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Well on Our Way to “Doing Something About That”

Some years ago, I was in the midst of one of those hectic days that most professionals who also happen to be parents all encounter at some point in their career. A brief was due in one case, preparation for an upcoming trial was necessary in another, a client needed immediate attention, and some fool had scheduled a partners’ meeting. The precarious balance of the day’s activities was just about within reach when disaster hit: the babysitter was suddenly taken ill. Using the kind of snap decision-making skill that is so effective in lawyering (and so ill-advised in parenting), I chose to take my son to the office with me.

Jeff, who is now off at college, was a comparatively well-behaved child, so the day was not a complete disaster. A few crayon marks on the upholstery, perhaps, but nothing like the mess we discovered one Monday morning when someone’s child visited the office with daddy over the weekend and had decorated all the walls with the certificate of service stamp. By the end of the day, I was even confident enough to admonish my child to sit quietly in my office while I attended the partners’ meeting — a confidence, as it turns out, that was not merited. As soon as I was out of sight, Jeff wandered around until he found a familiar face — my new associate, who was hard at work in his own office. Entering and introducing himself in what seemed to be a very adult style, Jeff sat in the guest chair and began a conversation with his new friend. “What do you do for a living?” he asked.

This story comes to mind fairly regularly these days, as friends, acquaintances, law partners, even family, invariably want to know what I am doing with my time. “Do you practice any law?” they ask. “What takes up most of your time?”

Occasionally these inquiries derive from concern for me, but I think that they mostly reflect the fact that we at the Louisiana State Bar Association (LSBA) are not as effective as we should be in telling our members what it is that we do.

We say, for example, that we have been involved in the efforts to restrain the unauthorized practice of law through the regulation and monitoring of public adjusters, or that we are assisting in the restructure of the criminal justice system in Orleans Parish (and working toward improvement of the statewide system), or that we are actively involved in assuring that civil legal services for the poor are available and adequately funded, or that we provide information and assistance to our members about managing their law practices, or that we answer inquiries regarding legal ethics, or that we proactively monitor the impact of the Rules of Professional Conduct, including the rules regarding lawyer advertising, and provide information and recommendations for change to the Supreme Court.

We talk occasionally about the Client Assistance Fund and the committee that works tirelessly to assist members of the public who have been defrauded by lawyers and provide them with some minimal recoupment for what has been stolen from them, or our members who work on the Legislation Committee and must sift through hundreds of draft bills to determine the handful that are of interest and import to our members, or those who volunteer their time to present professionalism programs at the state’s law schools, or the committees which focus on group and malpractice insurance coverage for our members, or those who provide interface between the legal and medical community, and every now and then we even talk about the group that tends to those amongst us who suffer from addiction or mental illness.

But making these lists is far different (and far more coma-inducing) than coming to understand how much work all of this really is. Mind you, I don’t claim to do it all. But it’s a full-time job just keeping abreast of what is being done and trying to be sure that we can keep on doing it. Judging from the outpouring of positive responses I received to my last column, it appears that many of you agree that the purpose and goals of the organized bar remain important to you. I hope that you will also agree that, for the most part, our earnest efforts to reach those goals are well placed.

Now, I am not so gullible as to believe that a few e-mails, phone calls and letters constitute a mandate. Many in our profession are frustrated with what they witness in their colleagues, in their courthouse, or even on their televisions. Why doesn’t someone do something about that? they wonder. Sometimes they wonder it directly at me, assuming that I am that “someone” who should be doing something. The “I’m pedaling as fast as I can” answer is not effective, I’ve found.

The truth is that nothing grinds more slowly than the advent of a good idea or even a push for change from within an organizational, societal or governmental structure. The disappointing part of my job is that it does not come with a grant of absolute power. (Indeed, there are days on which I believe that it does not come with the grant of any type of power — those are mostly the days when hate mail arrives.) I cannot don the dime-store crown nor wave the accompanying scepter that was so cleverly made a part of my induction and change the rules governing lawyer advertising or improve the delivery of indigent defense services provided...
in Louisiana. I cannot magically conjure the money to create a Professionalism Center. I cannot instill an appreciation for our system of justice, nor an understanding of the basis for our profession’s commitment to pro bono representation, in every law school graduate. So I am often frustrated, too.

Three particularly important events will have transpired by the time this column goes to press, however, which are the culmination of initiatives begun before the scepter was passed and about which we can proudly say, “Someone has done something about that.” The “someones” include a myriad of folks who have devoted countless hours to their work for our profession, and particularly our two most recent past presidents, Mike McKay and Frank Neuner.

