrected even after the record is transmitted to the appellate court, by the parties by stipulation, by the trial court or by order of the appellate court. All other questions as to the content and form of the record shall be presented to the appellate court. (Emphasis added.)

It is therefore imperative that the appellant performs due diligence to ensure the record lodged with the court of appeal is accurate and/or contains the information upon which he intends to rely on appeal. If a record is deficient, the court of appeal will assume the trial court's ruling was correct. ¹⁸

The Standard of Review

The Louisiana Constitution of 1974 details state appellate courts jurisdiction. "Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts." La. Const. art. V, § 10(B). In interpreting

this provision, the Supreme Court expressly outlined a two-part test for reviewing factual issues on appeal in *Arceneaux v. Domingue*. ¹⁹ Under *Arceneaux*, appellate courts may not disturb a factfinder's factual determinations if the appellate court finds in the record there is: (1) a reasonable factual basis for the trial court's findings; and (2) the trial court was not clearly wrong/manifestly erroneous. ²⁰

Manifest Error or Clearly Wrong

When a trial court's factual findings are based on witness credibility, appellate courts must give great deference to the factfinder's determinations. ²¹ The Supreme Court has held that "[t]he reason for this well settled principle of review is based not only on the trial court's better capacity to evaluate live witnesses (as opposed to the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts." ²² Accordingly, "where two permissible views of evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong." ²³

Although appellate courts must give great deference to witness credibility, such evaluations may be clearly wrong when documents and other objective evidence so contradict with witness's testimony that no reasonable factfinder could credit the witness's story. ²⁴ Courts of appeal must also give the same deference to trial court decisions based on deposition testimony as to decisions based on "live" testimony. ²⁵ Nevertheless, "the reviewing court must always keep in mind that 'if the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" ²⁶

De Novo

When the appellate court reviews the trial court's findings of fact as if it were the trier of fact, the review is *de novo*.

The classic and most common example of *de novo* review is when appellate courts review a grant of summary judgment.²⁷

Furthermore, when a case is bifurcated and the judge and jury render inconsistent verdicts, the court of appeal must review the issues *de novo*.²⁸ More importantly, when an appellate court has all the facts before it, it may not remand but must decide the case on the merits.²⁹

Practice Before the Louisiana Supreme Court

The Louisiana Supreme Court has both original and appellate jurisdiction over certain litigious matters. For example, under La. Const. art. V, § 5, ¶ (B), “[t]he supreme court has exclusive original jurisdiction of disciplinary proceedings against a member of the bar.” Similarly, the court has appellate jurisdiction over litigation “if (1) a law or ordinance has been declared unconstitutional, or (2) the defendant has been convicted of a capital offense and a penalty of death actually has been imposed.” Art. V, § 5, ¶ (D). Equally as important, the court has appellate jurisdiction over certain matters from the Louisiana Public Service Commission. “Appeal may be taken in the manner provided by law by any aggrieved party or intervenor to the district court of the domicile of the commission. A right of direct appeal from any judgment of the district court shall be allowed to the supreme court.” Art. IV, § 21, ¶ (E). With regard to adjudicating the foregoing, the Supreme Court does not have discretion because of the constitutional mandates.

However, unlike appeals to Louisiana’s five circuit courts, the Louisiana Supreme Court is much like the United States Supreme Court because it does have a great deal of discretion over general adjudication. In 2003, the court received 1,929 general writ applications and 1,381 prisoner *pro se* applications. Of all the aggregate writ applications filed, the court only granted 294 of the applications. Of the 294 writ applications the court granted, only 93

cases were docketed for oral arguments while 201 were transferred with order.³⁰

Louisiana Supreme Court Rule X, § 1, details the court’s wide discretion on writ grant considerations. If an applicant is to successfully apply for writs of certiorari on a litigious matter falling outside the express constitutional provisions previously detailed, the application must meet one or more of the court’s Rule X consideration. Because of the criteria’s obvious importance, the five factors are listed below.

In outlining the criteria to be evaluated when determining whether a writ application should be granted, Rule X provides the following:

The grant or denial of an application for writs rests within the sound judicial discretion of this court. The following, while neither controlling nor fully measuring the court’s discretion, indicate the character of the reasons that will be considered, one or more of which must ordinarily be present in order for an application to be granted:

1. Conflicting Decisions. The decision of a court of appeal conflicts with a decision of another court of appeal, this court, or the United States Supreme Court, on the same legal issue.

2. Significant Unresolved Issues

of Law. A court of appeal has decided, or sanctioned a lower court’s decision of, a significant issue of law which has not been, but should be resolved by this court.

3. Overruling or Modification of Controlling Precedents. Although the decision of the court of appeal is in accord with the controlling precedents of this court, the controlling precedents should be overruled or substantially modified.

4. Erroneous Interpretation or Application of Constitution or Laws. A court of appeal has erroneously interpreted or applied the constitution or a law of this state or the United States and the decision will cause material injustice or significantly affect the public interest.

5. Gross Departure from Proper Judicial Proceedings. The court of appeal has so far departed from proper judicial proceedings or so abused its powers, or sanctioned such a departure or abuse by a lower court, as to call for an exercise of this court’s supervisory authority.

Analysis of the foregoing clearly shows odds are stacked against a writ application being granted. Moreover, although the criteria are not “ranked,”

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they arguably appear in order of importance. The author argues successful writ applications will be direct, concise, and focus the reader on why the issue presented is critical to more than his or her client, but important to Louisiana jurisprudence in general.

General Tips and Advice from a Former Law Clerk

From the perspective of a former Louisiana Supreme Court law clerk, the author candidly believes “less is always more.” More often than not, applications for writs of certiorari are almost a verbatim regurgitation of the briefs and/or application filed at the circuit court of appeal. Louisiana Supreme Court Rule X is a road map for Supreme Court writ applications. The URCA serve as a roadmap for circuit court applications. At the risk of mimicking a cliché, “driving with the wrong map can only get you lost.”

After administrative processing, the justices’ law clerks provide the first comprehensive writ-application review. Although clerks work only for one justice, they work and socialize with all the other justices’ law clerks. From the author’s recollection, the uniform sentiment among all clerks was “less is always more.” An application that focuses on one or two Rule X criterion is always better than a shotgun approach attempting to hit as many points as possible with a wide aim. The shotgun approach arguably lacks discipline and credibility.

Equally important as a focused approach, accurate citations — preferably pinpoint citations referencing the exact page from which relevant language was extracted — are more helpful than simply citing a case with no other foundation. Law clerks actually look up and review key cases upon which the practitioner relies. As such, specific page references are always helpful and allow the law clerk easier focus.

Some practitioners will nevertheless feel more comfortable using a citation without a specific page. If such is the case, he or she should consider following the citation with a short parenthetical to

further explain the citation’s significance. For example, “*See Reynolds v. Select Properties, Ltd.*, 93-1480 (La. 4/11/94), 634 So.2d 1180 (noting that appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate).” The foregoing clearly explains the citation’s significance without mentioning the exact page on which the relevant language is found. As a practical rule, the easier it is for the law clerk to follow a concise argument, focused on one or two Rule X criterion, the easier it is for the law clerk to recommend to the justices the writ application should be granted.

Conclusion

The foregoing is obviously only one practitioner’s perspective. Hopefully, it will serve as a rough guide for practitioners who are infrequently required to engage in appellate litigation. As made evident herein, the governing rules are much different from those of a trial court. Accordingly, a practitioner taking a matter on appeal should live by the rules of the craft.

FOOTNOTES

1. One of the URCA’s key provisions requires the party seeking writs from the court of appeal to first file a notice of intention with the trial court, serve opposing counsel with the same, provide a copy to the trial judge and request a return date not to exceed 30 days from the date the adverse ruling was signed. *See* URCA 4-2 & 4-3.

2. 94-0693 (La. App. 3 Cir. 12/7/94), 659 So.2d 507.

3. *Id.* at 510.

4. *Id.*

5. *See, e.g.*, *White v. West Carroll Hosp.*, 613 So.2d 150 (La. 1992); *see also Earles v. Ahlstedt*, 591 So.2d 741 (La. App. 1 Cir. 1991).

6. *See, e.g.*, *State v. McCutcheon*, 93-0488 (La. App. 1 Cir. 3/11/94), 633 So.2d 1338, *writ denied*, 94-0834 (La. 6/17/94), 638 So.2d 1093 (providing that a party must make timely objections on evidentiary rulings during trial to preserve grounds for appeal); *Davis v. Kreuter*, 93-1498 (La. App. 4 Cir. 2/25/94), 633 So.2d 796, *writ denied*, 94-0733 (La. 5/6/94), 637 So.2d 1050; *see also* La. C.E. art. 103.

7. Applicable statutory law also provides that “[a]ll objections to the manner of selecting or drawing the jury or to any defect or irregularity that can be pleaded against any array or venire must be entered before entering on the trial of the case; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.” La. R.S. 13:3052.

8. *Tartar v. Hymes*, 94-0758 (La. App. 5 Cir. 5/30/95), 656 So.2d 756, 760, *writ denied*, 95-1640 (La. 10/6/95), 661 So.2d 475.

9. *See Camaille v. Shell Oil Co.*, 562 So.2d 28, 30 (La. App. 5 Cir. 1990), *writ denied*, 565 So.2d 944 (La. 1990) (citing *Overmier v. Traylor*, 475 So.2d 1094 (La. 1985), in support of the position that although the appellant’s appeal was technically premature, because the trial court did eventually sign a final judgment, the defect was considered cured).

10. *See, generally*, La. C.C.P. art. 2083.

11. La. C.C.P. art. 1974.

12. *See Johnson v. E. Carroll Detention Ctr.*, 27,075 (La. App. 2 Cir. 6/21/95), 658 So.2d 724.

13. *See Womer v. Womer*, 95-0833 (La. App. 5 Cir. 1/8/96), 666 So.2d 1232.

14. If however a party only appeals a portion of the trial court’s judgment, the court of appeal only has jurisdiction over the matters before it on appeal and the trial court retains jurisdiction on the other matter(s). *See, generally* La. C.C.P. art. 1915.

15. La. C.C.P. art. 2125.

16. La. C.C.P. art. 2127; *see also* URCA 2-1.

17. *McMorris v. McMorris*, 94-0590 (La. App. 1 Cir. 4/10/95), 654 So.2d 742; *see also* *W. Handien Marine v. Gulf States Marine*, 624 So.2d 907 (La. App. 5 Cir. 1993), *writ denied*, 93-2851 (La. 1/13/94), 631 So.2d 1166.

18. *See, e.g.*, *Porche v. Waldrip*, 597 So.2d 536, 537 (La. App. 1 Cir. 1992), *writ denied*, 599 So.2d 316 (La. 1992) (“It is the appellant’s responsibility to ensure the appellate record is complete. Since the appellant failed to do so, we must presume the trial court’s ruling on this issue is correct.”); *Cf. LeBlanc v. Cajun Painting, Inc.*, 94-1609 (La. App. 1 Cir. 4/7/95), 654 So.2d 800, 806, *writs denied*, 95-1655 (La. 10/27/95), 661 So.2d 1349 & 95-1706 (La. 10/27/95), 661 So.2d 1350 (discussing the plaintiff’s attempt to “supplement” the record on appeal by taking a deposition and moving the appellate court to accept the same in support of his assignment of error while noting said motion was inappropriate because the applicable provisions of the Code of Civil Procedure envisioned only correcting a record, not adding things to it once the trial court is divested of jurisdiction).

19. 365 So.2d 1330 (La. 1978).

20. *See also* Steven Guillory v. Ins. Co. of N. Am., 96-1084 (La. 4/8/97), 692 So.2d 1029; Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987).

21. *See, e.g.*, Theriot v. Lasseigne, 93-2611 (La. 7/5/94), 640 So.2d 1305; Stobart v. State Dept. of Transp. & Dev., 617 So.2d 880, 882 (La. 1993) (“[F]actual findings . . . should not be reversed on appeal absent manifest error.”); *see also* Rosell v. ESCO, 549 So.2d 840, 844 (La. 1989).

22. Stobart, 617 So.2d at 883 (citing Canter v. Koehring Co., 283 So.2d 716 (La. 1973)).

23. *Id.* “This state’s appellate review standard, which is constitutionally based and jurisprudentially driven, is that a court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding which is manifestly erroneous or clearly wrong.” Stobart, 617 So.2d 882 n. 2.

24. Rosell, 549 So.2d 844-45.

25. *See, generally*, Shepard v. Scheeler, 96-1720 (La. 10/21/97), 701 So.2d 1008; *see also* Bruno v. Harbert Int’l, Inc., 593 So.2d 357 (La. 1992).

26. Stobart, 617 So.2d 883 (citing Housley v. Cerise, 579 So.2d 973 (La. 1991)).

27. *See, e.g.*, Reynolds v. Select Properties,

Ltd., 93-1480 (La. 4/11/94), 634 So.2d 1180, 1182 (noting that appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate); Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181 (La. 2/29/00), 755 So.2d 226 (citing Schroeder v. Board of Supervisors, 591 So.2d 342, 345 (La. 1991), for the position that review of a grant of a motion for summary judgment is *de novo*); *see also* Carter v. State, 03-0634 (La. App. 4 Cir. 3/24/04), 871 So.2d 450, 452.

28. *See, generally*, Mayo v. Audubon Indem. Ins. Co., 26,767 (La. App. 2 Cir. 1/24/96), 666 So.2d 1290, writ denied, 96-0457 (La. 4/1/96), 671 So.2d 325; Moore v. Safeway, Inc., 95-1552 (La. App. 1 Cir. 11/22/96), 700 So.2d 831, writs denied, 97-2921 & 97-3000 (La. 2/6/98); *see also* Gremillion v. Derks, 96-0412 (La. App. 4 Cir. 11/18/96), 684 So.2d 492.

29. *See* Gonzales v. Xerox Corp., 320 So.2d 163 (La. 1975); *see also* Myers v. American Seating Co., 93-1350 (La. App. 1 Cir. 5/20/94), 637 So.2d 771, 779, writ denied, 94-1569 (La. 10/7/94), 644 So.2d 631.

30. The Supreme Court of Louisiana Annual Report (2003), pg. 33.

ABOUT THE AUTHOR

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2005 Amendment to La. C.C.P. Art. 2083

Louisiana has always had a policy against piecemeal appellate review of interlocutory rulings and favoring consolidated consideration of all alleged trial court errors in one appeal after final judgment. Louisiana has also recognized the need to have procedures, subject to judicial control, which provide a litigant with an opportunity to request appellate intervention in trial court proceedings before final judgment when the harm resulting from the continuation of an erroneous trial court interlocutory ruling outweighs the efficiency of the final judgment rule.

The Louisiana Code of Civil Procedure has provided two procedures for interlocutory appellate review — an appeal of right¹ and discretionary supervisory writ review.² In response to

Appellate Review of Interlocutory Rulings

By William R. Forrester, Jr.

complaints about the inefficiency and confusion caused by the interrelationship of these two procedures, the Louisiana State Law Institute undertook a study to consider a change.

As a consequence, on the recommendation of the Law Institute, La. C.C.P. art. 2083 was amended in Act No. 205 of 2005 (effective on Jan. 1, 2006) to eliminate an appeal as a procedure for seeking

appellate review of interlocutory judgments except when an appeal is expressly provided by law (*e.g.*, Articles 592(A)(3)(b) and 3612).³ In the future, appellate review of interlocutory judgments for which an appeal is not expressly provided can only be applied for pursuant to the appellate court's supervisory authority set forth in Article 2201, the Uniform Rules – Courts of Appeal, and the Rules of the Supreme Court of Louisiana.

The amendment to Article 2083 was made for several reasons.

Prior System Was Counterproductive

First, continued co-existence of two overlapping procedures for interlocutory appellate review was unnecessary, confusing and wasteful.

Under the prior version of Article 2083, the cornerstone of an interlocutory appeal was the “irreparable injury” standard, which was intended by the Legislature to provide for interlocutory appellate review in compelling circumstances without opening the door to a flood of frivolous assertions of error.

The scope of supervisory review on the other hand is plenary and has no legislative parameters. But the appellate courts, to protect their overcrowded dockets, have traditionally screened writ applications under the same “irreparable injury” standards set forth in Article 2083. More recently, however, with increasing frequency and little apparent uniformity, strict application of the “irreparable injury” standard for writ review has been relaxed. Now, even in the absence of irreparable injury, writs are being granted to reverse a variety of erroneous interlocutory rulings, particularly when it avoids an unnecessary trial.⁴

Thus, under the prior regime as it has evolved, if an interlocutory ruling was viewed as one that may cause irreparable injury, the grounds for seeking the two appellate review remedies were largely redundant, but if the ruling was simply erroneous and did not meet the irreparable injury standard, only a writ application was available.

Litigants often encounter difficulty in determining when an interlocutory judgment may cause irreparable injury, leaving them in a confusing “twilight zone” as to which procedure to use. The problem became acute when after the delay for pursuing the alternative remedy had expired, the appellate court informed the litigants that they made the wrong choice. The attitudes of the appellate courts in affording relief to litigants in this predicament have not been uniform. In the name of “judicial economy,” the 1st,⁵ 3rd⁶ and 4th⁷ Circuits have used their discretion to convert from one procedure to the other and ruled on the merits of the issues presented rather than order dismissal. However the 5th Circuit has consistently favored ordering dismissal and then granting an additional time period

for commencing the alternative procedure.⁸ This refiling process can alone delay actual consideration of the issue for months.

A widely utilized recommendation for avoiding risks in picking between the two remedies is set forth in Maraist and Lemmon, *Vol. I, Louisiana Civil Law Treatise*, §14.17, p.404 as follows:

The cautious attorney who is caught in this twilight zone will both apply for supervisory writs and perfect a back-up appeal . . . such a waste of judicial effort and litigant funds begs for a better remedy, but this procedure may be necessary to protect the client’s appellate rights.

The “waste” condemned by Maraist and Lemmon can be substantial. Duplicate appellate filing fees are incurred and counsel must obtain separate orders from the trial court and comply with the differing briefing and record preparation requirements for each of the two procedures.

Though the amendment to Article 2083 is a significant procedural change, it should not be interpreted as a signal to the appellate courts of any new legislative direction in the substantive standards for considering interlocutory rulings. The pre-existing criteria, including significant focus on the irreparable injury standard, remain unchanged.

During the debate of the proposal before the Law Institute Council and the Louisiana State Bar Association’s House of Delegates, concerns were expressed that elimination of interlocutory appeals under Article 2083 in favor of expanded writ review might diminish the appellate courts’ thorough consideration of important issues. This argument assumes that appeals as of right more fully protect litigants because writ applications, unlike appeals, are typically ruled on quickly without oral argument and written opinion. What prevailed as the better view, however, is that the appellate courts should have broad discretion to consider trial court rulings on a flexible schedule without the formalities of an appeal. In-

terlocutory issues typically require a much narrower analysis than review of a final judgment and are usually best resolved without extensive opinions that are a burden on the appellate courts’ resources and often can lead to premature and inappropriate factual assumptions and characterizations of the case before trial. Furthermore, filing an interlocutory appeal, even where irreparable injury is clearly present, provides no guarantee that the briefing and oral argument procedures of an appeal will be utilized. When circumstances have demanded it, some of the appellate courts have, on their own initiative, disregarded the appeal label and considered interlocutory errors under their supervisory authority.

Interlocutory Appeals Can Needlessly Delay Trial Court Proceedings

Secondly, the appellate courts have recognized that the procedures inherent in ordinary appeals can be so time consuming that they are often at cross purposes with the more important goal of the prompt resolution of litigation. For example, the delay (over one year in the 3rd Circuit) in processing an interlocutory appeal of a venue ruling (while the suit sat dormant) was found unacceptable in *Hamilton Medical Group v. Ochsner Health Plan*.⁹ The court noted that utilization of appeals to consider interlocutory rulings could open the door to meritless appeals of adverse rulings on exceptions for no reason other than to delay the case. To rectify the problem, the *Hamilton* court dismissed an appeal of a venue ruling and then promptly ruled on the issue through its supervisory authority noting, “Justice delayed is Justice denied.”