By the time you read this, the LSBA will have taken affirmative steps in protecting the public against non-lawyers who provide legal advice and charge contingency fees. With the support of a variety of other legal organizations, the LSBA has sought injunctive relief against a public adjuster who has consistently failed to adhere to the practices authorized by the law passed in 2006 by way of curbing the unauthorized practice of law — legislation to which a number of those “someones” contributed. The LSBA and the Louisiana Bar Foundation will also have received the final report on the Orleans Parish indigent defense system which we commissioned from the National Legal Aid & Defender Association, using money raised in the advent of the hurricanes from lawyers and bar associations across the country. The report will assist in improving the Orleans system but also offers valuable recommendations regarding statewide reform. This report will also inform the work of the Right to Counsel Committee, chaired by Frank Neuner, as it sets upon the task of building consensus amongst the indigent defense community so as to propose sweeping changes in the state structure for the delivery of legal services to those charged with criminal offenses.

Last, but surely not least, a subcommittee, chaired by Larry Shea, of the Rules of Professional Conduct Committee will have produced a comprehensive recommendation for the revision of the Rules of Professional Conduct as they pertain to lawyer advertising. In September, the recommended revisions, modeled after the successful changes in lawyer advertising rules that have been introduced in Florida, were passed on to the Supreme Court task force examining these issues. There remains time to comment and discuss what changes can and should be made, but we are well on our way to “doing something about that” as well.

In short, I don’t get much time to practice law these days. And, for this year anyway, it’s because I’m trying to be one of those “someones.”

Need some help managing your law office?

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The Louisiana State Bar Association (LSBA) has established the Law Office Management Assistance Program (LOMAP, for short). The program is designed to assist lawyers in increasing the quality of the legal services they provide.

LOMAP’s components currently include a Lending Library and other resources available online at the LSBA’s Web site, www.lsba.org. More components are planned for the future. Questions or comments about LOMAP may be sent to Eric K. Barefield, ebarefield@lsba.org or call (504)619-0122 or (800)421-5722, ext. 122.

For more information on all LSBA programs, go to www.lsba.org.
All attorneys involved in personal injury cases, regardless of whether representing plaintiffs or defendants, need to be aware of the issues presented by the Medicare Secondary Payer Act (MSPA). The essence of the Act is that Medicare has a priority right of recovery for medical bills it has paid in the past and/or might pay in the future on behalf of claimants. The MSPA statute and regulations reflect the congressional intent to shift the burden of coverage from Medicare to private entities in an effort to reduce Medicare costs. Consequently, Medicare in many instances will remain a secondary payer when there is an appropriate “primary payer.”

Does It Apply in My Case?

Payments made pursuant to workers’ compensation laws and certain third-party payments are primary as to Medicare; therefore, Medicare only pays as a secondary payer. Workers’ compensation claims include cases involving the Federal Employees’ Compensation Act and the U.S. Longshoreman’s and Harbor Workers’ Compensation Act. Medicare is also a secondary payer for medical expenses covered by accidental injury policies, automobile insurance policies, self-insured entities responsible for accident victims, and any personal injury coverages. Such personal injury coverages include all types of liability insurance, automobile med-pay coverage, and uninsured motorist coverage.

What is the Critical Determination?

Settlements in a tort or workers’ compensation type of case require Medicare considerations if the settlement involves the payment of any past or future medical bills. There are two circumstances that trigger Medicare approval. One circumstance arises when the injured party has been both Medicare-eligible since the time of his or her injury, and when the injured person is 65 years of age or older, or has been on Social Security disability for 24 months or longer. If the above criteria have been met, Medicare must approve the settlement.

The second circumstance occurs when a gross settlement exceeds $250,000, and the injured party has a reasonable expectation of being Medicare-eligible within 30 months. The beneficiary of the medical benefits must cooperate with the Centers for Medicare and Medicaid Services (CMS). If the beneficiary does not cooperate, the CMS may recover from him or her.

Who Administers This Program?

Originally the Medicare program was managed by the Healthcare Financing
Administration, a unit of the Department of Health and Human Services. The unit has subsequently been renamed the “Centers for Medicare and Medicaid Services” located in Baltimore, Md., with regional offices located around the United States.5

What About Applicable Statutes of Limitations?

There is no statute of limitations that affects this program. The CMS may recover without any regard to claim filing requirements or statute of limitations.6

What Needs to be Done if the Provisions Are Applicable?

Medicare pre-approval is required through the CMS. The CMS literature states that the process takes between 45 and 60 days; however, anecdotal history indicates that this is a bit optimistic. The CMS looks at a number of factors in determining whether to approve the settlement. These factors include the date of entitlement to Medicare, the type and severity of the injury or illness, whether the injured party’s condition is stable or whether the party will require serious additional medical care in the future, and the amount of the settlement. Approval is required to preserve the beneficiary’s benefits if certain medical expenses exceed projected costs.

What Happens if Medicare is not Protected?

The beneficiary is responsible for obtaining payments reasonably expected under the workers’ compensation or liability scheme. Medicare will not pay future benefits until the beneficiary has exhausted those remedies under the primary payer scheme. Therefore, the plaintiff can lose future Medicare benefits if the approval has not been obtained from the CMS. Additionally, CMS may either file suit against the party that received a payment or against the third-party payer.7

The Medicare Secondary Payer Act and regulations have teeth. Therefore, claims made against defendants could result in a penalty repayment of medical bills after settlement.

What Happens if Medicare’s Interests Are Ignored?

The CMS has a right to file suit against any entity to recover benefits that should have been paid to Medicare, regardless of whether the entity is a beneficiary, provider, supplier, physician, attorney, private insurer, etc.5 The provisions of the Act clearly apply to both settlements and judgments. Further, Congress has created a private right of action for double damages.9

Structured Settlements

In the establishment of a Medicare set-aside, the parties must satisfy the administrative requirements of the CMS. Structured settlements are allowed pursuant to the CMS rules promulgated in an Oct. 15, 2004, Policy Memorandum. The use of the structured settlement must be approved by the CMS.

Valuation of the $250,000 Threshold

The use of a structured settlement may trigger the requirement for an MSA where one would not otherwise be required. As discussed above, one of the circumstances in determining whether the Medicare Secondary Payer Act is applicable is whether or not the gross settlement exceeds $250,000, and whether the injured party has a reasonable expectation of being Medicare-eligible within 30 months of settlement. The determination of the $250,000 value is measured by the total to be paid out over the life of the payments, and not by the present value cost of the annuity.10 Special attention should be paid because this is the one circumstance where the use of a structured settlement can actually be harmful to your client. This is because the use of the structured settlement may trigger the applicability of the statute when a lump sum valuation would not.
Has This Been Tested in the Courts?

In United States of America v. Baxter International, 345 F.3d 866 (11 Cir. 2003), the court was faced with a claim by the government that Medicare had a right of recovery in the class action involving breast implants. In Baxter, supra, the parties had resolved the class action lawsuit without protecting Medicare’s right of recovery. The United States Court of Appeals determined that Medicare did have a right of recovery. The court also expanded and explained the reach of the Medicare Secondary Payer Act with an excellent discussion of congressional intent and the obligation imposed by the statutory scheme. The court noted the congressional intent of reducing federal health care costs and shifting the burden to those who are rightfully the primary payers. The court also observed that the statutes are complex and have created confusion.11

How Do I Deal with This After Obtaining a Judgment or Participating in a Mediation or Settlement Discussion?

Start by explaining it to the client. There are no options, no exceptions and no prudent alternatives in dealing with the problem. The simplest solution after recognizing the applicability of the problem is mentioned above. Go to the “search engine” and find a company that specifically deals with the set-aside issue. The company will assist you in navigating through this complex medical and Medicare bureaucracy. Under some circumstances, CMS may waive recovery if either the probability of recovery or the amount involved is considered by CMS to be insignificant.12

The CMS will consider procurement expenses when certain factors have been met. First, the third-party payment must have been made as a result of a settlement or judgment. Secondly, the procurement costs (legal fees and expenses) were incurred because the claim was disputed. Lastly, the plaintiff was required to incur this expense in order to obtain a recovery.13

Prepare Ahead

If you are the attorney for either plaintiff or defendant, you must work through the analysis to see if your case is subject to the MSPA.

If the case does fit the criteria, determine what amounts have been paid in the past. Put Medicare on notice of the potential secondary recovery. Then, hire the entity that specializes in computing the amount of the set-aside. Explore with the entity the appropriate funding mechanism.

Be certain that all the parties entering the mediation or negotiation are aware of the issue. They also must realize that each and every one involved will be at risk for penalties if the issue is not resolved.

Conclusion

The MSPA and regulations have teeth. Therefore, claims made against defendants could result in a penalty repayment of medical bills after settlement. The plaintiff that received the settlement funds is subject to penalties and the lawyers may be as well. Claims may be made against the lawyers and health care providers for recovery of funds paid by Medicare.

A claim made against a defendant may result in a “three-fold” payment of medical bills. One such example occurs when the original settlement with a plaintiff constitutes one payment, and the paying party has been subject to a penalty of two times the medical bills. This would result in the “three-fold” payment.