By contrast, appellate review of interlocutory judgments by supervisory writs is a superior system. Writ applications have become common and the appellate courts are internally organized with sufficient judges and staff to properly review the issues and make timely rulings.¹⁰ The appellate courts’ rules for writ review are written to deal with the

exigencies of ongoing litigation. Preparation and submission of the pertinent documents in the trial court record is streamlined and the appellate courts have virtually unlimited discretion to dispense with oral argument and briefing schedules and written opinions in order to promptly rule on writ applications. Nevertheless, when time permits, and in an appropriate case, more orderly briefing schedules, oral argument and a published opinion can be utilized.

Amendments to Article 2083 Promote Uniformity

Finally, the amendment promotes uniformity and clarity in appellate practice in that there is now one delay period for seeking appellate review of all interlocutory judgments except those for which an appeal is expressly provided. Under the prior system, there were multiple periods when a supervisory writ and suspensive and devolutive appeals were considered options.

According to Uniform Rules, Courts of Appeal §§4-2 and 4-3, a writ applicant must give notice of an intention to apply for writs to the court and opposing counsel within 30 days from the date of "notice" by the trial court of its challenged ruling as provided in Article 1914. The trial court then sets a return date within the same 30-day period (unless otherwise extended) and the writ application must be filed within that return date. There is no new trial period that suspends commencement of the aforesaid period.¹¹

On the other hand, under prior law, there was never a codal provision specifically fixing the time period for an appeal of interlocutory judgments causing irreparable injury. Practitioners extrapolating provisions of the Code of Civil Procedure often assumed that such interlocutory judgments were appealable within the two periods of 30 and 60 days provided in Articles 2123 and 2087 for suspensive and devolutive appeals of final judgments.¹² Application of these final judgment articles to interlocutory judgments was uncertain and often

The amendments to Article 2083 eliminate the prior system of two overlapping procedures and replace them with a more workable and consistent system of supervisory writs.

confusing to counsel because the delays start from notice of the signing of a written judgment, which is not always required for an interlocutory ruling, and their commencement is suspended during the time for applying for a new trial of a final judgment provided in Article 1974 which is not available for the trial court's reconsideration of interlocutory judgments.

Conclusion

Due to their efficiency, supervisory writs have evolved as the procedure of choice by practitioners and the courts alike for appellate consideration of interlocutory rulings. The amendments to Article 2083 eliminate the prior system of two overlapping procedures and replace them with a more workable and consistent system of supervisory writs.

FOOTNOTES

1. The prior version of Article 2083(A) provided: "An appeal may be taken from a final judgment rendered in causes in which appeals are given by law whether rendered after hearing or by default, *from an interlocutory judgment which may cause irreparable injury*, and from a judgment reformed in accordance with a remittur or additur under Article 1814."

2. Article 2201 provides: "Supervisory writs may be applied for and granted in accordance with the constitution and rules of the supreme court and other courts exercising appellate

jurisdiction."

3. Article 2083(C), as amended by Act 205, now provides: "An interlocutory judgment is appealable only when expressly provided by law."

4. See *Herlitz Constr. Co. v. Hotel Investors of New Iberia, Inc.*, 390 So.2d 878 (La.1981); Tatum, "Revisiting the Supervisory Powers," *La. Bar Journal*, Vol. 41, No. 5, p. 433 (Feb. 1994). For an excellent summary of the recent utilization of supervisory writs see Plotkin, *Louisiana Civil Procedure, West Practice Series*, Vol. 3, pp. 561-563.

5. *Citgo v. Dept. of Revenue*, 845 So.2d 558, 563 (La. App. 1 Cir. 2003).

6. *Hamilton Medical Group v. Ochsner Health Plan*, 550 So.2d 290, 292 (La. App. 3 Cir. 1989); more recently in *Starks v. American Bank Nat. Ass'n*, 2004-1219 (La. App. 3 Cir. 5/4/05), 901 So.2d 1243, the defendant took both an appeal and writ when its venue exception was overruled. The appellate court ruled that either procedure was proper and then granted the writ and consolidated it with the appeal.

7. *N.O. Firefighters Ass'n v. New Orleans*, 750 So.2d 1069, 1072 (La. App. 4 Cir. 1999).

8. *Masson v. Masson*, 815 So.2d 270, 272 (La. App. 5 Cir. 2002); *Meany v. Meany*, 685 So.2d 356 (La. App. 5 Cir. 1996).

9. *Hamilton*, supra, fn.6 at 292.

10. Plotkin, *Louisiana Civil Procedure, West Practice Series*, Vol. 3, p. 554.

11. *Carter v. RHEA*, 01-0234 (La. App. 4 Cir. 4/25/01), 785 So.2d 1022; Ward, "A Writ in Time," *La. Bar Journal*, Vol. 51, No. 5, p. 338 (Feb./March 2004).

12. *Williams v. Litton*, 2003-805 (La. App. 3 Cir. 12/23/03), 865 So.2d 838; *Warren v. Southern Energy Homes, Inc.*, 00-1236, (La. App. 3 Cir. 10/4/000); *Jacobson v. Ryder Truck Rentals, Inc.*, 421 So.2d 436 (La. App. 1 Cir. 1982). Article 3612 expressly provides for an appeal of an order relating to a preliminary injunction within 15 days of the order or judgment.

ABOUT THE AUTHOR

William R. Forrester, Jr. serves as the reporter for the Louisiana State Law Institute Section on Civil Procedure. He is a partner with Lemle & Kelleher, L.L.P., and has taught Louisiana Civil Procedure as an adjunct faculty member at Tulane Law School. He received his BA degree from the University of Virginia and his JD degree from Tulane Law School. (21st Flr., 601 Poydras St., New Orleans, LA 70130-6029)



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Because of hurricanes Katrina and Rita, the needs of Louisiana's children are more apparent now than ever before, especially at holiday time. For this reason, the Louisiana State Bar Association and the Louisiana Bar Foundation's Community Action Committee is asking those able to assist these children to participate in its ninth annual Secret Santa Project. Because of the devastation in our areas, we know that some of our loyal and dedicated supporters from years past may be unable to participate in our project this year. We do understand and offer them our deepest condolences and best wishes.

The project has identified several agencies serving children who desperately need clothing and gifts. To the best of its ability, the project has ensured that these agencies are not receiving similar help from any other source.

Most of the children served by the project are young. We have, however, made a special effort to include teenagers, up to the age of 18. These teenagers, many of whom are working to support their families, often do not buy gifts for themselves. We, therefore, ask that you please support these children.

Anyone who sponsors a child will receive the child's Christmas Wish list to use as a guide. Please note that there is no required minimum or maximum. The sponsoring Santa must bring each wrapped present directly to the agency or to the Louisiana Bar Center on December 8th and 9th. Details about gift wrapping, drop off, etc., will be included in your packet.

The Secret Santa Project also welcomes monetary donations in addition to or in lieu of gifts to help defray administrative costs and to buy gifts for children who may not be adopted by a Secret Santa. If you wish to make a monetary donation, please make the check payable to the Louisiana Bar Foundation and mail it to the attention of Shelly Buckel, Louisiana Bar Center, 601 St. Charles Avenue, New Orleans, LA 70130.

This project not only provides holiday cheer, but also provides much needed assistance to many affected by the tragedies of Katrina and Rita. By participating in this program, you are helping to rebuild the lives of many children.

For more information or questions, contact Shelly Buckel at 504-619-0147 or sbuckel@lsba.org or Tina Crawford White at 504-582-1111 or twhite@gordonarata.com.

150+ Attorneys, Judges Participate in Law School Professionalism Orientations

For the sixth consecutive year, the Louisiana State Bar Association's (LSBA) Professionalism and Quality of Life (P&QL) Committee hosted law school orientations on professionalism at Louisiana's four law schools. More than 150 attorneys and judges from across the state participated in the August programs.

Opening remarks were given by the deans and chancellors of the law schools, as well as from LSBA President Frank X. Neuner, Jr., Louisiana Supreme Court justices, P&QL Committee Co-Chairs Bobby J. Delise and E. Phelps Gay, and Lawyers Assistance Program (LAP) representative Craig L. Caesar. First-year law students also heard from practicing attorneys and members of the judiciary about what it meant to be a professional attorney.

This program, inaugurated in August 2000, has now been institutionalized as a yearly project for the LSBA and the law schools. The deans and admissions staff of all of the law schools have been accommodating in assisting with the logistical challenges of putting this program together.

Opening remarks at the Louisiana State University Paul M. Hebert Law Center orientation were given by Chancellor John J. Costonis, Louisiana Supreme Court Justice Chet D. Traylor, LSBA President Neuner, LAP representative Caesar and P&QL Committee Co-Chair Delise.

Opening remarks at the Loyola University Law School orientation were given by Dean Brian Bromberger, Louisiana Supreme Court Chief Justice Pascal F. Calogero, Jr., LSBA President Neuner, LAP representative Caesar and P&QL Committee Co-Chair Delise.



Chancellor Freddie Pitcher, Jr. welcomed special presenters at the Southern University Law Center 2005 Professionalism Orientation. From left, Pitcher, Louisiana State Bar Association (LSBA) President Frank X. Neuner, Jr.; Louisiana Supreme Court Associate Justice John L. Weimer; and E. Phelps Gay, co-chair of the LSBA Professionalism and Quality of Life Committee. Photo by John H. Williams.



First-year law students at the state's four law schools participated in various professionalism and ethics discussions at the orientation. Sessions were presented by attorneys and judges.

Opening remarks at the Southern University Law Center orientation were given by Chancellor Freddie Pitcher, Jr., Louisiana Supreme Court Justice John L. Weimer, LSBA President Neuner, LAP representative Caesar and P&QL Committee Co-Chair Gay.

Opening remarks at Tulane Law School were given by Dean Lawrence Ponoroff, Chief Justice Calogero, LSBA President Neuner, LAP representative Caesar and P&QL Committee Co-Chair Gay.

The LSBA and the Professionalism and Quality of Life Committee thanks all of the attorneys and judges who volunteered their time and talent to this year's programs.

The LSBA and the Professionalism and Quality of Life Committee also thanks its sponsors of the programs.

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Bobby J. Delise, co-chair of the LSBA's Professionalism and Quality of Life Committee.



LSBA President Frank X. Neuner, Jr., left, and Louisiana Supreme Court Chief Justice Pascal F. Calogero, Jr. led a session.

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Loyola: Dean Brian Bromberger addressed the students.

Ottinger Hebert, L.L.C.
 John Pieksen & Associates, L.L.C.

Program participants included:

LSU Paul M. Hebert Law Center

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 David L. Bateman
 Fred Sherman Boughton, Jr.
 Hon. James J. Brady
 Douglas D. Brown
 Hon. Marilyn C. Castle
 Ronald D. Cox
 Hon. John Crigler
 Hon. Laura P. Davis
 Bobby J. Delise
 Steven "Buzz" Durio
 Hon. Glennon P. Everett
 Larry Feldman, Jr.
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 Elizabeth E. Foote
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 Catherine S. Giering
 Nancy Goodwin
 Holly G. Hansen
 Paul J. Hebert
 Michael E. Holoway
 Hon. Bonnie Jackson
 Bernadine Johnson
 Hon. Charles W. Kelly IV
 J. Don Kelly, Jr.

Continued Next Page



LSU session: Left photo, presenters Lorraine McCormick, John Ortego, Disciplinary Counsel Charles B. Plattsmier and LSBA President Frank X. Neuner, Jr. Top photo, Michael W. McKay and Valerie Briggs Bargas.

R. Loren Kleinpeter
 William T. McCall
 Lorraine McCormick
 Jackie M. McCreary
 Michael W. McKay
 Gregory K. Moroux
 Hon. William A. Morvant
 Hon. Pam Moses-Laramore
 Frank X. Neuner, Jr.
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 John Ortego
 Patrick S. Ottinger
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 Charles B. Plattsmier
 Betty A. Raglin
 Dawn M. Rawls
 Laurie Kadair Redman
 Sandra Ribes
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 Joseph L. Shea, Jr.
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 Hon. Ulysses Gene Thibodeaux
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Loyola University Law School

Kay Barnes Baxter
 Carmelite M. Bertaut



Southern: Judge Trudy M. White of Baton Rouge City Court, Thomas Lorenzi, Virginia G. Benoist, Genia Coleman-Lee and D. Beau Sylvester. Photo by John H. Williams.



Southern: Judge Paul Dehay, Monique M. Edwards, Melanie Fields, Dennis Blount and Micheal Penn. Photo by John H. Williams.

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Allison Penzato
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Claudia P. Santoyo
Marta-Ann Schnabel
Scott A. Shelton
Hon. Ronald J. Sholes
William J. Sommers, Jr.
Scott J. Spivey
Raymond Steib, Jr.
Sheryl D. Story
Sharonda R. Williams

Southern University Law Center

Virginia Gerace Benoist
Shelton Dennis Blunt

Hon. Curtis Calloway
Joseph Casanova
Genia Coleman-Lee
Thomas D. Davenport, Jr.
Hon. Paul DeMahy
Donald R. DeRouen
Wade D. Duty
Melanie S. Fields
E. Phelps Gay
Hon. John Michael Guidry
Michael E. Holoway
Jim Holt
Dianne Irvine
LaKeisha Jefferson
Thomas L. Lorenzi
Frank X. Neuner, Jr.



Tulane: This panel included Franklin D. Beahm, Alan G. Brackett, John H. Butler II, John R. Cook IV and Judge Patricia T. Hedges.

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Michael Penn
Cynthia Reed
Hon. John D. Saunders
Leslie J. Schiff
Jocelin M. Sias
D. Beau Sylvester
Hon. Trudy M. White

Tulane Law School

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House of Delegates Approves Formation of Appellate Section

The Louisiana State Bar Association's House of Delegates approved the formation of the Appellate Section.

The section members will meet and communicate via an electronic discussion group. All members will be automatically subscribed to this list serve.

The section will ask every member to make a small scholarly contribution to the list serve once a year, even if it is just an educational war story from his/her practice or a few remarks about a recent decision or court rule.

The section welcomes all LSBA members to join.

For more information, e-mail René B. deLaup at rdelaup@bellsouth.net.

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for sponsoring the continental breakfast during the "Rebuilding Your Practice After the Disaster" seminar on Friday, Oct. 7, 2005, in Lafayette.

La. Board of Legal Specialization Approves Resolution on 2005 CLE Hours

The Louisiana Board of Legal Specialization, at its Oct. 20 meeting, approved a resolution that the year 2005 will be treated as a non-year for specialization CLE requirements, and that a maximum of eight (8) hours from 2004 and all specialization CLE earned in 2005 will be applied to 2006. The resolution was approved without opposition.



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PUBLIC Ethics Advisory Opinions

These Public Opinions have been prepared by the Publications Subcommittee of the Louisiana State Bar Association's Rules of Professional Conduct Committee. The issues and topics covered within these opinions originate from actual requests for ethics advisory opinions submitted to the Ethics Advisory Service by lawyer members of the Association.

In selecting topics and issues for publication, the Publications Subcommittee has reviewed opinions referred to it by Ethics Counsel and/or panel members of the Ethics Advisory Service for purposes of determining whether the opinions submitted address issues of interest, importance and/or significance to the general bar and which are not highly fact-sensitive. The Publications Subcommittee has made every effort to promote and maintain confidentiality of the parties involved in the original requests.

Recommended format for citation of PUBLIC opinions: e.g., "LSBA-RPCC PUBLIC Opinion 05-RPCC-001 (04/04/2005)".

Questions, comments or suggestions regarding the opinions, the publication process or the Ethics Advisory Service may be directed to Richard P. Lemmler, Jr., Ethics Counsel, Louisiana State Bar Association, 601 St. Charles Ave., New Orleans, LA 70130; direct dial (504)619-0144; fax (504)598-6753; e-mail: RLemmler@lsba.org.

PUBLIC Opinion 05-RPCC-003¹

Surrender of Client File Upon Termination of Representation

Upon termination of representation, a lawyer must surrender the client's papers and property. Further, upon written request, he must deliver to the client the entire original file, including work product. The lawyer may not condition delivery on payment of his bill or on payment of copying costs. Nor may he unreasonably insist upon a particular place or mode of delivery. If there is a single file for multiple clients, they should decide among themselves who will receive the original file.

The Rules of Professional Conduct Committee considers here the ethical concerns regarding the client's property, papers and the lawyer's file that arise when a lawyer's representation terminates. Under Rule 1.16(d) of the Louisiana Rules of Professional Conduct (2004) (the LRPC), a lawyer has a two-part obligation upon termination of representation.² The first duty is automatic: he must surrender the "papers and property to which the client is entitled." The second duty, in contrast, only comes into play upon written request by the client. In that event, the lawyer must "promptly release to the client or the client's new lawyer the entire file relating to the matter." In our view, both parts of the Rule are intended to guide the lawyer in fulfilling what the Rule specifies is an obligation to "take steps to the extent reasonably practicable to protect a client's interests" upon termination of representation.

The duty to surrender "papers and property to which the client is entitled" covers, for example, original documents brought to the lawyer by the client for

purposes of administering an estate or for a closing. Money delivered to the attorney to pay a judgment is an example of property to which the client is entitled.

The second sub-part of the Rule relating to the lawyer's file has two sub-parts. The first is that, upon written request, the lawyer must promptly release to the client or the client's new lawyer "the entire file relating to the matter." The second sub-part provides that the lawyer "shall not condition release over issues relating to the expense of copying the file or for any other reason." Failure to comply with the client's request for the file may result in the imposition of sanctions. *See, e.g., In re Turnage*, 790 So.2d 620 (La. 2001).

What Does "Entire File" Mean?

In our view, the specific provision regarding release of the "entire file relating to the matter" must be read in the context of the overall purpose of the Rule, which is protection of the client's interests to the extent reasonably practicable. It serves to clarify the general duty to deliver "papers and property to which the client is entitled." The clarification is intended to emphasize and insure the obligation to deliver the file expeditiously so that the client's legal claims or rights will not be prejudiced. Its use of the term "entire file" allows no argument that work product containing mental impressions, research, analysis and the like is exempt from inclusion in what must be delivered to the client.³ The entire file must be delivered. The lawyer has the option of making a copy for his own records.

Can the Lawyer Retain the File Until His Bill is Paid?

The immediate predecessor to the current Rule⁴ (and now the current Rule⁵ has) changed the law that existed prior to its amendment on May 24, 2001. Retaining liens are now forbidden. Upon termi-

nation, a lawyer who receives a written request by the client for the file must promptly release it to the client or the client's new lawyer, and may not condition release **for any reason**. See generally "Rule 1.16(d) of the Louisiana Rules of Professional Conduct — No 'Hostages' Allowed," *Louisiana Bar Journal*, Vol. 50, No. 3, at p. 216.

What if There Are Multiple Clients Represented Jointly?

To the extent that the clients have delivered papers or property to the lawyer, these should be returned to the proper owners. However, given that the Rule contemplates delivery of the entire original file to the client, multiple clients must determine among themselves who gets the original. If they are unable to do so, the lawyer may file a concursus proceeding.

Where Must the File Be Delivered?

If a file contains photographs, original notes and other original documents, a

lawyer may not wish to mail it to the client. On the other hand, there may be circumstances where the client is uncomfortable coming to the lawyer's office or finds it inconvenient or difficult to do so. Therefore, while making the file available at the lawyer's reception desk for in-person retrieval by the client normally would not be unreasonable, and the lawyer's concern regarding the possibility of loss or damage in the event of mailing is legitimate, it would be improper to insist on in-office pickup without further inquiry and dialogue.

Two reasons compel further inquiry and dialogue. First, absent an investigation of alternatives, insisting on in-office pickup could be seen as placing a condition on the release, in violation of Rule 1.16(d). (On the other hand, a client's unreasonable demands, such as in-person delivery in Outer Mongolia, do not have to be acceded to.) Second, a lawyer has a duty to communicate with his client, including a duty to "reasonably con-

sult with the client about the means by which the client's objectives are to be accomplished." Rule 1.4. While the lawyer-client relationship may technically be over, Rule 1.16(d) envisions a continuing obligation to accomplish certain specified and limited objectives, one of which is surrender of the file.

In our opinion, therefore, the lawyer should not simply stand pat on delivery/pickup at the office, but should inquire whether any alternate method of delivery would be appropriate and acceptable to the client (e.g., private courier, commercial courier, hand-delivery, etc). The cost of such delivery could, like the copying costs specifically mentioned in the Rule, be determined in an appropriate proceeding if a resolution cannot be achieved directly with the client. Alternatively, the client may be willing to sign a written release, authorizing the use of the mails and agreeing to hold the lawyer harmless in the event of the file's loss or damage as a result of that requested mailing. Writ-

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ten inquiry to the client on this subject would serve to provide support for the reasonableness of the lawyer's efforts in trying to release the file to the client while protecting his interests to the extent reasonably practicable.

Similarly, unilaterally electing to deposit the file with a copy service and then requiring the client to pay the copying charges prior to or upon retrieval of the file from the copy service would be a violation of the Rule. The lawyer should not use a third party, such as a copying service, to try to accomplish what the Rule prohibits her from doing herself: conditioning "release over issues relating to the expense of copying the file." The lawyer should pay the copying costs to obtain a copy of the file to keep, as well as any other costs associated with promptly delivering the file to the client, and then seek reimbursement of those charges from the client, if allowable under the lawyer's fee agreement or contract law.⁶

No matter how delivery is accomplished, it would be prudent to obtain a signed and dated receipt evidencing safe delivery of the file to the client.

Can the Lawyer Charge for Organizing the Files Prior to Delivery to the Client?

If it is reasonable for the client to expect the files to be relatively organized based upon the fees paid prior to termination, it would be unreasonable to charge additional fees for any time required to organize the files to that level — *i.e.*, to

do what the lawyer has presumably already been paid to do.

FOOTNOTES

1. The comments and opinions of the Committee — public or private — are not binding on any person or tribunal, including — but not limited to — the Office of Disciplinary Counsel and the Louisiana Attorney Disciplinary Board. Public opinions are those which the Committee has published — specifically designated thereon as "PUBLIC" — and may be cited. Private opinions are those that have not been published by the Committee — specifically designated thereon as "NOT FOR PUBLICATION" — and are intended to be advice for the originally-inquiring lawyer only and are not intended to be made available for public use or for citation. Neither the LSBA, the members of the Committee or its Ethics Counsel assume any legal liability or responsibility for the advice and opinions expressed in this process.

2. "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding."

3. This is in accord with the majority view on this subject generally. *See, e.g.*, Sage Realty Corp. v. Proskauer, 91 NY 2d 30, 689 NE 2d 879 (1997); Resolution Trust Corp. v. H, PC, 128 FRD 647 (ND Tes. 1989); Maleski v.

Corporate Life Ins. Co., 163 Pa. Cmmw. 36, 641 A. 2d 1 (1994); Matter of Kaleidoscope, Inc., 15 Bankr. 232 (Bankr. ND Ga. 1981), *rev'd on other grounds*, 25 Bankr. 729 (ND Ga. 1982); Colo. Bar Ass'n Ethics Comm. Op. 104 (April 17, 1999); Conn. Bar Ass'n Comm. on Professional Ethics, Op. 94-1 (1994); Ohio Sup. Cr. Bd. of Commr's on Grievances and Discipline, Op. 92-8 (April 10, 1992); State Bd. of Ca. Standing Comm. on Professional Responsibility and Conduct, Formal Op. 1992-127 (1992); Oregon State Bar Ass'n, Formal Op. 1991-125 (1991); and State Bar of Ga. Formal Advisory Op. 87-5. The minority view is that only the "end products" of the lawyer's work (pleadings, a contract, etc.) belong to the client, while the lawyer owns his mental impressions, research, analysis etc. *See, e.g.*, Federal Land Bank v. Federal Intermediate Credit Bank, 127 FRD 473, modified, 128 FRD 182 (SD Miss. 1989); Corrigan v. Armstrong, Teasdale, 824 S.W. 2d 92 (Mo. App. 1992); Alabama State Bar, Formal Op. RO-86-02 (Dec. 23, 1987); Arizona State Bar Comm. on Rules of Professional Conduct, Op. 92-1 (March 12, 1992); Illinois State Bar Ass'n, Op. 94-13 (January 1994); North Carolina State Bar Ethics Com. RPC 178 (April 14, 1994). The *Restatement of The Law Governing Lawyers* (2003) sanctions refusal to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The basis for these exceptions is that they are necessary for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation, and the materials are not needed by the client in order to be able to continue to pursue the legal matter for which the client originally retained the attorney. *Accord*, Vermont Ethics Opinion 91-3 (1991) (lawyer may withhold internal notes).

4. Rule 1.16(d) of the Louisiana Rules of Professional Conduct (1987), as amended effective May 21, 2001.

5. Rule 1.16(d) of the Louisiana Rules of Professional Conduct (2004), effective March 1, 2004.

6. There is a split of authority in other jurisdictions over who must pay for the copies, depending on whether the file is seen as belonging to the lawyer or the client. In the latter view, the copying is strictly for the lawyer's benefit. Compare "Ownership of Lawyer's Files: Who Gets the 'Original'? Who Pays for the Copies?," 79 Mich. B.J. 1062 (August 2000), with *In re X.Y.*, 529 N.W. 2d 688 (Minn. Sup. Ct. 1995), *McKim v. State*, 528 N.E. 2d 484 (Ind. Ct. App. 1988), and *Kansas Ethics Opinion 92-05* (1992).

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By Rebecca K. Knight

LSBA OFFICERS DO PRO BONO

Most attorneys know that Rule 6.1 of the Louisiana Rules of Professional Conduct, entitled Voluntary Pro Bono Publico Service, encourages each lawyer to provide a minimum of 50 hours each year in pro bono legal services to the poor. The rule is meant to bolster one of the fundamentals of our system: access to the courts. If our poorest citizens cannot be protected and their rights assured through the legal system, then justice for all cannot be a reality. Lawyers, more than any other profession, carry both the honor and the burden of being the guardians of a just society. Indeed, one of the goals articulated in the Mission Statement of the Louisiana State Bar Association (LSBA) is to “assure access to and aid in the administration of justice . . .”

Of course, talk is cheap. The real question is whether Louisiana’s Bar leaders transform these laudable goals into a working reality. We talked to three current officers to find out.

LSBA President-Elect Marta-Ann Schnabel, who has co-chaired the Association’s Access to Justice Committee for the past two years and earned the 2004 President’s Award for her work on the committee, sees pro bono representation as an opportunity to remember why she chose to become a lawyer in the first place. Although she describes lawyers as “a cynical bunch,” she holds strongly to the belief that most of us chose to go to law school because of the desire to participate in, promote and achieve justice. Pro bono work has helped her remain grounded. She says, “When we graduate and enter the practice of law, we learn that much of what we do in our day-to-day practice is more mundane. But when I go to court on behalf of an abused woman or a neglected child, I know that I am contributing to our society in a very direct and positive way, and in a way that seems considerably more immediate and more

important than some of the other work I do. Ultimately, I do pro bono work for very selfish reasons: it makes me feel good about myself and my chosen line of work.”

LSBA President Frank X. Neuner, Jr. agrees. He believes that providing pro bono services achieves more than just personal satisfaction; it is an important part of the serious responsibility inherent in having chosen to be an attorney. Neuner says, “I have truly come to believe that providing pro bono services is a core element of being a professional.”

Neuner, who in 2004 received the LSBA’s David A. Hamilton Lifetime Achievement Award for his commitment to pro bono service, has been a participant in the Lafayette Bar Foundation’s Volunteer Lawyers Program since its inception in 1988. According to Neuner, one of the strengths of this particular program is that it makes it very easy for its volunteers to participate. In his experience, “clients are very grateful for the service you have performed for them.”

LSBA Secretary E. Wade Shows agrees that pro bono service is an important professional responsibility. A 2005 recipient of the David A. Hamilton Lifetime Achievement Award, Shows

points out that when we take our professional oath, we pledge to represent indigents. He says, “Our Rules of Professional Conduct require that we provide services to the needy. But additionally, our consciences should demand that we use the skills we are fortunate to have to help those who are less fortunate. It’s just the right thing to do.”

Moreover, Shows agrees with Neuner’s and Schnabel’s observation that pro bono work is personally rewarding and that the clients are often grateful. “Not only is it nice to have a client who is satisfied with the outcome,” he says, “but the appreciation demonstrated by that client is very gratifying.”

Neuner, Shows and Schnabel invite you to contribute your time and talent to make sure that the legal system functions for everyone, including the indigent. “Remember,” says our president-elect, summoning the language of the LSBA campaign to garner more volunteers, “pro bono attorneys hold the key to justice!”

Rebecca K. Knight is the former Access to Justice training coordinator for the Louisiana State Bar Association.

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FOCUS ON Professionalism

By E. Phelps Gay

PROFESSIONALISM SUCCESSES, CHALLENGES

With all the hand-wringing over the supposed decline in lawyer professionalism over the past decade or so, we sometimes forget that from a big-picture standpoint the legal profession is in many ways more “professional” now than it has ever been.

Consider these stories:

Ms. Jones,¹ a hard-working licensed practical nurse with a spotless record, was terminated by her employer after reporting certain rules violations which she believed endangered the health and welfare of patients. One of the hospital physicians believed her rights had been violated and suggested she seek legal counsel. She retained an attorney to file a whistleblower claim and paid him an advance of \$1,000, a significant sum considering her modest annual income.

Having taken her money, the attorney filed a sketchy, two-page petition in the wrong venue and then disappeared. The court held prescription had not been interrupted on her claim. The case had to be dismissed. Unemployed, with no savings, Ms. Jones scrambled to find contract nursing jobs. She filed a complaint against the attorney with the disciplinary board, which eventually recommended that he be suspended for three years and that he reimburse the 10 clients who made similar complaints. However, attempts to reach the lawyer proved fruitless. He never responded to the disciplinary complaints and was ultimately disbarred by the Louisiana Supreme Court. No insurance was available to compensate his victims.

With nowhere else to turn, Ms. Jones sought relief from the LSBA Client Assistance Fund. Upon investigation, finding her claim to be meritorious, the committee authorized reimbursement of the \$1,000 her attorney had taken from her. Ms. Jones responded with a heartfelt letter to the committee chair, saying “it’s

nice to know there are honest lawyers somewhere in the world,” and after her discouraging experience the committee had “restored my faith in the legal system.”

One day a talented but troubled lawyer was called into his managing partner’s office. Expecting to see the managing partner, he was confronted instead by five of his colleagues and one Bill Leary of Houma, director of the Lawyers Assistance Program (LAP). In a caring but firm tone, they told him he needed help. They specified numerous instances where he failed to carry out his duties due to abuse of alcohol. They told him he needed to undergo inpatient evaluation and treatment at a facility chosen by the LAP director. If he failed to do so, he could no longer practice with the firm.

This occurred six years ago. Recently, the lawyer called Bill Leary and asked, “Do you know what today is?” It was the anniversary of the day he was summoned into his managing partner’s office. That was the day, he believes, that not only saved his practice, but also saved his marriage and his life. He has been sober for six years.

Johnny’s liver disease was deteriorating at an alarming rate. His doctor told him he needed to fly to Milwaukee immediately to begin screening for a liver transplant. Unable to pay for the tickets, he and his wife sought help from the Bar’s new SOLACE program, headed by U.S. District Judge Jay C. Zainey and New Orleans attorney Mark C. Surprenant. The program is designed to reach out “in a small, but meaningful and compassionate way” to judges, lawyers, court personnel, paralegals, secretaries and their families who experience a death or catastrophic illness or injury.

Judge Zainey sent an e-mail to

SOLACE members describing Johnny’s plight. Within minutes, e-mails and phone calls flooded in from lawyers willing to donate their Delta Sky Miles to Johnny and his wife. Not only were they able to fly to Milwaukee for the treatment, their ambulance charges also were paid for by SOLACE volunteers.

In the aftermath of Hurricanes Katrina and Rita, hundreds of Bar members participated in disaster training to offer free legal assistance to the storms’ survivors. Attorneys manned shelters to answer a myriad of storm-related legal questions and offered advice through the LSBA’s Legal Assistance Hotline.

These stories, I should add, do not represent isolated or even unusual occurrences. They form part of the everyday work undertaken by dedicated lawyers and judges (usually volunteers) who care about our profession and want to see its standards maintained and improved. Like all “good news” stories, they draw little interest from the press; they will never land on the front page. Instead, we read about the occasional corrupt judge and dishonest lawyer, and we grieve for what they have done — to themselves, to their clients and constituents, and to our profession. But beneath the headlines, the “good news” goes on and, from time to time, without boasting or becoming complacent, we should tell those stories, too.

These thoughts came to mind a few years ago when I read a provocative piece written by a lawyer from Minnesota named William Wernz.² Responding to an article decrying the “professionalism crisis,” he maintained we should not necessarily equate a decline in civility among litigators with an overall decline in professionalism.

Wernz postulated that the “core values” of professionalism relate to these areas: lawyer fee practices, concern for

loyalty and conflicts of interest, self-regulation, care for clients and adverse parties, learning and literature about the profession, and consideration for those outside the establishment, such as indigent criminal defendants or legal aid clients. Point by point, he demonstrated that what some lawyers believe was the “golden age” 30 years ago was not really so golden.

Back then, the profession imposed minimum fee schedules. For many persons, these schedules effectively blocked access to legal services — that is, until 1975, when the U.S. Supreme Court struck them down as “unusually damaging” to the public.³ Fee agreements were rarely regulated; the old DR 2-106 did not even require communication of the basis of the fee. Conflicts of interest were not as strictly enforced as they are today. It was not until 1983 that the Model Rules directly addressed the issue of lawyers suing a current client.

For that matter, disciplinary action against lawyers for any offense was remarkably lax, “practically nonexistent in many jurisdictions.”⁴ But by 1991, according to the ABA McKay Report, “much progress [had] been made in the enforcement of lawyer discipline,” so that most of the problems identified 20 years earlier had been resolved. Louisiana, as we know, has been a national leader in the area of improved disciplinary enforcement.

During the 1970s, there were few, if any, client security funds. Clients whose lawyers stole their money were basically out of luck. Today, we can proudly tell the story of Ms. Jones, who came to the Bar and found relief.

If the health of a profession is “reflected in the quality of its learned discourse,” Wernz suggests we are living through a particularly robust era. Scholars such as Geoffrey Hazard, Thomas Morgan, Deborah Rhode and Stephen Gillers have provided us with rich resources on the law of lawyering. Ethics opinions to help lawyers navigate their way through difficult issues are better and more plentiful than ever.⁵ Wernz reminds us that it was not until

the convictions and disbarments arising out of the Watergate scandal that many law schools began to require courses in legal ethics.

Further, Wernz notes that an honest assessment of the profession’s past must come to grips with a history of exclusion. It was not until 1943 that the ABA stopped barring African-Americans from membership. It was not until much more recently that significant numbers of women and minorities began to enter the profession.

Wernz concludes that focusing on the “current abrasiveness” among certain lawyers runs the risk of ignoring “real progress on numerous professionalism issues.” In my humble opinion, he is right.

Acknowledging progress does not mean the status quo is perfect or that we don’t face serious challenges. This was recognized by the Conference of Chief Justices in 1999, when they adopted a National Action Plan on lawyer conduct and professionalism. This admirable document contains a long list of recommendations on improving lawyer competence, continuing legal education, law office management, ethics assistance, assistance to lawyers with mental health or substance abuse problems, programs for new admittees, funding client protection programs, pro bono service, professionalism in attorney advertising, and many other important topics. The action plan was followed by an Implementation Plan adopted by the Chief Justices in 2001.

Right now, thousands of Louisiana lawyers and judges are working diligently to improve our profession. They are serving on important committees; they are speaking at seminars; they are taking on pro bono cases; they are grading Bar exams. Yesterday (as I write), I attended the sixth annual Law Student Orientation on Professionalism at Louisiana State University Paul M. Hebert Law Center. Fifty-five volunteer lawyers and judges showed up on a Friday afternoon to join Associate Justice Chet Traylor and LSBA President Frank X. Neuner, Jr. in

welcoming the new students to our profession. They spent the rest of the afternoon engaging the students in a lively discussion of ethics and professionalism issues.

So, yes, we face challenges. And, yes, despite all of the articles, lectures, discussions, committee meetings and CLE programs, we have not solved many of the thorny issues confronting our profession. We may never. As Tiger Woods, the ultimate professional, said in another context, “You can always get better.” But it’s worth remembering that we’ve come a long way, and, contrary to popular wisdom, the place we came from was not necessarily a better place than the place we’re in right now.

FOOTNOTES

1. This is a true story, but her real name is withheld for privacy reasons.

2. “Does Professionalism Literature Idealize the Past and Over-Rate Civility? Is Zeal a Vice or a Cardinal Virtue,?” The Professional Lawyer, ABA Center for Professional Responsibility, Standing Committee on Professionalism, Fall 2001.

3. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

4. Wernz cites the 1970 ABA Clark Report, which noted that with few exceptions the “prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility.” See Wernz article, note 1, p. 5.

5. This certainly includes the LSBA Ethics Advisory Service, significantly improved in recent years.

E. Phelps Gay is co-chair of the Louisiana State Bar Association’s Professionalism & Quality of Life Committee. A past LSBA president, he is a partner in the New Orleans law firm of Christovich & Kearney, L.L.P. He received his undergraduate degree from Princeton University and his JD degree from Tulane Law School in 1979. He can be reached at (504)561-5700 or via e-mail at EPGay@christovich.com.

RECENT Developments

ADMINISTRATIVE TO PUBLIC UTILITIES



Administrative Law

Non-Immigrant Aliens Need Not Apply

The Louisiana Supreme Court, like many Louisiana regulatory agencies, requires that those who wish to receive a Louisiana license to practice law must be United States citizens or permanent U.S. residents, thus excluding non-immigrant aliens. Two challenges to this requirement, filed in the Federal District Court for the Eastern District of Louisiana, were heard before different judges, who reached opposite results. One found the requirement valid; the other concluded it was not. Although not consolidated for trial, the two cases were consolidated for appeal.

In *LeClerc v. Webb*, 419 F.3d 405 (5

Cir. 2005), the court held, 2-1, that the Louisiana Supreme Court's exclusion of non-immigrant aliens from admission to the bar is a valid exercise of the court's constitutionally granted authority to regulate the practice of law in Louisiana, reasoning that the level of protection afforded non-immigrant aliens is different from that in favor of permanent resident aliens; *i.e.*, non-immigrants are not, in this situation, a suspect class nor are they deprived of a fundamental right by the court. Moreover, the restriction bears a rational relationship to the legitimate state interest in assuring clients that their Louisiana lawyers are accountable and the attorney-client relationship is not subject to disruption.

The plaintiffs have requested review by the Federal 5th Circuit Court of Appeals, *en banc*.

— **Brian M. Bégué**
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Art, Entertainment and Sports Law

Louisiana's Newest Entertainment Legislation

The 2005 Louisiana Legislature passed several bills important to the entertainment industry. These include laws benefiting digital interactive media and the sound recording industry, as well as changes to existing film and television production tax credits and new legislation to protect child actors. Each law is briefly summarized below.

The Digital Media Act (SB 341) grants video game developers a 20 percent tax

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The Sound Recording Investment Act (HB 631) grants a refundable tax credit ranging from 10 to 20 percent for recording projects or for infrastructure in the music industry. This legislation is targeted at major record companies to increase recording in Louisiana studios and to create a permanent industry presence. The legislation also sets an annual cap on the costs of programs and limits usage per company.

Louisiana's "Coogan Law"

Louisiana also passed an important piece of non-tax-related legislation, the Child Performer Trust Act, Act 147, the equivalent of the California "Coogan Laws." These laws were passed in the 1930s after former child actor Jackie Coogan found his substantial movie earnings had been spent by his parents as he was growing up, to find he had very little money left. The Louisiana law tracks similar laws in California, Texas, New York and New Jersey, protecting certain wages earned by minors for their performances and addressing on-set education.