The plaintiff’s counsel should have worked out the set-aside issue prior to a mediation or settlement. This will help the client to understand that the entirety of the settlement fund does not necessarily get “pocketed.”

The purpose of the MSPA is to enforce responsibility for the payment of benefits to private payers under the defined circumstances. It bears repeating — the statutory and regulatory scheme has teeth.

FOOTNOTES

8. See for example, 42 C.F.R. § 411.24 (b), (e) and 42 C.F.R. § 411.26 (2006).
11. Id. at 875.

ABOUT THE AUTHOR

Robert S. Dampf began his mediation practice in 1989, mediates approximately 260 cases per year, and has mediated in excess of 3,000 cases. In addition to having trained in mediation and the negotiation process, he has lectured and given CLE seminars on mediation in California, Louisiana, Florida, Missouri, Texas and Ireland. He graduated, cum laude, from Southern Methodist University in 1976 and from Louisiana State University Paul M. Hebert Law Center in 1979. He has been active in the Louisiana State Bar Association, having served as treasurer and in the House of Delegates and on the Board of Governors. He is active in the Southwest Louisiana Bar Association (president, 1996-97) and is associated with Stockwell, Sievert, Viccellio, Clements & Shaddock, L.L.P., in Lake Charles and with Perry, Dampf, Watts & Associates, a statewide mediation company. (P.O. Box 2980, Lake Charles, LA 70602-2980)
This article addresses the current state of the law in Louisiana in relation to organ donor statutes, advance directives and the definition of death. Public policy issues surrounding these delicate topics are outside the scope of this article.

A review of the statutory framework regarding these subjects leaves the distinct impression that while the individual acts are well thought out and written, they would benefit from coordination to resolve some conflicts and gaps between the statutes. The interested reader is directed to the applicable cited statutes, the text of which has been omitted for the sake of brevity.

Background

There is a tremendous shortage of suitable tissues and organs available on the national and local scenes for use in organ transplants and other medical procedures requiring the harvesting of human tissue and/or body parts. The issues of allocation and rationing of resources raised by this crisis are both fascinating and potentially explosive, and provoke strong sentiments. For an excellent discussion of this problem, and other information on organ transplant issues, see Barry F. Furrow, Thomas L.

The relatively limited knowledge of the American public, together with a relatively unsuccessful attempt to promote organ and tissue donation, has created a crisis in this arena. While most Americans are generally aware of organ transplants, many individuals are not aware of the value of other body tissue, including ligaments, corneas, skin and even bone. The value of these tissues has, however, been recognized by some individuals who have participated in the illegal harvest of body parts from funeral homes. See, e.g., “Body Parts Scandal,” Associated Press, Tom Hayes, Houston Chronicle, Jan. 24, 2006. This lack of public knowledge is surprising, given the time that transplant procedures have been taking place. For an interesting review of some statistics about transplant history and procedures in general, and within Louisiana in particular, see www.yourlegacy.org.

One thorny issue, from an ethical perspective, has been the rationing of these scarce resources. According to the UNOS Web site, www.unos.org, as of Jan. 6, 2006, there were 90,728 individuals in the United States awaiting a transplant. This figure contrasts sharply with the number of willing donors, that, as of Jan. 6, 2006, was 12,084. Heated ethical debates have arisen as a result of this extreme shortage about how these scarce resources should be rationed. See *Health Law Cases, Materials and Problems*, *supra*. One method supported in the literature on the subject is preference in receipt of organs based upon willingness to become an organ donor. The leading organization in the United States promoting this methodology is LifeSharers (www.lifesharers.org), whose mission statement provides: “Members agree to donate their organs when they die. They also agree to offer them first to fellow members. This creates an incentive for others to donate their organs and join LifeSharers.”

Louisiana is beginning to confront the legal issues and problems of finite resources but high demand. La. R.S. 17:2353 provides that any organ procured in Louisiana will first be offered to a Louisiana resident. Several areas of Louisiana’s statutory scheme directly or indirectly affect the questions of when and from whom organs can be obtained, what liability may attach to the medical professionals involved, what authority a person or that person’s family may have to allow or object to the use of particular organs, and many other issues.

**The Statutory Scheme**

Louisiana has chosen to make organ donation a favored practice under its legislative scheme. Four Titles of the Louisiana Revised Statutes deal with organ donation:

- the Anatomical Gift Act, La. R.S. 17:2351 *et seq*.;
- the Louisiana Natural Death Act, La. R.S. 40:1299.58.1 *et seq*.;
- the Motor Vehicle Regulatory Act, La. R.S. 32:410, *et seq*.; and
- the definition of death, La. R.S. 9:111.