Louisiana's "Coogan Law" requires 15 percent of the gross earnings of a minor rendering "artistic or creative services" in Louisiana to be placed in an interest-bearing blocked trust account, subject to certain conditions. The law applies to any contract in which a minor is employed or agrees to render such artistic or creative services in Louisiana for \$500 or more.

The "artistic or creative services" of a minor include those of an "actor, actress, dancer, musician, comedian, singer, stunt-person, voice-over artist or other performer or entertainer in any motion picture, television, radio, theatrical or sports production or commercial production." The child's compensation can be paid directly or through a third-party services company, loan-out corporation or agency providing services such as casting. The

minor may not withdraw the funds before his 18th birthday, unless a court ruling determines the minor is in "necessitous circumstances." The Child Performer Trust Act also specifies at least three hours of educational instruction per day for any minor providing such artistic or creative services. The teacher must be certified by the state of Louisiana in order to qualify as an "on set" teacher. If the minor will be out of school two or more days within a 30-day period, teaching on set is required.

Representatives of the Screen Actors Guild and the Motion Picture Association of America from the East and West Coasts worked closely with the Legislative Committee of the Art, Entertainment and Sports Law Section and legislators, led by Senator Jay Dardenne, on this crucial bill to protect minors in the industry in Louisiana.

— Michèle LeBlanc

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Corporate and Business Law

Legislature Provides for Certificateless Shares; Amends Law on Transfer Restrictions

On June 21, 2005, the Governor signed Act No. 97, which took effect on Aug. 15. The law revises the sections of the Louisiana Business Corporation Law (LBCL), La. R.S. 12:1, *et seq.*, dealing with stock certificates and restrictions on the transfer of stock.

Revised Section 57(G) of the LBCL will now allow a corporation's board of directors to authorize the issuance of



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certificateless shares, unless the articles of incorporation or bylaws provide otherwise. The new law also makes changes to provisions governing physical certificates. Under the old law, a corporation's president and secretary were required to sign stock certificates unless the articles or bylaws designated another officer. Now, unless the bylaws designate two specific officers (or a clerk and an officer), the corporation's full board of directors must sign all stock certificates. This change may require many Louisiana corporations to amend their bylaws or else have their entire boards of directors sign stock certificates.

In addition, the new law deleted the requirements that the par value of the shares, or a statement that they have no par value, and restrictions on fractional shares other than voting restrictions be set forth on the stock certificate.

Act No. 97 makes significant changes to the LBCL regarding stock transfer restrictions. The changes, set forth in new Section 59, govern not just shares of stock, but also any "security convertible into or carrying a right to subscribe or acquire shares."

A corporation's articles or bylaws, or an agreement among shareholders, may contain provisions restricting the transfer of shares of the corporation's stock. However, new Section 59(B) provides that a transfer restriction will not affect shares issued before the restriction was adopted unless the holders of the shares agreed to it or voted for it. Additionally,

unless the restriction is set forth on the stock certificate or in the information statement provided to holders of uncertificated shares, it will not bind anyone who has no knowledge of it, even if it is contained in the articles or bylaws.

New Section 59 also provides that the only permissible purposes for a transfer restriction are: (1) to maintain the corporation's status when that status depends on the number or identity of its shareholders (for example, to maintain "S" corporation status); (2) to preserve exemptions under the federal or state securities laws; or (3) for any other "reasonable" purpose. The law also limits the manner of the restrictions to: (1) rights of first refusal; (2) an obligation of the corporation or other persons to acquire the shares; (3) a requirement that the corporation or other person approve the transfer, if that requirement is not manifestly unreasonable; and (4) a prohibition on transfers to certain persons or classes of persons, if the prohibition is not manifestly unreasonable.

Act No. 97 does not address Section 12:58(A), which specifically permits stock transfers to be regulated by bylaws not inconsistent with the now repealed Uniform Stock Transfer Law.

Management of Corporations

In *Hale v. Liljeberg*, 04-0861 (La. App. 5 Cir. 1/25/05), 895 So.2d 28, the Louisiana 5th Circuit considered whether the three shareholders of Capital Im-

provement, Inc. were entitled to either one vote per share, or one vote per shareholder, on matters considered at the corporation's annual shareholders' meeting. Hale, who owned 50 percent of the corporation's outstanding shares and who voted against the actions taken at the meeting, claimed that the proper vote was one vote per share, while the two defendants, who owned 25 percent of the stock each and voted in favor of the actions, argued the vote was by heads.

After reviewing the corporation's charter documents and considering Section 75 of the LBCL, the court held that the vote was by shares. However, it appears neither Hale nor the court considered whether, even if the vote was by heads, the actions taken at the meeting would have been invalid.

At the meeting, the defendants voted to, among other things, re-title company vehicles in their own names, cut Hale's compensation by \$25,000 and give themselves a \$10,000 bonus each. But managerial decisions such as these are the province of the board of directors, not the shareholders. Section 81 of the LBCL provides that "all the corporate powers shall be vested in, and the business and affairs of the corporation shall be managed by, [the] board of directors" Shareholders are entitled to vote on only certain matters specified in the LBCL or the articles of incorporation, such as the election and removal of directors, the approval of business combination transactions, or the amendment of the articles. Since the court had previously affirmed the trial court's factual finding that the defendants were not directors, it appears Hale could have challenged some, if not all, of the actions taken at the shareholders' meeting by pointing out that those items were not proper matters for shareholder consideration.

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Criminal Law

Brady Violations Can Be Ethical Violation as Well

In Re Jordan, 04-2397 (La. 6/29/05), ___ So.2d ___.

On March 2, 1995, Michael Gerardi was shot at point-blank range during an armed robbery attempt outside the Port of Call restaurant in New Orleans. The victim's date, Connie Ann Babin, gave three separate statements to the New Orleans Police Department, noting at various times that she was nearsighted and generally wears contacts or glasses. She stated that she did not get a good look at the perpetrators and probably couldn't identify them, and then gave somewhat different descriptions of the perpetrator at different times. Despite her misgivings, she identified Shareef Cousin as the shooter from a photographic lineup. Cousin was indicted for the first-degree murder of Michael Gerardi.

Roger W. Jordan, Jr. was at that time an assistant district attorney in Orleans Parish. Although he interviewed Babin

and reviewed the police reports, he "unilaterally determined that the absence of contacts or glasses on the night of the murder did not affect Ms. Babin's identification of Cousin as the shooter." Although two of the statements were disclosed to defense counsel prior to trial, the second statement, being the most inconsistent statement, was not. After a failed motion to suppress the identification, the matter was tried to a jury, which convicted Cousin of first-degree murder and sentenced him to death.

Several days after the completion of trial but prior to the penalty phase, a copy of Babin's second statement was delivered to defense counsel. On appeal, the defense tried to raise the failure to make full disclosure as error, but the conviction was reversed on other trial errors. *State v. Cousin*, 96-2973 (La. 4/14/98), 710 So.2d 1065. However, the Supreme Court noted in its opinion that Babin's second statement was "obviously" exculpatory, material to the issue of guilt, and "clearly" should have been produced to the defense under *Brady v. Maryland*, 83 S.Ct. 1194 (1963), and *Kyles v. Whitley*, 115 S.Ct. 1555 (1995).

Following Cousin's successful appeal, he and his sister filed a complaint with the Office of Disciplinary Counsel against Jordan, alleging that he wrongfully sup-

pressed *Brady* evidence by failing to disclose Babin's second statement. A series of hearings, dismissals of the complaint and reinstatements of the complaint followed. At issue was whether Jordan had violated the Rules of Professional Conduct, Rules 3.8(d) and 8.4(a), which provide:

3.8. The prosecutor in a criminal case shall:

(d) [M]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]

8.4. It is professional misconduct for a lawyer to:

(a) [V]iolate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

The Disciplinary Board had found that Jordan technically violated the rules, but found that no discipline was neces-

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sary and dismissed the formal charges. Considering the factors regarding punishment, the board found no aggravating factors but did find “numerous and weighty” mitigating factors. The Office of Disciplinary Counsel sought review, and the Supreme Court granted the request.

The Supreme Court explained that the duty to disclose material evidence favorable to a criminal defendant is more than a mere statutory discovery right, but strikes to the heart of the right to a fair trial as guaranteed by the 14th Amendment’s Due Process Clause. The court likewise clarified that exculpatory evidence includes evidence that impeaches the testimony of a witness whose credibility or reliability may determine guilt or innocence. As the second statement negated the witness’s ability to positively identify the defendant in a lineup, the statement was exculpatory and should have been disclosed. The court, therefore, concluded that Jordan had, in fact, violated Rule 3.8(d).

The court then considered the appropriate discipline, which was a *res nova* issue for Louisiana. Considering the high ethical obligations imposed on the prosecutor by the power of his position, the rules must be strictly enforced. Although

the defendant’s conviction in the underlying case was ultimately reversed on other grounds, the potential injury to the defendant and the criminal justice system required some form of discipline. Looking to the rulings of other states regarding prosecutorial ethical violations, the court suspended Jordan from the practice of law for three months, deferring imposition for one year, subject to the condition that any misconduct during the year following the judgment could be grounds imposing the suspension or additional discipline, as appropriate.

Justice Johnson concurred in part and dissented in part. Justice Johnson agreed that Jordan knowingly withheld *Brady* evidence and dissented from the decision to defer imposition of the suspension from practice.

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Family Law

Divorce

Rivette v. Rivette, 04-1630 (La. App. 3 Cir. 4/6/05), 899 So.2d 873.

The court of appeal affirmed the trial court’s finding that the parties had reconciled, thus extinguishing the cause of action for the divorce. A strong dissent discussed the burden of proof, the adverse presumption rule and the law regarding reconciliation.

Gremillion v. Gremillion, 39,588 (La. App. 2 Cir. 4/6/05), 900 So.2d 262.

Ms. Gremillion’s petition for divorce filed in Union Parish, where she was living with her father due to medical problems, sought use of the former matrimonial domicile in Rapides Parish. Her actions while living in Union Parish and her “unique circumstances” showed she had “no option” but to make Union Parish her domicile, so the trial court’s factual finding on this issue denying Mr. Gremillion’s exception of venue was not



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erroneous. For purposes of interim spousal support for Ms. Gremillion, Mr. Gremillion's earning potential and benefits such as *per diem* pay, housing and use of an automobile could be considered in fixing his income and ability to pay. The final spousal support award did not exceed one-third of his net income once these factors were considered.

Because Ms. Gremillion's irritability and argumentativeness were due to her history of mental problems and exacerbated by recent brain surgery, she was not at fault in the dissolution of the marriage, which the court stated was "a legal judgment of *moral* responsibility for ending the marriage," which was inappropriate under the circumstances. The court further stated:

Indeed it is questionable whether an individual suffering from mental illness can be blameworthy or at "fault" for the dissolution of a marriage where it is the symptomatic behavior of the mental disease that caused the dissolution.

Final Spousal Support

Voyles v. Voyles, 04-1667 (La. App. 3 Cir. 5/4/05), 901 So.2d 1204.

The court of appeal affirmed the trial court's award of \$500 per month final spousal support to Ms. Voyles based on her age (56), health problems (chronic asthma), Mr. Voyles's ability to pay (gross income of \$4,500 to \$5,500 per month) and the duration of their marriage (approximately two years). There was no error in the trial court's not setting a termination date for the support.

Custody

Wages v. Wages, 39,819 (La. App. 2 Cir. 3/24/05), 899 So.2d 662.

Whether *Bergeron* applies to a subsequent request to modify custody depends on the nature of the original custody award, not on subsequent custody hearings that may not have directly addressed parental fitness as the core issue regarding which parent should serve as the

primary domiciliary parent. Where the parents' parenting abilities are essentially equal, the preference of a mature and grounded 15-year-old is entitled to great weight, and his choice to live with the other parent constituted a material change of circumstances.

Fernandez v. Pizzalato, 04-1676 (La. App. 4 Cir. 4/27/05), 902 So.2d 1112.

Because the trial court was clearly wrong in finding that Ms. Pizzalato had not met her burden of proof to change custody, and because there were manifest errors in the trial court's factual findings, the court of appeal reviewed this change of custody and visitation case *de novo*. If the trial court interviews the child, it must make a record. Mr. Fernandez's arrest records were relevant and should have been admitted, but the omission was harmless because his testimony put the same evidence before the court. The trial court's ignoring of its court-appointed custody evaluator's recommendations was unexplained and erroneous, given its thoroughness and the trial court's failure to adopt any of the recommendations. The court of appeal vacated the trial court's ruling limiting Ms. Pizzalato's access to the child, and, instead, awarded joint custody. Although the court named Mr. Fernandez domiciliary parent, it designated Ms. Pizzalato to make all major decisions regarding the child's education.

Child Support

State v. Anderson, 04-1567 (La. App. 4 Cir. 3/9/05), 899 So.2d 93.

After the attorney for the mother, Ms. Love, and Mr. Anderson had an in-chambers conference with the court, Ms. Love's attorney read a purported "agreement" of child support arrearages and a payment schedule into the record, which the court then stated was its ruling. Mr. Anderson was not asked if, nor did he state on the record, that he consented. The court of appeal vacated the judgment and remanded for a determination of his consent or for a trial on the merits.

Ezernack v. Ezernack, 04-1584 (La. App. 3 Cir. 4/6/05), 899 So.2d 198.

One month after the court set the child support award, Mr. Ezernack stopped working the overtime he had worked for almost the entire marriage. The trial court did not err in denying his request to reduce the support, finding that he was voluntarily underemployed because he quit for the "express and admitted purpose" of avoiding his child support obligation. The court's order that the balance of a community property automobile mortgage be assessed to him as his separate debt after he voluntarily surrendered the vehicle to the finance company instead of paying the note as he was ordered (Ms. Ezernack had been awarded use of the vehicle) was reversed because the punishment exceeded the court's authority.

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Wyatt v. Wyatt, 39,518 (La. App. 2 Cir. 4/6/05), 899 So.2d 788.

Mr. Wyatt failed to show that his retirement was for illness or medical necessity rather than voluntary. Further, he had other financial resources, and his past failures to pay child support suggested that he was not in good faith but was attempting to avoid his child support obligation. Thus, he was not entitled to a reduction in child support.

Community Property

Boone v. Boone, 39,544 (La. App. 2 Cir. 4/6/05), 899 So.2d 823.

Sub-chapter S distributions from a community property corporation made to Mr. Boone post-termination were his separate property as earnings arising from his labor, not community property as shareholder distributions, because, even though he received a salary, the corporation had no capital assets or investments, but all of its earnings arose from his expertise and labor, including his supervision of subcontractors under his direction.

Procedure

Interdiction of Cade, 04-1619 (La. App. 3 Cir. 4/6/05), 899 So.2d 844.

The listing of grounds in La. R.S. 9:1025 to remove a curator is illustrative, not exclusive, and the trial court has broad discretion to remove a curator if in the best interest of the interdict. Because one sister who lived in the same town as the interdict was able to attend her on a daily basis, while the other sister, who was the curator, lived out of town, the court did not err in changing the curator. However, because the court changed the curator not because of mismanagement or wrongdoing, the court of appeal assessed the trial costs equally between the two sisters.

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Crash Course in Contract Construction

Riverwood Int'l Corp. v. Employers Ins. of Wausau, ___ F.3d ___, (5 Cir. 2005).

Riverwood, a paperboard manufacturer in West Monroe, purchased a series of excess workers' compensation and employers' liability policies from Wausau, providing coverage from May 1974 to January 1984. In 2000, numerous present and former employees sued Riverwood seeking damages for asbestos-related injuries. Riverwood settled 260 of the claims for a total of \$1.513 million, notifying its insurers, including Wausau, of the claims, characterizing them as "bodily injury by disease" claims. Wausau denied coverage, citing a policy provision excluding from coverage "bodily injury by disease" claims not brought within 36 months after the end of the policy period, and further asserting that Riverwood could not meet the self-insured retention (SIR) requirements of the policy:

III. RETENTION AND INDEMNITY.

The insured shall retain as its own net retention loss in the amount of the retention stated in the declarations and the company hereby agrees to indemnify the insured against loss in excess of such retention, subject to the limit of indemnity stated in the declarations; provided, that the retention and limit of indemnity apply as respects:

(a) bodily injury by accident, including death resulting therefrom, sustained by one or more

employees in each accident; or
(b) bodily injury by disease, including death resulting therefrom, sustained by each employee.

Wausau filed motions for summary judgment that were eventually granted by the district court, which concluded that the "underlying claims in question in this lawsuit involve bodily injury by disease. Therefore, the 36-month exclusion applies and should be enforced as written." Further, with respect to the SIR issue, because the claims were for "bodily injury by disease," a separate SIR had to be met for each claim before Wausau's obligation to indemnify would attach, and no individual claim exceeded the smallest per-employee SIR of \$100,000.

On appeal, Riverwood urged a genuine issue of material fact as to whether, under the policy terms, the asbestos claims were for "bodily injury by disease" or "bodily injury by accident." If the latter applied, the 36-month exclusion would be avoided, thus triggering Wausau's obligation to indemnify for the aggregate amount of the settlement, under the SIR.

The 5th Circuit cited La. Civ.C. arts. 2047 through 2050 on the interpretation of contracts, and La. R.S. 23:1021(1) (workers' compensation) to the effect that "accident" is defined as:

an unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently, with or without human fault, and directly producing at the time objective findings of an injury which is more than simply a gradual deterioration or progressive degeneration.

The court adopted the holding of the Louisiana 1st Circuit:

[T]o find that disease that results from accidental contact with a foreign body, such as an asbestos fiber, is bodily injury by accident would be to subsume the definition

of bodily injury by disease into the definition of bodily injury by accident.

Hubbs v. Anco Insulations, Inc., 98-2570 (La. App. 1 Cir. 12/28/99), 747 So.2d 804, 807-808. Therefore, the court held that:

[T]he district court properly concluded that the only reasonable interpretation of the [p]olicies is that an asbestos-related disease is not a "bodily injury by accident" but is rather a "bodily injury by disease." Accordingly, the 36-month exclusion applies.

Foreign-Flagged Cruise Ships Adjudged Places of "Public Accommodation"

Spector v. Norwegian Cruise Line Ltd., 125 S.Ct. 2169 (2005).

Petitioners, a group of disabled individuals and their companions who purchased tickets in 1998 and 1999 for round-trip cruises on two Norwegian Cruise Line vessels, filed a class action in the United States District Court for the Southern District of Texas. Petitioners sought

declaratory and injunctive relief under Title III of the Americans with Disabilities Act. They asserted that the Bahamian-registered cruise ships were covered by Title III's prohibition on discrimination in places of "public accommodation," and by its prohibition on discrimination in "specified public transportation services." See 42 U.S.C. § 12182(a); 42 U.S.C. § 12184(a).

The district court held that Title III applied to foreign-flagged cruise ships in United States territorial waters. The district court dismissed, however, the petitioners' claims regarding physical barriers to access. The United States 5th Circuit reversed in part, holding that Title III did not apply because of a presumption that absent a clear indication of congressional intent, general statutes do not apply to foreign-flagged ships. *Spector v. Norwegian Cruise Line Ltd.*, 356 F.3d 641, 644-646 (5 Cir. 2004). In a similar case, the 11th Circuit held that the ADA does apply to foreign-flagged cruise ships in United States waters. *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11 Cir. 2000). The United States Supreme Court granted certiorari to resolve the conflict. *Spector*, 125 S.Ct. at 2174.

The Supreme Court reversed in part, holding that Title III applied to foreign-

flagged cruise ships, except to the extent that the application of the act interfered with the "internal affairs" of the foreign vessel. *Id.* at 2178-2179. In sum, foreign cruise ships are places of "public accommodation" and "specified public transportation" within the meaning of Title III of the ADA. The court held, however, that the provision of Title III requiring barrier removal if "readily achievable," 42 U.S.C. § 12181(9), did not apply to the foreign ships if barrier removal would bring a vessel into non-compliance with the International Convention for the Safety of Life at Sea or any other international legal obligation.

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Supreme Court Rules in *MGM v. Grokster*

The United States Supreme Court recently ruled in the much-anticipated copyright infringement case *Metro-Goldwyn-Mayers Studios Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005). The high court reversed the judgment of the 9th Circuit Court of Appeals and held that Grokster, StreamCast (Morpheus) and KaZaA could be held liable for copyright infringements committed by users of their peer-to-peer file-sharing software. In its

ruling, the court stated that:

one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.

125 S.Ct. at 2780. The decision represents a major victory for the motion picture and recording industries, which took the case to the nation's highest court after losing in the lower courts.

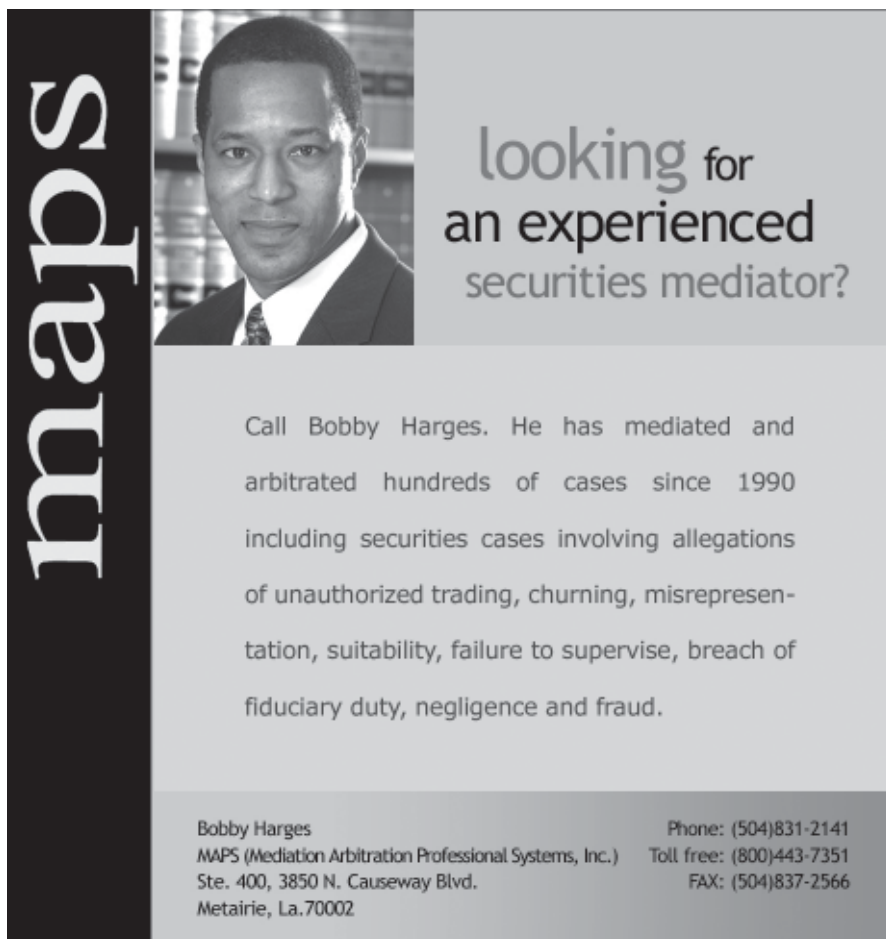
Lawyers for the plaintiffs (MGM) filed a complaint in the U.S. District Court for the Central District of California against Grokster and StreamCast alleging copyright infringement, in violation of 17 U.S.C. § 501. MGM asserted that Grokster and

StreamCast peer-to-peer software packages were created primarily to encourage users to illegally trade copyrighted songs and movies. In an innovative move, MGM did not file suit against the individual users of the software, but instead alleged contributory and vicarious infringement by the makers of the technology that enabled the infringement.

Supreme Court Ruling

The issue before the Supreme Court focused on a relatively narrow question: whether distributors of peer-to-peer products capable of both lawful and unlawful use could be held liable for acts of copyright infringement by third parties using the products. Supporters of Grokster and StreamCast argued that the case had broad implications, stating that if copyright owners were allowed to sue inventors of new technologies for the acts of their users, such regulation would chill innovation and development of new file-sharing technologies. Grokster and StreamCast primarily relied on the Supreme Court's 1984 Sony Betamax ruling — in which the court rejected claims brought against Sony for copyright infringement associated with the Betamax video cassette recorder (VCR) — to counter MGM's claims. *Sony Corp. of America v. Universal City Studio*, 104 S.Ct. 774 (1984). In the *Sony* case, the Supreme Court ruled that makers of technologies with "commercially significant non-infringing uses" were not liable for their users' copyright violations. Specifically, the court found that the sale of VCRs did not subject Sony to contributory copyright liability, even though Sony had constructive knowledge that its machines could be used, and were being used, to infringe copyrighted works. The utility of the VCR for "substantial non-infringing uses" convinced the court that "constructive" knowledge of infringing activity was insufficient to warrant liability based on the "mere retail" of Sony's recorder.

The ruling in *MGM* does not overturn the court's *Sony* decision. Instead, the



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court reasoned that the *Sony* ruling was never intended to provide shelter for promoters of copyright infringement. The court noted:

Sony's rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product. But nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence. . . .

125 S.Ct. at 2779. Justice Souter, writing for a unanimous court, noted that in the instant case:

[t]he record is replete with evidence that from the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took

active steps to encourage infringement.

125 S.Ct. at 2772. Consequently, the court concluded that Grokster and StreamCast could be found at fault for promoting and profiting from infringement among users of their products.

The court explained:

One infringes [copyright law] contributorily by intentionally inducing or encouraging direct infringement . . . and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.

125 S.Ct. at 2776. Justice Souter cited factors including the business model employed by Grokster and StreamCast, the lack of effort to filter copyrighted works or limit infringement, the quantity

of the alleged infringement, and the marketing strategy of the peer-to-peer software as indicators that Grokster and StreamCast intentionally induced its users to infringe copyrighted works. The court also found that the defendants profited from the infringement by selling advertising space and streaming the advertisements to its software users while they employed the programs to download and trade files. According to the court's rationale, both contributory and vicarious infringement theories were seemingly applicable, but the court did not rule on the vicarious liability issue, opting only to address the applicability of contributory infringement based on an inducement theory.

Harmonizing its ruling with *Sony*, the court concluded that "mere knowledge of infringing potential or of actual infringing uses" of a product is not enough to "subject a distributor to liability." But in instances where "the

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distributors' words and deeds" go beyond distribution and show a purpose to cause and profit from third-party acts of copyright infringement, the "inducement rule" premises liability on such "purposeful, culpable expression and conduct." 125 S.Ct. at 2780-2782. The court, therefore, concluded that there "is substantial evidence in MGM's favor on all elements of inducement, and summary judgment in favor of Grokster and StreamCast was error." *Id.* at 2782. The judgment of the 9th Circuit Court of Appeals was accordingly vacated and the case remanded to the district court for further proceedings.

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International Law

Foreign Service of Process

The Export-Import Bank of the United States (Ex-Im Bank), a corporation organized pursuant to federal law as a federal

agency, instituted suit in *Export-Import Bank of the United States v. Asia Pulp & Paper Co.*, 03 Civ. 8554 (LTS)(JCF) (S.D. N.Y. 2005), against Asia Pulp and subsidiaries of Asia Pulp, alleging that the defendants breached loan and guarantee agreements. The Ex-Im Bank, maintaining that the subsidiaries had frustrated service of process, moved the court to declare service valid and for leave to serve amended pleadings.

The plaintiff maintained that service on the subsidiaries in Indonesia should be deemed valid pursuant to either Federal Rule of Civil Procedure 4(f)(2)(C)(ii) or 4(f)(3). Rule 4(f)(2)(C)(ii) provides, in part, that service outside of the U.S. may be effected "by . . . any form of mail requiring a return receipt, to be addressed and dispatched by the clerk of court to the party to be served." Rule 4(f)(3) provides that service may be made "by other means not prohibited by international agreement as may be directed by the court."

The court held that the service attempted by mail was ineffective pursuant to Rule 4(f)(2)(C)(ii) because the mail was not sent by the clerk of court and because the subsidiary defendants did not sign the return receipts. Service attempted by means of an international courier, in this instance DHL, was also ineffective pursuant to Rule 4(f)(2)(C)(ii) because it too was not dispatched by the clerk and further because this aspect of Rule 4 also requires that the manner of service is not "prohibited by the law of

the foreign country." The court concluded that "Indonesia appears to prohibit service by international courier."

The court, however, concluded that service by way of international courier, although "technically in violation of Indonesian service requirements," was acceptable pursuant to Rule 4(f)(3). The court noted that the defendant subsidiaries breached their contractual obligations to maintain agents for service of process, that any offense to Indonesia's sovereignty would be minimal and that the means of service attempted by the Ex-Im Bank were reasonable given the fact that the parties were engaged in international transactions.

U.S. Criminal Proceedings and Vienna Convention

The U.S. Supreme Court, in *Medillin v. Dretke*, 125 S.Ct. 2088 (2005), dismissed a writ of certiorari sought by a Mexican national convicted in Texas of the gang rape and murder of two girls, concluding that certiorari had been "improvidently granted." The court initially granted certiorari to consider two questions: (1) whether a federal court is bound by a decision of the International Court of Justice (ICJ), the judicial arm of the United Nations, to reconsider the petitioner's claim for relief asserted under the Vienna Convention on Consular Relations; and (2) whether the decision of the ICJ should be given effect "as a matter of judicial comity and uniform treaty interpretation."

The ICJ in *In re Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. No. 128 (judgment of March 31), declared that the Vienna Convention "guaranteed individually enforceable rights" and that the U.S. must provide for the review and reconsideration of the conviction and sentencing of Mexican nationals who maintained that their Vienna Convention rights had been violated. Medillin, subsequent to being convicted and sentenced to death, asserted on appeal that the State of Texas violated his rights under the Vienna Convention by failing to notify him of his right to

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contact a Mexican consular official.

The petitioner, subsequent to the Supreme Court's decision to grant his writ, filed a writ of habeas corpus in state court relying in part on a memorandum of the President that addressed how the U.S. would carry out its international obligations under the Vienna Convention. The Supreme Court held that "the state-court proceedings may provide Medellin with the very reconsideration of his Vienna Convention claim that he now seeks" and that the "merits briefing" raised a number of issues that needed to be overcome before he would be entitled to the habeas relief he sought.

OFAC: "Prompt" Penalty Notice

The issues before the court in *Office of Foreign Assets Control v. Voices in the*

Wilderness, ____ F. Supp. 2d ____ (D.D.C. 2005), were whether the Office of Foreign Assets Control (OFAC), a Treasury Department agency charged with administering and enforcing U.S. economic sanctions, violated its regulations by failing to "promptly" issue a penalty notice and whether it had acted arbitrarily and capriciously when it issued a penalty notice in the amount of \$20,000 nine days after the defendant protested against the government's military policy in Iraq. *Voices in the Wilderness* exported medical supplies and traveled to Iraq in the late 1990s contrary to Executive Order 12724 and the Iraqi Sanction Regulations.

OFAC's regulations required that the agency "promptly" issue a monetary penalty notice once "the Director determines that there was a violation" of U.S. economic sanctions. The penalty notice issued to *Voices* came almost four years

after OFAC issued its pre-penalty notice. The court, subsequent to reviewing the agency record, concluded that the delay was not unreasonable given the agency's "other enforcement priorities, particularly in the wake of the September 11, 2001 terrorist strikes." The court further held that while the timing of the issuance of the penalty notice was "fortuitous," no evidence before the court established selective prosecution.

China Textile Safeguards

The Court of Appeals for the Federal Circuit in *U.S. Assoc. of Importers of Textiles and Apparel v. United States*, 413 F.2d 1344 (Fed. Cir. 2005), reversed a December 2004 decision of the Court of International Trade (CIT) that granted the plaintiff's motion for a preliminary injunction. The CIT enjoined the Committee for the Implementation of Textile



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Agreements from considering petitions or self-initiating safeguard investigations against Chinese textile products based on the threat of market disruption. The Federal Circuit concluded that the CIT had abused its discretion in granting the preliminary injunction “[b]ecause the Association failed to show even a fair chance of success on the merits.”

The views expressed do not necessarily represent the views of U.S. Customs and Border Protection or the United States government.

— **J. Steven Jarreau**
Member, LSBA International
Law Section
U.S. Customs and Border Protection
1300 Pennsylvania Ave., N.W.,
Mint Annex
Washington, D.C. 20229



Professional Liability

Payment by Physicians of the Statutory Maximum After Judgment: Is Liability Admitted?

Hanks v. Seale, 04-1485 (La. 6/17/05),
___ So.2d ___.

A jury awarded the plaintiff’s damages in excess of the cap, plus past and future medical expenses. Following denial of their JNOV/new trial motion, the two defendant health care providers satisfied the judgment against them by each paying the statutory maximum of \$100,000, plus interest, and foregoing their rights to appeal. The PCF then intervened and filed a petition for a suspensive appeal.

The court of appeal refused to allow the PCF to contest the liability of the doctors after the doctors admitted their liability by paying the statutory maximum. The appellate court also affirmed the district court’s award of past and future medical expenses.

The Louisiana Supreme Court granted certiorari:

primarily to consider the issue of whether the Fund is entitled to contest the physicians’ liability on appeal when the physicians have paid the statutory maximum amount in satisfaction of judgment and have foregone their rights to appeal.

The PCF argued the inapplicability of La. R.S. 40:1299.44(C)(5)(e), which provides that the payment of \$100,000 in settlement amounts to a statutory admission of liability. The court agreed:

In the instant case, nothing in the record indicates the existence of an agreement between the health care

providers and the plaintiff to settle their liability in exchange for anything. This case simply does not involve a settlement of liability. Rather, it involves a payment in satisfaction of an adverse judgment. Consequently, the provisions of La. R.S. 40:1299.44(C)(5)(e) . . . do not apply to this case.

The court of appeal had relied on *Koslowski v. Sanchez*, 576 So.2d 470 (La. 1991), overruled in part by *Russo v. Vasquez*, 94-2407 (La. 11/7/95), 648 So.2d 879, which held that a post-judgment settlement prevented the Fund from contesting liability on appeal. The *Koslowski* court held that the PCF could not contest liability when there was a binding settlement “either before or after trial.” But, *Koslowski* does not apply to this case because, in *Koslowski*, the plaintiff executed a release in favor of the defendant and his insurer, whereas in the instant case, the defendant elected not to appeal and instead satisfied the judgment. The record did not indicate that a release had been executed. The plaintiff’s brief said the judgment was paid without the benefit of a release, whereas the PCF indicated that the plaintiff did sign a release and satisfaction of judgment. The record did not contain a release signed by the plaintiff.

In reviewing its prior decisions and tracing the history of the MMA from its enactment in 1975, the court pointed out that it had long recognized that a suit under the MMA is against the health care provider only and that the Fund is not a party defendant against whom the action can be brought. After a plaintiff has settled with a health care provider, the PCF takes the form of a statutory intervenor. The court cited a number of cases for this proposition, including *Felix v. St. Paul Fire and Marine Ins. Co.*, 477 So.2d 676 (La. 1985), which held that after a judgment is rendered against the health care provider in excess of \$100,000, the PCF has “an interest in the action for the purpose of appealing the excess judgment against the Fund.” These principles led the court to conclude that the Act

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contemplates that liability is generally an issue to be determined between the claimant and the health care provider, whereas the Fund has an interest in the issue of excess damages, a conclusion validated by La. R.S. 40:1299.44(C)(6), which provides that any settlement approved by a court shall not be appealed, whereas a judgment fixing damages can be appealed:

Thus, the settlement itself, which is between the health care provider and the plaintiff, cannot be appealed, but the amount of damages assessed by the Court, which can include excess damages to be paid by the Fund, may be appealed.

Here, when the defendants each chose not to appeal and decided to satisfy the judgment, the judgment of liability became final. No provision of the Act gives the PCF the right to appeal this part of the judgment.

The PCF also argued that the lower courts erred by affirming the award of future medical expenses because the plaintiff did not submit any evidence as to the nature, extent and amount of such expenses. The court recognized that La. R.S. 40:1299.43 provides, in part, that the fact finder should decide whether the

patient is or is not in need of future medical care “and the amount thereof.” The jury awarded \$2,435,040 in future medical expenses, but the Fund argued that the plaintiff did not establish with any degree of certainty that he was in need of future medical care, and he presented no medical evidence or testimony to support such a claim. But the evidence produced at trial was such that a jury could reasonably conclude that the patient was in need of future medical care without direct expert medical testimony on that issue, although there was “non-specific” testimony related to the need for future medical care. The court noted that future medical care is not a lump sum award payable immediately but instead is paid as the bills are submitted to the PCF. One justice suggested that the judgment should be reformed, with respect to future medical expenses, simply to state that if the plaintiff was in need of future medical expenses that they would be paid “when and as incurred.”

2005 Legislation

Act No. 63, Amending and Re-enacting R.S. 44:4.1(B)(5) and Enacting R.S. 13:3715.4 and 3715.5

Section 3715.4 protects from any kind of discovery, and prevents from being

admitted into evidence in any civil action, any information “created, generated, or compiled” by a medical professional liability insurance company, a health care provider professional and public liability trust created pursuant to R.S. 22:5, the Office of Risk Management or the PCF. However, any factual information that is otherwise discoverable from a health care provider or is otherwise admissible in evidence “shall not be deemed confidential because it has been reviewed or used for purposes of risk management or loss prevention” by a medical professional liability insurer, a public trust, the Office of Risk Management or the PCF.

Section 3715.5 is commonly referred to as the “I’m sorry” statute. It provides that any oral or written statement, gesture or conduct by a health care provider “expressing or conveying apology, regret, grief, sympathy, commiseration, condolence, compassion, or a general sense of benevolence made to a patient, a relative of the patient, or an agent or representative of the patient” shall not constitute an admission or a statement against interest and shall not be admissible “to establish liability, or for any other purpose, including impeachment,” in panel proceedings, arbitration proceedings or civil actions. However, a

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statement of fault that is part of, or in addition to, any such communication is not made inadmissible pursuant to this statute.

Act No. 127, Amending and Re-enacting R.S. 40:1299.39.1(A)(1)(e), (2)(a), (3)(a) and/or R.S. 40:1299.47(A)(1)(e), (2)(a), (3)(a) and (c), and enacting R.S. 40:1299.39.1(A)(5) and 1299.47(A)(5), and repealing R.S. 40:1299.47(K)

All references to "60"-day deadlines were changed to "90"-day deadlines.

Confirmation to the claimant that the filing of a medical-review-panel complaint has been officially received and whether the named defendant or defendants are qualified must now be made by "certified mail, return receipt requested." However, if the certified mail is not claimed or is returned undeliverable, the state or the PCF shall provide notification by regular first-class mail.

The requirement that the medical-review panel must render its opinion within 180 days after the selection of the

last panel member was deleted.

— **Robert J. David**

Gainsburgh, Benjamin, David,
Meunier & Warshauer, L.L.C.

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Public Utilities

Energy Policy Act of 2005 Brings Change to the Regulation of Public Utilities

On Aug. 8, President Bush signed into law the Energy Policy Act of 2005 (Act), a sweeping piece of legislation that will have implications for many aspects of energy law and business. This article will highlight some of the major changes brought about by the new Act.

Electric Reliability Standards

The Act allows FERC to select and certify an Electric Reliability Organization (ERO) that would be given the authority to set nationwide "reliability standards." The ERO is given the authority to penalize violations of ERO-established (and FERC-approved) reliability standards, subject to FERC review. This legislation will transform the North American Economic Reliability Counsel (NERC) from a voluntary reliability organization to a regulated organization that will have authority to set and enforce mandatory reliability standards. State authority is preserved to act regarding safety, adequacy and reliability issues, as long as the action is not inconsistent with the FERC-approved reliability standards.

Transmission Infrastructure Modernization

The Act creates what has become known as federal "backstop" siting authority. The Secretary of Energy is authorized, after study, to set up "national

interest electric transmission corridors" in areas that are congested and meet other specified standards. Once established, FERC would have the authority to issue permits for construction or modification of transmission facilities in these corridors under some circumstances. The statute does not consider traditional state interests such as aesthetics, or environmental or public health and safety issues. It creates a right of federal eminent domain over property necessary to make the transmission modifications. It would not affect Louisiana unless or until it is included in a "national interest electric transmission corridor."

Transmission Operation Improvements

The Act protects existing transmission rights that are needed to serve retail native load. It states that utilities are entitled to use existing firm transmission rights that are needed to secure native load and to serve that native load in the future. The Act is silent on the issue of RTO participation.

Transmission Rate Reform

The Act requires FERC to establish incentive-based and performance-based rates intended to encourage transmission investment. These incentives would apply to existing as well as new transmission investment. Section 1242 of this subtitle allows the FERC to approve participant funding for transmission upgrade costs.

PURPA Amendments

The Act requires each utility to 1) make "net metering service" available to customers requesting such service; 2) develop a plan to diversify its fuels and technologies, including renewable technologies; and 3) develop and implement a 10-year plan to increase the efficiency of its fossil fuel generation. This amendment states that each state regulator shall conduct a proceeding to consider adopting the requirements listed above for its regulated utilities.

It also requires state regulators to conduct proceedings to investigate whether

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it wants to adopt time-based metering, time-based rate schedules, real-time pricing rate schedules, and credits for consumers that agree to peak load reductions in advance. The Act further requires state regulators to investigate forms of demand response devices and rates.

Section 1253 of this subtitle eliminates mandatory PURPA purchase and sales obligations from QF facilities for new contracts, if the QF has nondiscriminatory access to a wholesale market or if the QFs are protected by an RTO. It eliminates the requirement to purchase from any new cogeneration facility unless that QF facility was built to be used primarily for industrial/commercial use — and not designed to be used to sell to a utility.

Repeal of PUHCA

The Act repeals the Public Utility Holding Company Act (PUHCA), effectively removing jurisdiction over utility holding companies from the SEC.

Under PUHCA, the SEC regulated affiliate transactions of utility holding companies, and it had approval authority over most utility mergers. Under this repeal, state utility regulators retain access to the books and records of affected holding companies to the extent that those books and records are legitimately needed to regulate the costs incurred by the utility. It reserves the right of state regulators to exclude from retail rates excess costs associated with inappropriate affiliate transactions. State regulators may move to enact protective measures necessitated by PUHCA's repeal.

"Market Transparency, Enforcement and Consumer Protection"

The Act sets up an electronic information system to provide public access to appropriate information needed to provide price transparency in wholesale electric markets, including information on the availability and market prices of wholesale energy and

transmission services. It protects sensitive market information, prohibits the providing of false information, and prohibits energy market manipulation.

Liquefied Natural Gas

The Act grants the FERC exclusive jurisdiction over the siting, construction, expansion and operation of LNG terminals and removes state authority to enforce safety violations.

Renewable Portfolio Standards

The Act includes tax credits for renewable electricity resources, but does not include a federal renewable portfolio standard. A federal renewable portfolio standard has passed the Senate several times.

— Noel J. Darce and
Dana M. Shelton

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NOBA IOC, YLS Sponsor Joint Mentoring Program

The New Orleans Bar Association (NOBA) Inn of Court and the New Orleans Bar Association Young Lawyers Section sponsored “The Art of Mentoring: Ways and Means to a Successful Mentoring Relationship” in July. This was a “brown bag lunch” program held in the courtroom of U.S. District Judge Carl J. Barbier. It was designed to benefit attorneys of all experience levels. Addressed were the need for mentoring, analyzing ways to incorporate mentoring into the daily practice of law and presenting the ways and means to a successful mentoring relationship.

Inn of Court Vice President William B. Schwartz chaired the event with the assistance of Kelly T. Scalise, NOBA Young Lawyers Section Executive Board member and chair of the YLS Mentoring Committee. A mock presentation was performed by Cassie E. Felder, YLS Immediate Past Chair Chauntis T. Jenkins, YLS Directors Deborah McCrocklin and Maurice C. Ruffin and Schwartz.

New Orleans Mayor Nagin Speaks at NOBA Mayor’s Luncheon

The New Orleans Bar Association (NOBA) Young Lawyers Section sponsored its annual Mayoral Luncheon with New Orleans Mayor Ray Nagin on June 9. More than 100 people attended to hear an update from the mayor on the state of the city.

NOBA President Jesse R. Adams, Jr. introduced Mayor Nagin who spoke can-



A joint mentoring program was hosted by the New Orleans Bar Association (NOBA) Inn of Court and Young Lawyers Section. From left, NOBA YLS Chair Bradford E. Adatto, NOBA Immediate Past Chair Chauntis T. Jenkins, NOBA YLS Directors Maurice C. Ruffin and Deborah McCrocklin and NOBA Inn of Court Vice President and Program Chair William B. Schwartz. Seated is NOBA Executive Board member Kelly T. Scalise.



New Orleans Mayor Ray Nagin addressed members of the New Orleans Bar Association (NOBA) at the annual NOBA Young Lawyers Section Mayoral Luncheon. From left, NOBA First Vice President Daniel Lund, Nagin, NOBA President Jesse R. Adams, Jr. and NOBA Board member José R. Cot.

didly with area lawyers about the progress that has been made since he was elected and the challenges that remain. After his talk, he welcomed questions from the audience.

Carey L. Menasco is chair of the YLS Mayor's Luncheon Committee.

Airline High Mock Trial Team Places Second in State

The Shreveport-area high school mock trial competition winners, Airline High School, made it to the championship round of the 2005 Louisiana State Mock Trial Competition and placed second in the state behind Baton Rouge Magnet High.

Airline High team member Tina Dean was named "Best Attorney" in the competition. In addition to Dean, other Airline team members included Emily Atwood, Rachal Cox, Michael Gillespie, Paul Gillespie, Andrew Green, Tahani Hammad and Michael Kim, with Mickey White and Judy Podner serving as team coaches.

The case argued in the competition involved violation of the civil rights of prisoners in North Feliciana Parish. The parish sheriff was charged with conspiracy to violate the civil rights of the federal prisoners placed in his care. The case centered around a group of San Marcan refugees who had been placed in parish and county facilities all across the South while awaiting transfer to federal holding areas.


Seven teams participated in the state competition, with Airline and Destrehan high schools being the only two public schools in the competition. Airline beat Destrehan and St. Fredrick's High School of Monroe prior to facing Baton Rouge Magnet in the championship round.

Team Coach White said that the championship match "was a very close match, but their (Baton Rouge High) polish and poise lifted them over us. The experience of making that final round will be invaluable for next year." Airline finished third in last year's state competition.

In addition to the two teacher coaches,



The Airline High School mock trial team (honored at the Shreveport Bar Association's Law Day luncheon) won the regional competition and placed second in the state. From left, Coach Mickey White, Michael Kim, Tahani Hammad, Rachal Cox, Emily Atwood, Tina Dean, Andrew Green, Paul Gillespie and Michael Gillespie.



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the Airline team received guidance from Shreveport attorneys Robert Gillespie, Chuck Phillips and Mary Ellen Halterman. The Shreveport Bar Association annually provides funding to the Shreveport-Bossier area winning team to help cover expenses for attending the state competition.

Teen Court Presents Law Week Training

The Volunteers for Youth Justice Teen Court Program hosted Teen Volunteer Training on May 9 in observance of National Law Week. Area middle and high school volunteers from Caddo and Bossier's Teen Court Programs participated in the training. Attorneys presented information on several topics: the role of the prosecuting attorney and defense attorney, case preparation techniques, the role of the jury, and proper courtroom decorum. Trainers included Geya Williams, assistant Caddo district attorney; Brian Barber, assistant Caddo district attorney; Michelle AndrePont, Caddo public defender; Carlos Prudhomme, attorney; and Cpl. Lifford Jackson, Caddo Parish Sheriff's Office. Several of the teen volunteers also presented a mock Teen Court trial and the trainers critiqued their performance.

The youth participants received valuable knowledge of how the legal system works. This training also opened the door for the adult attorneys to mentor the teen attorneys. The result is that several teen volunteers set up summer job shadowing schedules with the adult attorneys. Some Teen Court defendants were required to participate in this training as well. The training allowed the defendants to also see how the court operates and it presented them with the opportunity to volunteer once their Teen Court sentence is complete. Immediately after the training, one defendant asked how he could become a volunteer.

Sponsoring the event were the Volunteers for Youth Justice, Juvenile Court for Caddo Parish, the Young Lawyers Section of the Shreveport Bar Association and the American Bar Association.



Volunteers for Youth Justice (VYJ) training program volunteers included, from left, Bossier Parish Teen Court Director Pat Faulkinberry; Cpl. Lifford Jackson, Caddo Sheriff's Office; Caddo Parish Assistant District Attorney Brian Barber; 1st Judicial District Court Public Defender Michelle AndrePont; VYJ Director of Youth Programs Shonda Houston; attorney Carlos Prudhomme; and Caddo Parish Assistant District Attorney Geya Williams.



Teen Court jurors are sworn in.

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New Judge

Richard “Chip” Moore III, was elected to Division N, 19th Judicial District Court, East Baton Rouge Parish. He earned his undergraduate degree from Louisiana State University in 1988 and graduated *magna cum laude* from Southern University Law Center in 1992, where he also earned the Chancellor’s



Richard Moore III

Award and was an International Law Moot Court participant. Prior to his election to the bench, he was a sole practitioner in Zachary where he also served as the Zachary city prosecutor for 10 years, through April 2005. He was appointed as the attorney for the town of Slaughter as well as its magistrate judge for four years prior to his election. He is involved in a number of civic and community organizations and is a member of the Baton Rouge and Feliciana bar associations. He is married to Sheryl DeMetz Moore and they are the parents of three children.

Deaths

9th Judicial District Court **Judge B. Dexter Ryland**, 63, died June 28 in Alexandria. Following study at Louisiana College and Louisiana State University, he earned his JD degree from LSU Paul M. Hebert Law Center in 1965 where he won the 1965 Moot Court competition. He was inducted into the LSU Law Center Hall of Fame in 1987. Prior to his election to the bench, he served as assistant city attorney for Pineville and later as city attorney for Alexandria. He also served as assistant district attorney for Rapides Parish prior to his election to the bench in 1990. In September 1996, the Alexandria Bar Association nominated him for the Louisiana Bar Foundation’s Outstanding Jurist Award.

24th Judicial District Court **Commissioner Craig J. Cimo**, 61, died July 6. He earned his undergraduate degree from Loyola University in 1967, graduating with *cum laude* honors, and his JD degree from Loyola University Law School in 1967, also graduating *cum laude* and earning the Dean’s Award. He was in the private practice of law from 1967-99 and was appointed domestic commissioner

for the 24th JDC in November 1999 and took his oath in February 2000. Prior to serving as commissioner, he was an assistant parish attorney for Jefferson Parish, 1976-96; served as city magistrate, city of Harahan, 1991-94, also sitting ad hoc in 1995 and 1997; was commissioned as a reserve police officer in Harahan in 1983; and served as legal advisor to the Harahan Police Department on a pro bono basis. He also served as a volunteer instructor on violence prevention for the Louisiana Center for Law and Civic Education’s Teen Camp at Loyola Law School. He was a member of the national legal fraternity Phi Alpha Delta, the American and Jefferson Parish bar associations, and the American Jurisprudence Society.

Do You Have a Post-Hurricane Professionalism Story?

Members of the LSBA’s Professionalism & Quality of Life Committee are aware that there have been remarkable acts of kindness and selflessness shown to Bar colleagues following the two hurricanes, including assistance with their practices and with basic needs ... in other words, true “professionalism.” The committee is now soliciting “professionalism” stories from members, with the idea of publishing them online, in print publications, or both. Send your story or comments to:

dlabranche@lsba.org

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PEOPLE

LAWYERS ON THE MOVE

The 3rd Circuit Court of Appeal announces the promotions of **Renée R. Simien**, **Peter M. Stevens**, **Sandi Aucoin Broussard** and **Tara B. Hawkins**. Simien is the new central staff director. Stevens is the new central civil staff director. Broussard is the new central criminal staff director. Hawkins has been appointed administrative general counsel.

Abbott, Simses & Kuchler announces that **Robert E. Guidry**, **Michael H. Abraham**, **McGready L. Richeson** and **Mazen Y. Abdallah** have joined the firm in its New Orleans office. **Andre E. Maillho** has joined the firm in its Covington office.

ADR inc., a multi-service dispute resolu-

tion firm, announces the addition of **Judge Richard J. Ganucheau** (retired) to its statewide panel of neutrals. He will serve as a mediator and arbitrator and will chair medical review panels.

Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., announces that Dickie W. Patterson has joined the New Orleans office as of counsel.

Briney & Foret announces the association of Jason R. Garrot with the Lafayette firm.

Chehardy, Sherman, Ellis, Breslin, Murray, Recile & Griffith Law Firm announces that William J. Furnish, Jr. has joined the firm as a partner.

Jennifer L. Crick has joined National Investment Managers, Inc. in New York, N.Y., as associate counsel.

Faircloth, Vilar & Elliott, L.L.C., announces that Christopher M. Sylvia and R. Christopher Nevils have joined the Alexandria firm as associates.

General Health System, parent company of the Baton Rouge General Medical Center, announces that Catherine Smith Nobile has joined the company as in-house counsel.

The Gray Law Firm, A.P.L.C., announces that Chris J. Guillory has joined the Lake Charles firm as an associate.

E. Eric Guirard Injury Lawyers announces the addition of **William H. "Wick" Cooper III** and **Amy Vandever Christina** as associates to the firm.

Jones Walker announces that **Don Rouzan** has joined its New Orleans office as an associate.



Mazen Y. Abdallah



Michael H. Abraham



Sandi A. Broussard



Amy V. Christina



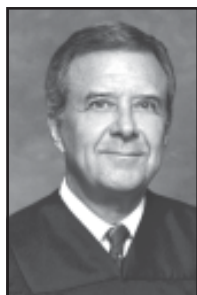
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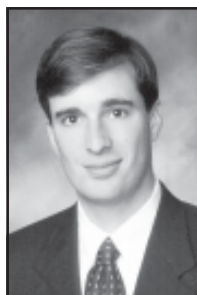
Jennifer L. Crick



Catherine L. Davidson



Judge Richard J. Ganucheau (Ret.)



Robert E. Guidry



Tara B. Hawkins



Linda A. Liljedahl



Andre E. Maillho

Liskow & Lewis announces that Jana L. Grauberger has been elected as a shareholder in the Houston office, Monica D. Gibson joined the New Orleans office as of counsel, and James E. Lapeze, Stephen M. Pesce, Paul C. Kitziger and Brianne M. Star joined the New Orleans office as associates.

Katherine M. Loos announces that she has joined the mediation and arbitration firm of Perry, Dampf, Watts & Associates.

Toni R. Martin announces the opening of her law office at Ste. 7, 1104 MacArthur Dr., Alexandria, LA 71303; phone (318)448-4388.

McGlinchey Stafford announces that Mary L. Grier Holmes has joined the New Orleans office as of counsel, Sarah E. Bleichner has joined the New Orleans office as staff attorney, and John Marron Monsour and Dawn M. Rawls have joined the Baton Rouge office as associates.

Preston & Cowan, L.L.P., announces that **Tina L. Suggs** has joined the firm as an associate in the New Orleans office.

Shields Mott Lund, L.L.P., announces that **Stephen D. Morel** and **Catherine L. Davidson** have become associates of the firm.

Steffes, Vingiello & McKenzie, L.L.C., announces the relocation of its Baton Rouge offices to 13702 Coursey Blvd., Building 3, Baton Rouge, LA 70817; phone (225)751-1751.

Stemmans & Alley, P.L.L.C., announces that **Michael J. Taffaro** has been named partner.

James Wattigny, P.L.C., has relocated his law practice to Ste. C, 124 West Washington, New Iberia, LA 70560; phone (337)364-8272.

NEWSMAKERS

Tonia Dandry Aiken has been elected president of New Orleans District Nurses Association and secretary of Louisiana State Nurses Association. She is editor and contributing author of a recently published textbook, *Legal, Ethical and Political Issues in Nursing*.

Mary E. "Mimi" Hunley, an assistant attorney general, has been elected to a two-year term as president of the National Association of Extradition Officials.

Arbitrator/mediator **Linda A. Liljedahl** of Baton Rouge received the Woman of the Year Award (2005) from the United Cultural Committee and American Biographical Society. She was recognized for her 15 years of work in mediation, ADR and settlement of disputes.

William Lurye of New Orleans has been inducted as a Fellow in the College of Labor and Employment Lawyers.

G. Fred Ours, deputy disciplinary counsel in the Office of Disciplinary Counsel, was elected president of the National Organization of Bar Counsel.

Shutts & Bowen partner **John H. Rooney, Jr.** has become chair of the International Law Section of the Florida Bar. He also is licensed to practice in Louisiana.

Marie C. Williams was selected as an administrative law judge for the Division of Administrative Law for Louisiana.

Tara Bell Hawkins has been appointed to the Louisiana State Bar Association's 2005-06 Leadership LSBA class by President Frank X. Neuner, Jr.

Robert B. Worley, Jr., a partner at Jones Walker, has been selected for inclusion in the 14th edition of *Who's Who in American Law 2005-2006*.



Stephen D. Morel



McGready L. Richeson



John H. Rooney, Jr.



Don Rouzan



Renée R. Simien



Peter M. Stevens



Tina L. Suggs



Michael J. Taffaro



Marie C. Williams



Robert B. Worley, Jr.

REPORT BY DISCIPLINARY COUNSEL

Public matters are reported to protect the public, inform the profession and deter misconduct. Reporting date Aug. 2, 2005.

Decisions

Larry M. Aisola, Jr., Chalmette, (2005-B-1160) **Consent public reprimand** ordered by the court on June 3, 2005. JUDGMENT FINAL and EFFECTIVE on June 3, 2005. *Gist:* Assisting a non-lawyer in the unauthorized practice of law by sending him to depositions; and engaging in a conflict of interest by representing a client in a criminal matter stemming from an incident with a former client.

Daniel Elmore Becnel III, LaPlace, (2005-B-0831) **Consent suspension of one year and one day, deferred with 18 months' probation and special conditions**, ordered by the court on April 29, 2005. JUDGMENT FINAL and EFFECTIVE on April 29, 2005. *Gist:* Neglecting clients' matters; failure to adequately communicate with his clients; and failure to promptly remit third-party funds.

Arthur L. Carter, New Orleans, (2005-B-0725) **Permanent disbarment** ordered by the court on June 24, 2005. JUDGMENT FINAL and EFFECTIVE on July 7, 2005. *Gist:* Conversion or mishandling of clients' funds in light of prior misconduct.

Broderick C. DeJean, Opelousas, (2005-B-0337) **Disbarment** ordered by the court on

May 24, 2005. JUDGMENT FINAL on June 7, 2005. JUDGMENT EFFECTIVE on July 9, 2002, retroactive to the date of his interim suspension. *Gist:* Neglect of legal matters; conversion of client and third-party funds; and failure to cooperate with the Office of Disciplinary Counsel.

Joseph R. DePaoli, Jr., Gretna, (2005-B-1112) **Consent public reprimand** ordered by the court on June 3, 2005. JUDGMENT FINAL and EFFECTIVE on June 3, 2005. *Gist:* Failure to promptly return client's file; and failure to cooperate with a disciplinary investigation.

David M. Dickson, Covington, (2005-B-1498) **Interim suspension** ordered by the court on June 15, 2005. JUDGMENT FINAL and EFFECTIVE on June 15, 2005. *Gist:* For threat of harm pursuant to Rule XIX, Section 19.2.

James C. Ferguson, Baton Rouge, (2005-OB-1625) **Transferred to disability inactive status** ordered by the court on June 22, 2005. JUDGMENT FINAL and EFFECTIVE on June 22, 2005.

Margrett Ford, Shreveport, (2005-B-1328) **Consent suspension for one year and one day, fully deferred subject to probation**, ordered by the court on June 24, 2005. JUDGMENT FINAL and EFFECTIVE on

June 24, 2005. *Gist:* Lack of diligence; failure to communicate; failure to refund unearned fee; and termination of representation.

Walter Hunter, Jr., Shreveport, (2005-OB-1497) **Indefinite probation with conditions by consent** ordered by the court on June 23, 2005. JUDGMENT FINAL and EFFECTIVE on June 23, 2005.

Robert Margavio, Covington, (2005-B-1514) **Consent suspension of three years with 18 months deferred** ordered by the court on June 15, 2005. JUDGMENT FINAL and EFFECTIVE on June 15, 2005. *Gist:* Neglect of his client's case by not acting diligently and not communicating with his client; failing to properly protect his client's interest upon termination of the representation; and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Michael F. Melton, New Orleans, (2005-OB-0409) **Permanent disbarment** ordered by the court on June 17, 2005. JUDGMENT FINAL and EFFECTIVE on July 1, 2005. *Gist:* Engaging in the unauthorized practice of law; failure to cooperate with the Office of Disciplinary Counsel in its investigation; and engaging in conduct prejudicial to the administration of justice.

Norman Mopsik, New Orleans, (2004-B-2395) **Suspension of 60 days** ordered by the court on May 24, 2005. JUDGMENT FINAL and EFFECTIVE on June 24, 2005, the date rehearing was denied. *Gist:* Failing to supervise a non-lawyer employee and assisting the employee in the unauthorized practice of law.

Milton Osborne, Jr., New Orleans, (2005-B-0190) **Consent public reprimand** ordered by the court on May 6, 2005. JUDGMENT FINAL and EFFECTIVE on May 6, 2005. *Gist:* Failure to properly discuss his fee with his client.

Bobby K. Pitre, Lake Charles, (2005-B-

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Discipline continued next page

DISCIPLINARY REPORT: UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

The following is a verbatim report of the matters acted upon by the United States District Court for the Eastern District of Louisiana, pursuant to its Disciplinary Rules. This information is published at the request of that court, which is solely responsible for the accuracy of its content. This report is as of Aug. 1, 2005.

Respondent	Disposition	Date Filed	Docket No.
Craig W. Marks	Interim suspension.	6/2/05	05-1493 S
Vincent J. Glorioso, Jr.	Reinstated.	6/10/05	01-2383 T
Gilbert E. Stampley	Suspension deferred, 12 months' probation.	3/11/05	05-1381 A
Andrew C. Engolio	Retroactive interim suspension.	3/16/05	05-1382 T
Henry J. Lafont, Jr.	Retroactive 90-day suspension.	4/15/05	05-1627 N
Reginald J. Laurent	Retroactive deferred suspension, two years' probation.	4/1/05	05-1626 K
Michael J. Riley, Sr.	Petition for reinstatement DENIED.	7/7/05	87-2028 H
Milton Osborne, Jr.	Public reprimand.	7/26/05	05-2090 N
Douglas C. Dorhauer	Interim suspension.	7/26/05	05-1717 B
Daniel E. Becnel III	Suspension deferred, 18 months' probation.	4/29/05	05-1923 A
Bradford D. Carey	Transfer to disability inactive status.	7/26/05	05-1625 B

Discipline continued from page 258

0853) **Disbarment** ordered by the court on June 17, 2005. JUDGMENT FINAL and EFFECTIVE on July 1, 2005. *Gist:* Engaging in the unauthorized practice of law.

Robert E. Randolph, Baton Rouge, (2005-B-0125) **Suspension of one year and one day** ordered by the court on June 3, 2005. JUDGMENT FINAL and EFFECTIVE on June 17, 2005. *Gist:* Neglect of clients' legal matters; failure to communicate with his clients; failure to provide accountings for client funds; and failure to cooperate with the Office of Disciplinary Counsel in disciplinary investigations.

Robert E. Shadoin, Ruston, (2005-B-1545) **Consent suspension of one year and one day, deferred, conditioned upon two years' probation**, ordered by the court on June 24, 2005. JUDGMENT FINAL and EFFECTIVE on June 24, 2005. *Gist:* Criminal conviction for driving while intoxicated.

Fritz M. Stoller, New Orleans, (2004-B-2758) **Permanent disbarment** ordered by the court on May 24, 2005. Rehearing denied on June 24, 2005. JUDGMENT FINAL and EFFECTIVE on June 24, 2005. *Gist:* Violating the Rules of Professional Conduct; commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer; and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Marvin L. Schwartz, Monsey, N.Y., (2005-OB-1391) **Public reprimand and re-**

instatement from interim suspension imposed in *In Re: Schwartz*, 04-0519 (La. 4/2/04), 870 So.2d 982, ordered by the court on June 22, 2005. JUDGMENT FINAL and EFFECTIVE on June 22, 2005. *Gist:* Violating the Rules of Professional Conduct.

Duke Ellington Tilley, Jr., Baton Rouge, (2005-B-0338) **Suspension of three years to run consecutively to the minimum five-year period for seeking readmission from the disbarment imposed in *In re: Tilley*, 01-2454 (La. 4/26/02), 814 So.2d 1289, subject to conditions**, ordered by the court on June 24, 2005. JUDGMENT FINAL and EFFECTIVE on July 8, 2005. *Gist:* Lack of diligence; failure to communicate with a client; failure to provide an accounting to client and failure to refund fees following termination of representation; knowing disobedience of an obligation under the rules of a tribunal; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct prejudicial to the administration of justice.

Paul T. Voiron, Gretna, (2005-B-1256) **Consent suspension of one year and one day, deferred, plus two years' probation**, ordered by the court on June 24, 2005. JUDGMENT FINAL and EFFECTIVE on June 24, 2005. *Gist:* Neglect of his clients' cases by failing to diligently pursue their legal matters; failing to adequately communicate with his clients and by failing to make reasonable efforts to expedite litigation consistent with the interests of his clients or to take any steps

in the prosecution or defense of his clients' cases; limited the scope of his representation without his client's consent; and failed to fully cooperate with the disciplinary investigation into these matters.

Lester J. Waldmann, Gretna, (2005-B-1751) **Interim suspension for threat of harm** ordered by the court on July 7, 2005. JUDGMENT FINAL and EFFECTIVE on July 7, 2005.

Admonitions (private sanctions, often with notice to complainants, etc.) issued since the last report for misconduct involving:

	No. of Violations
Practicing law while ineligible for failure to pay bar dues and assessment	1
Conflict of interest	4
Lack of reasonable diligence and promptness in representing a client	1
Failure to keep a client reasonably informed of the status of a matter	3
Engaged in conduct prejudicial to the administration of justice	1
Failure to safe keep client's property	2
Failure to timely notify and promptly deliver funds to third parties	1
Acting beyond the scope of representation of a client	1
Violating or attempting to violate the Rules of Professional Conduct	1
TOTAL INDIVIDUALS ADMONISHED	9

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People Deadlines & Notes

Note the following deadlines for submitting People announcements (and photos) in future issues of the *Louisiana Bar Journal*:

Publication	Deadline
Feb./March 2006	Dec. 5, 2005
April/May 2006	Feb. 3, 2006
June/July 2006	April 4, 2006
Aug./Sept. 2006	June 2, 2006

Announcements are published free of charge to members of the Louisiana State Bar Association. *Only the names of Louisiana State Bar Association members are published.*

LSBA members may publish photos with their announcements at a cost of **\$50 per photo**. Firms submitting multiple photos for publication must remit \$50 for each photo.

Payment for photos must be submitted when the announcement is submitted (adhering to the submission deadlines above). All photos must be paid for prior to publication.

Send announcements, photos and photo payments (checks payable to Louisiana State Bar Association) to:

Publications Coordinator
Darlene M. LaBranche
Louisiana Bar Journal
601 St. Charles Ave.
New Orleans, LA 70130

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Announcements and photos
may be e-mailed to
dlabranche@lsba.org.

UPDATE

Francophone Section Conducts Annual Meeting

The Louisiana State Bar Association's Francophone Section held its annual meeting in April during Festival International de Louisiane in Lafayette. Guests included Patrick Rolot, counsel general of France in New Orleans; Christian Goudeau, honorary counsel of France for Lafayette; Eliane De-Pues Levaque, permanent representative from Belgium; and Pierre Boudreaux, avocat from Moncton, New Brunswick, Canada.

Rolot was honored for his aid to the section during his tenure as counsel general of France in New Orleans. He and his wife received a gift from the Francophone Section, presented by President John A. Hernandez III and Vice President John A. Hernandez, Jr., from Le Centre International de Lafayette, presented by Philippe Gustin, and Christian Goudeau. A special presentation followed by Bench Bar Section President Val Exnicios.

The Francophone Section also held a meeting during the LSBA's Annual Meeting in Las Vegas, Nev. Special guest was Bernard Synott, ancien bâtonnier du Barreau de Montréal. Present were Francophone President Hernandez, Charsley Wolff and Joseph Barreca.

The section's next annual meeting will be held in Lafayette during Festival International de Louisiane on Friday, April 21, 2006.

For more information on joining the Francophone Section and to learn of the planned 2006 events, contact President Hernandez at (337)233-5330 or at notaire@bellsouth.net.



Attending the LSBA Francophone Section's annual meeting in Lafayette were, from left, Section Vice President John Hernandez, Jr., Madame Rolot, Patrick Rolot, Section President John A. Hernandez III, Christian Goudeau and Philippe Gustin.

Judge Dufresne Inducted into St. Stanislaus College Hall of Fame

Fifth Circuit Court of Appeal Chief Judge Edward A. Dufresne, Jr. was recently inducted into the St. Stanislaus College Hall of Fame. A 1956 graduate of St. Stanislaus, Judge Dufresne earned his undergraduate degree in 1960 from Loyola University and his JD degree in 1963 from Loyola Law School.

He was admitted to practice in Louisiana in August 1963 and, five months later, was elected to the position



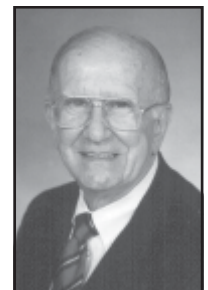
Judge Edward A. Dufresne, Jr.

of St. Charles Parish clerk of court, where he served four consecutive terms.

He was elected as district judge (29th Judicial District) in 1978 and was elected to the 5th Circuit Court of Appeal in 1981.

Landry Receives Inn of Court Professionalism Award

New Iberia attorney Alfred Smith Landry was presented the professionalism award by the Teche Chapter American Inn of Court in September. The chapter of judges and lawyers from Iberia, St. Mary and St. Martin parishes presented the award in



Alfred Smith Landry

recognition of Landry's achievements and ethical and professional excellence during his 55-year legal career.

Landry, a partner in the firm of Landry, Watkins, Repaske & Breaux, began practicing law in New Iberia in 1950. He is past president of the Iberia Bar Association, former member of the Louisiana State Bar Association (LSBA) Board of Governors, longtime member and past chair of the LSBA's Committee on Alcohol and Drug Abuse and member of the LSBA's Ethics Advisory Committee. He is a past president of the Louisiana Association of Defense Counsel and a Fellow of the American Academy of Trial Lawyers.

Presenting the award on behalf of the Inn was Porteus Burke, who co-chaired the awards presentation with his wife, attorney Margaret Justice.

Attorney General's Summer Fellowship Program a Success

Louisiana Attorney General Charles C. Foti, Jr. recently conducted his second annual Summer Fellowship Program, a full-time work program allowing law students to experience the operations and functions of the Attorney General's office.

The program attracted top law students from a variety of backgrounds. Thirty-two students from Harvard, Louisiana State, Loyola, Tulane and Southern law schools participated in the 2005 program.

Students worked in specific areas of interest, while rotating among the different sections, according to the needs of each division. The program also allows hiring personnel to oversee and work with law school students, so the office is better equipped to meet its entry-level hiring needs.

Speakers for the 2005 program included Attorney General Foti and First Assistant Nick Gachassin, Louisiana Supreme Court Justice Catherine D. "Kitty" Kimball, Chief Federal Court Judge Frank Polozola, 1st Circuit Court of Appeal Chief Judge Burrell Carter, Governor Blanco's Executive Counsel

Terry Ryder, U.S. Attorney David Dugas, U.S. Attorney Donald Washington, State District Court Judge "Ricky" Wickers, Family Court Judge Kathleen Ritchie, Chief Disciplinary Counsel Charles B. Plattsmier, District Attorney Association Executive Director E. Pete Adams and 1st Circuit Court of Appeals Clerk Christine Crow.

The students also participated in Federal Law Day at Middle District Federal Court, visited the Louisiana Supreme Court and toured Angola State Penitentiary with the Civil Rights section.

LOCAL & SPECIALTY BARS

Lafayette Bar Members Volunteer Time at St. Joseph's Diner

Members of the Lafayette Parish Bar Association recently helped feed the needy at St. Joseph's Diner. The diner is open for breakfast and lunch 365 days per year for anyone in need of a hot meal.

Alcohol and Drug Abuse Hotline

Director William R. Leary 1(866)354-9334
Ste. 4-A, 5789 Hwy. 311, Houma, LA 70360

Area	Committee Contact	Phone
Alexandria	Stephen E. Everett	(318)640-1824, (318)443-6312
Baton Rouge	Steven Adams	(225)753-1365, (225)924-1510
	David E. Cooley	(225)751-7927, (225)753-3407
	John A. Gutierrez	(225)715-5438, (225)744-3555
Houma	Bill Leary	(985)851-0611, (985)868-4826
Lafayette	Alfred "Smitty" Landry	(337)364-5408, (337)364-7626
	Thomas E. Guilbeau	(337)232-7240
	James Lambert	(337)233-8695, (337)235-1825
Lake Charles	Thomas M. Bergstedt	(337)433-3004, (337)558-5032
	Nanette H. Cagney	(337)437-3884, (337)477-3986
Monroe	Robert A. Lee	(318)387-3872, (318)388-4472
New Orleans	Craig Caesar	(504)596-2774
	Deborah Faust	(504)486-4411, (504)833-8500
	Donald Massey	(504)585-0290
	William A. Porteous	(504)581-3838, (504)897-6642
	Dian Tooley	(504)861-5682, (504)831-1838
Shreveport	Bill Allison	(318)221-0300, (318)865-6367
	Ed Blewer	(318)227-7712, (318)865-6812
	Steve Thomas	(318)872-6250

The Lawyers Assistance Program, Inc. provides confidential assistance with problems such as alcoholism, substance abuse, mental health issues, gambling and all other addictions.

The Lafayette Bar volunteers, consisting of judges, attorneys and support staff, spent three days at St. Joseph's Diner. They spent each morning chopping vegetables and preparing food to be served, as well as serving the meal during the lunch hour.

Lafayette Volunteer Lawyer Chair Ric Mere was recently featured as the keynote speaker at the Silent Witness Unveiling ceremony hosted by the Louisiana Violence Prevention Alliance. The ceremony memorialized women from the Acadiana area whose lives were unfortunately cut short by the tragedy of domestic violence. Their stories were told in an effort to bring light to the problem of domestic violence and to help bring an end to it.



Erin Beyer, from left, John Miller, Dora Morton, Elsie Fontenot and Donna Domingue were the first group to serve lunch at St. Joseph's Diner in Lafayette.



Lafayette Parish Bar Participates in UW Day of Caring

Members of the Lafayette Parish Bar Association participated in the United Way of Acadiana's annual Day of Caring. This project pairs community agencies and schools with volunteers from numerous companies and organizations to spend one entire day participating in projects to better the entire Acadiana

community. Participants included, front row from left, Hoa Nguyen, Cassie Bidstrup, Jo Ann Snyder, Vicki Truxillo, Tammy DeRouen, Jill Suire, Callie Stagno and Brandi Mayet. Back row from left, Jennifer Arabie, Steven Ramos, Greg Koury, Jacques Duplantier and Jim Diaz, Sr.



Incoming president of the New Orleans Bar Foundation, Adriel G. Arceneaux, presented James R. Morton with a plaque commemorating his three years of service as president of the foundation.

New Orleans Bar Foundation Elects New Officers

The New Orleans Bar Foundation elected new officers. Serving as president is Adriel G. Arceneaux; vice president, Grady S. Hurley; and secretary-treasurer, Bradford E. Adatto. Directors are Allain C. Andry and Kim M. Boyle. Executive director is Helena N. Henderson.

Claverie Receives NOBA's Presidents' Award

Philip deVilliers Claverie, Sr. is the recipient of the 2005 New Orleans Bar Association (NOBA) Presidents' Award. He was honored at a reception in July. This award recognizes attorneys who, in addition to their professional excellence and integrity, have dedicated themselves to community service in the exercise of the highest ideals of citizenship. This award is the highest level of recognition from the association.

Claverie is a senior partner in the firm of Phelps Dunbar, L.L.P. In addition to the New Orleans Bar Association, he is a member of the Louisiana State Bar Association, American Bar Association, Association of the Bar of the City of New York, American Judicature Society and the Louisiana State Law Institute. He is a Fellow with the American Bar Foundation and the Louisiana Bar Foundation. Additionally, he is a member of the board of advisory editors for the *Tulane Law Review*. He was included in the charter listing of *Best Lawyers in America*, as well as in *Who's Who in America* and

Who's Who in American Law.

He has served on the board of directors of Children's Hospital since 1978 and has been a member of the hospital's Executive Committee since 1984, serving as president from 1985-87. He has been a board member of the New Orleans Police Foundation since 1997 and currently serves on the advisory board of the International School.

NOBA President Jesse R. Adams, Jr. presented Claverie with a proclamation from New Orleans Mayor Ray Nagin, naming July 14, 2005, "Philip DeV. Claverie, Sr. Day," a certificate from Louisiana Gov. Kathleen B. Blanco, a letter from United States Sen. David Vitter and a letter from President George W. Bush.

Attending the reception were past NOBA Presidents Kim M. Boyle, Hon. Jerry A. Brown, Jack C. Benjamin, Sr., Grady S. Hurley, Thomas O. Lind, John M. Page and Phillip A. Wittmann. Two past Presidents' Award recipients were also in attendance, Benjamin and David J. Conroy, as was Ambassador John G. Weinmann.

Speech and Awards Highlight Shreveport Law Day Luncheon

If you were one of the approximately 125 attorneys and guests attending the Shreveport Bar Association's (SBA) Law Day luncheon in April, then you had the good fortune to hear an excellent talk on "The American Jury" by Hon. William G. Young, chief judge of the U.S. District Court, Division of Massachusetts. Judge Young, a nationally acclaimed lecturer and author, received a standing ovation following the speech which was inspired by this year's Law Day theme: *The American Jury: We the People in Action*.

Prior to Judge Young's talk, SBA President-Elect John Frazier presented the 2005 Liberty Bell Award to Dr. Phillip A. Rozeman, president and co-founder of Cardiovascular Consultants, for his outstanding community service, particularly in connection with his work in sup-



With Philip deVilliers Claverie, Sr., 2005 recipient of the New Orleans Bar Association (NOBA) Presidents' Award, are, from left, NOBA President Jesse R. Adams, Jr. and Laura M. Claverie.



Shreveport Bar Association President-Elect John Frazier, left, presented the 2005 Liberty Bell Award to Dr. Phillip A. Rozeman.



With Shreveport Bar Association Liberty Bell Award recipient Dr. Phillip Rozeman, third from left, are, from left, Judge Tom Stagg, Judge William Young, Rozeman and Law Week Chair Chris Slatten.

port of public education. Dr. Rozeman founded the Alliance for Education, a non-profit organization that combines human and financial resources in support of public education in Caddo, Bossier, Webster and DeSoto parishes. He developed the Alliance after personally researching school improvements and traveling (using his own resources) to other cities in the United States to learn about similar programs. Through the efforts of Dr. Rozeman and local community and business leaders, \$1 million was raised to fund the Alliance, with Dr. Rozeman donating \$250,000 of his own funds to the organization.

Other luncheon highlights included special recognition of the Airline High School mock trial team, who placed second in the Louisiana state competition (see related story in this issue) and the winners of the SBA-sponsored Law Day Essay Contest (see related story in this issue).

Serving on the Law Day Committee are Chair Chris Slatten, Co-Chair Allison Duncan and members Karen Fox, Felicia Gilliam, Denise Tolber, Patti Guin,

Shannan Hicks, Tommy Johnson, Garrett LaBorde, Jason Nichols, Carol Paga, Kim Ramsey and Richard Ray.

Law Career Forum: Shreveport Bar Sponsors Law Day Project

As a Law Day project, the Shreveport Bar Association sponsored a free forum for college students interested in pursuing a career in law. Approximately 100 students attended the forum at the Science Lecture Hall on the campus of LSU-Shreveport.

The career forum was an open panel discussion among lawyers, judges and students with an emphasis on the national Law Day theme, "The American Jury: We the People in Action."

Participating as panel members were 1st Judicial District Court Judge Jeanette Garrett and attorneys Don Miller, Bill Kendig and Shannan Hicks. Co-chairs of the event were Garrett LaBorde and Jason Nichols.



Career Forum moderator and co-chair Garrett LaBorde.



Career Forum panel member Don Miller shares legal career pointers with students.



Megan Pickett, the first place winner of the Shreveport Bar Association's Law Day Essay Contest, with contest Chair Shannan Hicks.

Caddo Magnet Student Wins SBA's Law Day Essay Contest

Megan Pickett, a 10th grade student at Caddo Magnet High School, was the winner of the Shreveport Bar Association-sponsored Law Day essay contest. A total of 43 essays based on this year's Law Day theme, "The American Jury: We the People in Action," were submitted for judging in the competition. For her efforts, Pickett received a \$500 check at the association's annual Law Day luncheon.

Second place honors (\$300) went to Brandi Andrews, a senior at Byrd High School, and third place honors (\$150) went to Tierney Strange, also a senior at Byrd High School. Other schools submitting essays in the competition were Huntington High School and Green Oaks High School.

Shreveport Bar Foundation Sponsors VYJ "Champion for Children" Fundraiser

With funds donated by the Shreveport Bar Foundation, the Volunteers for Youth Justice (VYJ) organization was able to hold its annual "Champion for Children" fund-raising dinner/silent auction and



About 100 students attended the Shreveport Bar Association's Law Career Forum. Panel members, from left, Shannan Hicks, Don Miller, Bill Kendig and Judge Jeanette Garrett. Co-chairs of the event were Garrett LaBorde and Jason Nichols.

badminton tournament on April 8-9 at East Ridge Country Club. The two events raised \$35,800 for Volunteers for Youth Justice.

During the dinner, the attendees viewed a two-part inspirational video featuring comments and information from Sheriff Steve Prator, Caddo Juvenile Court Administrator Ted Cox and a real-life success story by James Williams, a VYJ "Power of

Choice" workshop graduate.

George Sirven, general manager of KTBS-Channel 3, and pediatrician Dr. Donald Mack were presented with the 2005 Ron Anderson "Champion for Children" awards for their contributions to area youth, and Olympia Norris was presented with the "Bright Future Award" for her essay regarding her experience in one of VYJ's programs.



Shreveport Bar Association member Roy Payne, center, with two-time Olympic badminton medalist Su Sin and her husband/partner Anthony. Payne was a member of one of the eight teams competing in the fund-raising tournament.



Shreveport Bar Association President Tommy Johnson addressed guests at the Volunteers for Youth Justice “Champion for Children” dinner. The Shreveport Bar Foundation was the underwriter for the event.

Following the awards presentation, guest soloist, Adreana Harvey, received a standing ovation for her accapella performance of “One at a Time.”

Eight teams participated in the badminton tournament, directed by Tom Carmody and Joe Averett. Gold and Silver Olympic medalist Su Sin and her husband and team partner, Anthony, clocked bird speeds (shuttlecock) of more than 150 miles an hour and captured first place honors in the tournament. Second place honors went to David Soto and David Rutherford, with Max Kelly and Kevin Vonkijacobsnolten receiving the consolation trophy.

Shreveport Bar Golf Tournament: A Great Outing!

This year’s Shreveport Bar Association (SBA) golf tournament had all the ingredients needed for a fun day at the links – great weather, good food and impressive scores turned in by SBA golfers and their guests. Tom Bordelon not only chaired this year’s event, but his team (Bordelon, Brad Wright, Randy Kornrumpf and Buster Toms) took top honors by turning in the lowest gross score of the tournament (54). Low net

flight winners, both of which were scorecard playoffs, were:

First Flight – Low Net:

First Place, Greg Batte, Bryan Calloway, Sock Sockrider and Scott Griffis (49);

Second Place, Jimmy Muslow, Fred Sexton, Chris Marlowe and Doug Roundtree (49).

Second Flight – Low Net:

First Place, Larry Shea, Gene Hilliard, Hank Anderson and Cole Anderson (57);

Second Place, Sid Cook, Charlton Holmes, Keith Hightower and Billy Joe Toliver (57).

For the second year in a row, the Isle of Capri Casino sponsored a “Million Dollar Shootout” contest with 20 tournament golfers, whose names were randomly drawn, attempting to make a 165-yard hole-in-one shot for \$1,000,000. Unfortunately, no one walked away with the prize.

Proceeds from the tournament fund the projects of the Shreveport Bar Association.

Law Day Community Project: SBA Members Donate More Than \$2,000

Members of the Shreveport Bar Association (SBA) donated \$2,145 towards the 2005 Law Day community project. The project was aimed at helping families of local National Guardsmen stationed overseas. The 1st Battalion, 156th Armor Unit, headquartered at Fort Humbug on Youree Drive, includes approximately 500 soldiers who have been in Iraq for several months. The 1-156th has a Family Readiness Group (FRG) that helps serve the families of the deployed soldiers. After all donations were collected, the Law Day Committee consulted the FRG and asked how the money could best be spent to meet current needs.

Per the suggestions of the FRG, the committee made three presentations to the support organization. The first was a check for \$1,000 for purchasing International calling cards. The cards will be distributed to soldiers overseas and will allow them to call their families more often. The second presentation was a



Shreveport Bar Association golf tournament low-gross winners, from left, Tom Bordelon, Brad Wright, Buster Toms and Randy Kornrumpf.

check for \$520 for defraying the costs of a “Welcome Home” picnic that the FRG will hold for returning soldiers and their families this fall (when the unit is scheduled to return). The FRG has obtained the use of Hirsch coliseum to host the event, but it needs funds to pay for food and other supplies. Finally, the committee presented \$625 worth of \$25 gift cards from Tinseltown Theater to children of local soldiers.

The committee extends its gratitude to everyone who donated to this project:

- Beard & Sutherland
- Michael Carmody
- Sam Caverlee
- Trina T. Chu
- Ted Cox
- Allison Duncan
- James B. Gardner
- Judge Jeannette Garrett
- Mark Gilliam
- Patti and Billy Guin
- Magistrate Judge Mark Hornsby
- Jim Jeter
- Bernard Johnson
- Tommy Johnson
- Allison Jones
- Judge Bill Kelly
- Bill Kendig
- Sarah Kirkpatrick
- David Klotz
- Legal Secretaries of Shreveport-Bossier
- Gail McCulloch
- Malcolm Murchison
- Jason Nichols
- Pettiette, Armand, Dunkelman, Woodley,
Byrd & Cromwell L.L.P.
- Donna Prudhome
- Stephen Ramey
- Chris Slatten
- Marty Stroud
- Kim and David Tullis

Members Enjoy SBA-Sponsored Crawfish Boil

Approximately 150 members and area law school students attended the Shreveport Bar Association-sponsored crawfish boil at the Shreveport Yacht Club on May 13.



Chris Slatten, center, chair of the Shreveport Bar Association Law Week activities, presented donations raised for 1-156th Family Readiness Group to Mary Sue Adams, FRG Battalion point of contact, right, and Heather Luebbert, battalion treasurer.



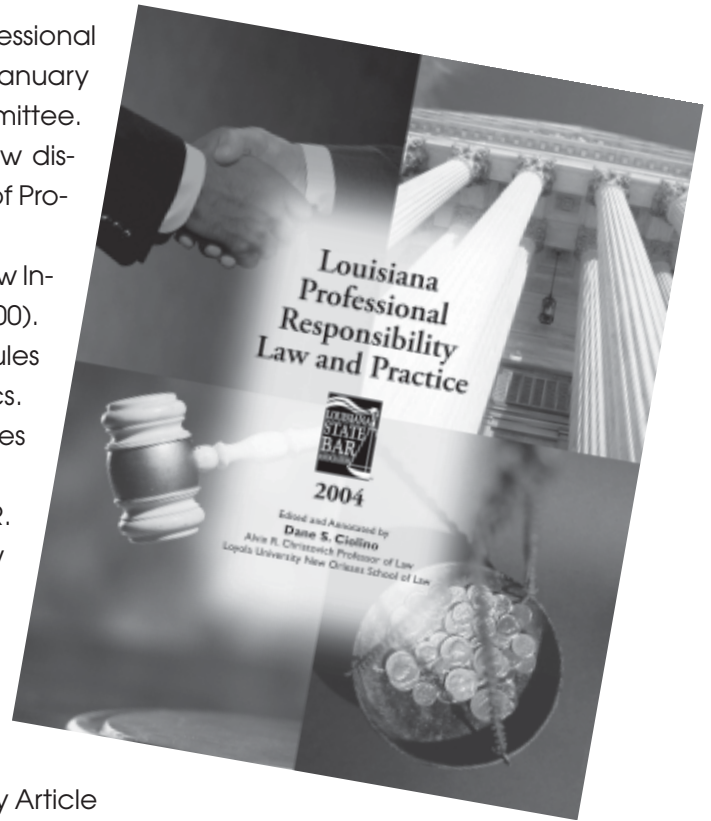
Alma Jones, director of Legal Services of North Louisiana, seated center, and co-workers are impressed with the size of their crawfish.

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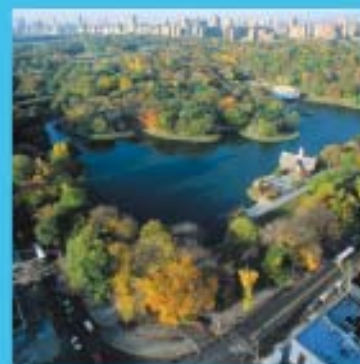
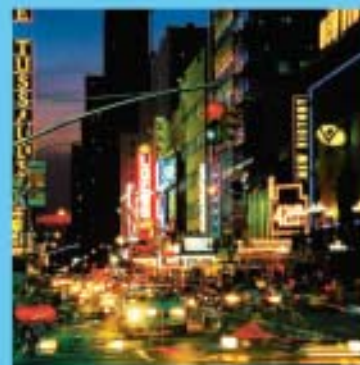
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By Vincent P. Fornias

CALIFORNIA SCHEMING

Louisiana Civil Code Article 2439

Definition: Sale is a contract whereby a person transfers ownership of a thing to another for a price in money. The thing, the price and the consent of the parties are requirements for the perfection of a sale.

Got that? Now promptly forget about our laws if you are dealing in plastic currency in California. It all started one August day while my wife and I were wandering touristically and happened upon the quaint little hamlet of Moss Point, Calif. You know the drill. Lots of “cool” shops with “cool” names like Noah’s Arches or Shelter Skelter (not really!). I spent most of our couple of hours there down the street in a shabby little place, haggling over a baseball glove from the turn of the century. When my reasonable offer was scoffed at, I walked away to look for my wife. She had had considerably more success than I in the form of a western-style belt with silver inlay that she had charged for \$150.15. The cutesy name of the place will go unmentioned to spare me more grief. She was impressed with the deal she had gotten concerning the artisanship of the inlay. We soon drove away from the place and flew home. Case closed. NOT-T-T. Here is an abbreviated journal of the sale from hell.

September 10, 2004. She receives her MC statement from one of the big financial conglomerates (hereafter “Clueless One”), wherein there was a credit of \$150.15 and a unilateral charge of \$1,500.15 for what was obviously the holy grail of inlaid silver belts.

September 11, 2004. With my advice, she e-mails Clueless One informing it that she emphatically denies this charge, made without her knowledge or consent, and requesting that the prior charge of \$150.15 be reinstated. By the way, did I mention that she had misplaced her copy of the charge receipt?

September 29, 2004. Now starts the litany of nonsensical bureaucratic letters from Clueless One, usually signed in succession by a different person, who unfailingly uses his or her first name initial and a surname that is either fictitious or indicative of major outsourcing. Thus, “U Kalisch” thanks her for her recent inquiry, then requests a laundry list of information ranging from an account number to blood type, culminated by a request for a copy of the charge receipt. At this point, I take over.



October 8, 2004. My wife’s next MC statement shows a temporary credit of the pending \$1,500 charge, pending resolution.

October 13, 2004. My first letter, on firm letterhead, goes out to Mr./Ms. Kalisch. I provide every scintilla of available information requested and try to explain that although my wife did not retain the charge receipt, it would be one of the great coincidences of mankind that this merchant just *happened* to credit \$150.15 if that were not the amount actually charged and agreed upon. I further explain to U. that my wife had picked out a belt whose price tag was smudged and actually took the further step of bringing it to the sales clerk and telling her that if the price was \$150 she was very interested, but not if it was \$1,500 — at which point the clerk responded that she “could not imagine” that it was \$1,500, so the \$150 sale was consummated. Wait around.

October 29, 2004. C. Zappas responds on Clueless One letterhead, addressed not to me, but to my wife, mentioning a recent letter was received from an “unauthorized third party” and requiring that an attached authorization form be filled out by her if she wishes that party to act on her behalf.

November 5, 2004. The authorization is faxed back to C. at the number provided.

Continued Next Page

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November 12, 2004. My wife receives a second letter from C. Zappas, stating that his/her prior letter concerning an authorized third party should have not been sent: “We failed to realize that your husband . . . is acting on your behalf as an attorney.” DUHHH. It closes by assuring her that she is “a valued customer” of Clueless One.

November 21, 2004. Letter to my wife from S. Keith requesting the identical information requested almost two months before by U. Kalisch and answered in my exhaustive reply of October 13. This one also closes with the now traditional “valued customer” mantra.

November 24, 2004. I fax off a letter to both Zappas, Kalisch and Keith, restating what transpired at the store and spoon feeding the same information previously requested: “In closing, although you continue to insist that (my wife) ‘is a valued customer,’ she is being treated as anything but that. She rightfully feels that the burden is being placed on her to correct a serious breach of ethics by your merchant.” (I couldn’t resist.)

December 6, 2004. My wife receives her next MC statement — now showing again the \$1,500 charge. I call the “800 customer service” number (an oxymoron if ever one existed). After the testy menu maze, my first 30 seconds of conversation with an actual human being (wherever she may be) persuades her to transfer me to a supervisor. After a hold of 27 minutes, I am connected with someone identifying herself (egads! a first name!) as “Laura.” She informs me that I am not authorized to deal on this account. I assure her that not one but two consent forms have been faxed to the black hole that is Clueless One. She then places me on hold for 16 more minutes, comes back on the line and says “the system is down,” but offers to call me tomorrow after she “researches the file.” Not unless she gives me her last name. She says it is “Hanna.” I hang up. Big mistake.

December 8, 2004. Surprise. Laura Hanna never called back. Neither did L. Hanna. I call the customer service number and no one recognizes the name Laura Hanna. By now I am about to call the State Department. I fax for the third time my authorization form so that someone will speak to me. No response. I take it a step further. I “Googlize” the merchant and get the owner’s name and address.

December 9, 2004. Certified letter to California merchant on my letterhead. I repeat the facts, including her own store clerk’s incredulity, stated to my wife, that the belt could cost \$1,500: “I hereby request . . . that you provide me immediately with a copy of the signed charge under which you have attempted to collect \$1,500 on a sale that was completed for \$150. Your failure to do so will cause me to contact the California Attorney General’s Office, Department of Consumer Fraud.”

December 10, 2004. I try the customer service number again (by now I know it by heart). I am speaking to what may as well be S. Hussein at Clueless One. At least he actually acknowledges receipt of one of my collection of authorization faxes. He then tells me that unless the merchant’s bank responds by December 19, “it’s out of our hands.” Translation: You will then be stuck paying 10 times what you agreed to pay for the belt.

December 12, 2004. Letter from California merchant: “My intention was never to commit fraud. I merely was trying to get someone’s attention so that (your wife) would contact me so that I could recoup my belt.” (*e.g.*, a means to an end). She attaches a letter she had sent to her servicing bank when the charge was first questioned, claiming that the belt purchase was made from “a young high school student worker” and that the purchaser had asked to see “numerous . . . belts, none of which cost less than \$550, and proceeded to purchase the most expensive belt with



a price of \$1,400. My young employee mistakenly charged her card \$140 plus sales tax, totaling \$150.15.” She then admits in writing that she “took it upon myself to change the transaction . . . with the hope that your cardholder would contact me so that I could recuperate (sic) my belt.” In closing, she adds that she understands “this might have become a moral issue” (can you believe it?) but that she is hopeful that the cardholder will make “the right choice.” Attached to that letter is a copy of my wife’s signed charge for \$150.15. Eureka.

December 13, 2004. Armed with these silver bullets, I fax letters to all prior Clueless One bureaucrats I have dealt with, sending both a copy of the wife’s charge receipt and the merchant’s “I took it upon myself” written admission.

Continued Next Page

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December 14, 2004. Another call to the Clueless One 800 number connects me with S. Lucemill. They continue to acknowledge my existence and authority — and actually confirm receipt of my letter and charge receipt. Noncommittally, she states that a responsive letter to me “is in the mail,” refusing to tell me what it says.

December 16, 2004. Merry Christmas, in the form of a letter from K. Bracken of Clueless One: “. . . We are crediting \$1,500.15 to your account and are charging the same amount back to the merchant’s bank.” But wait. We didn’t want to *steal* the belt. We want to pay the \$150.15 agreed upon. We will await receipt of the next periodic Clueless One statement before acting impulsively.

January 20, 2005. After confirming the statement crediting \$1,500.15, I write a letter to the California merchant: “Nah, nah, nah, nah, nahhhhhh!!!!!!” (just kidding). I enclose a check in the amount of \$150.15: “For the record, I concur with your letter that ‘this might have become a moral issue’. In a prior letter, you practically accused my wife of casing your store to find the most expensive belt, then taking advantage of a young student clerk. Please know that my wife is the most honest person I have ever met, to the point of finding a \$100 bill on the floor of a gambling casino and turning it into their lost and found department.” (True story. At this point, I’m thinking closure.)

January 22, 2005. Letter from W. Myers of Clueless One: “We understand the amount you agreed to be billed is \$150.15. Therefore, we have rebilled your account for this amount, which will appear on your next statement.” We have now doubled the price of the belt!

January 31, 2005. I fax a letter to a California merchant with whom I had hoped never to communicate again: “I hereby request that you either return our check or provide us with evidence of your request that the said amount be re-credited to the account.”

February 3, 2005. I receive a certified collection letter from the merchant, including invoice for belt in the amount of \$1,500.15. A copy is shown going to her lawyer in a San Francisco firm with six names on the letterhead.



February 7, 2005. Letter received from R. Hughes at Clueless One: “We have new information about your disputed charge. The merchant has provided additional proof (what? an affidavit from the high school worker?) that the charge is valid. You must provide proof of the return of the belt before any credit will be issued.”

February 8, 2005. (I had nothing to do with this, but I secretly rejoiced.) Letter by me to the merchant, stating that my wife has instructed me that once we are advised in writing that the \$150.15 charge has been credited to her account she will promptly return the belt to her.

February 11, 2005. (This one’s for me.) I fax my final letter to R. Hughes at Clueless One: “My wife and I give up. Your endless bureaucracy and non-accountability have officially worn us down. You win! Enclosed is a copy of our letter to the merchant confirming we are returning the belt for credit. We hereby request that once and for all full credit of all charges for this transaction be confirmed. Shortly thereafter, my wife will ‘unchoose’ Clueless One in any further financial relationship.”

* * *


Be assured, dear reader(s), this is the abridged version. At the conclusion of this unfortunate transaction, surely one less rain forest exists in the Amazon, the by-product of the systematic unraveling of a valid Louisiana sale.

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