**Motor Vehicle Regulatory Act**

Most citizens’ first exposure to this subject may well come during their driver’s license application. Title 32 Motor Vehicles and Traffic Regulation § 410 is a lengthy statute that deals with driver’s license applications and the availability to indicate one’s desire to be an organ donor. The Legislature attempted to make it relatively simple to become an organ donor and be registered as such on

Since organs and other body parts and tissue can only be harvested upon the death of the donor, it becomes critical to determine when death occurs. Death is defined in La. R.S. 9:111, and the Legislature has adopted a bifurcated test for determining the time of death. Obviously, in the event of “heart-lung” death, in the absence of medical intervention, the brain is soon to follow, simply because of the lack of oxygen.
the state registry. Unfortunately, however, a review of the more detailed provisions in Title 17 becomes necessary in order to determine the actual mechanics of executing a valid donation of one’s organs at the time of death.

It is noteworthy that R.S. 32:410B(1)(a) specifically uses the disjunctive when referring to the methods available for the donation of organs, and refers to usage of the methodology set out by the Anatomical Gift Act, R.S. 17:2351, et seq., but does not provide any additional method for donating organs in Title 32. The reasonable conclusion then is that the only effective method of donation of organs is as set out in the Anatomical Gift Act. Also, the Legislature specifically references R.S. 40:1299.58.1 et seq. relative to advanced directives regarding life-sustaining procedures. Unfortunately, these statutes do not always agree.

Anatomical Gift Act

The Anatomical Gift Act provides for making a gift of body parts in La. R.S. 17:2354 through a valid will or through a stand-alone document executed by the donor in the presence of two witnesses. It specifies that any gift made becomes effective at the death of the donor, La. R.S. 17:2352. The act allows donation of a particular organ or organs to a specific person, hospital or physician, to an organ procurement organization, or to anyone listed on the organ transplant list, La. R.S. 17:2353. It gives broad personal discretion should the donor wish to specify a recipient.

The act further specifies that organs harvested in Louisiana are to be utilized for Louisiana recipients on a preferential basis, La. R.S. 17:2353. This is in contrast to the national rationing process that provides for distribution anywhere in the nation, based on a needs priority formula. This act also provides for immunity to physicians and other health care providers participating in the organ procurement process, La. R.S. 17:2357.

The Anatomical Gift Act also allows the decision to donate to be made by certain exclusive classes of persons, listed in an order of preference, after the death of the individual. The first class of persons listed has the right to make the decision to donate or not, to the exclusion of all lower classes. La. R.S. 17:2354.4 provides in pertinent part:

H. The following persons shall be requested to consent to a gift, in the order of priority stated:

1. The spouse if one survives; if not,
2. An adult son or daughter,
3. Either parent,
4. An adult brother or sister,
5. The curator or tutor of the person of the decedent at the time of his death,
6. Any other person authorized or under obligation to dispose of his body.

I. When a donation is requested, consent or refusal need only be obtained from the person in the highest priority class available after best efforts have been exercised to contact those persons in a higher priority class. If there is more than one person within an above named class, then the consent to the donation shall be made by all members of that class reasonably available for consultation.

This classification sets the stage for a conflict between the Anatomical Gift Act and the Louisiana Natural Death Act.

Definitions of Death

Since organs and other body parts and tissue can only be harvested upon the death of the donor, it becomes critical to determine when death occurs. Death is defined in La. R.S. 9:111, and the Legislature has adopted a bifurcated test for determining the time of death. Obviously, in the event of “heart-lung” death, in the absence of medical intervention, the brain is soon to follow, simply because of the lack of oxygen. If artificial means of support have been utilized, the statute

While there is little doubt that there will be many difficult questions presented to our courts for resolution in this fascinating area of the law, and while there is little question that these will be controversial questions in light of the religious, ethical, moral and personal issues which are raised, the Louisiana Legislature has done a good job of providing a framework within which to make those decisions.
contemplates a declaration of death based upon an “irreversible total cessation of brain function.” This necessarily means that death is pronounced only upon cessation of function of the whole brain. This becomes a critical issue in the cases of “higher brain death” which involves loss of cerebral function, with continued brain stem function, thereby allowing the patient to have the capacity to breathe, maintain heart activity and react reflexively. However, that same individual would have no cognitive ability.

Since the Louisiana Legislature adopted the two-pronged test, there can be no question definitionally, since a person breathing on his own, even if he had experienced higher brain death, would not be dead under the act’s definition. Also, when the person’s organs are to be used in a transplant, “then an additional physician, . . . not a member of the transplant team, must make the pronouncement of death.”

**Louisiana Natural Death Act**

The careful medical practitioner, by a reading of these statutes, can now conclude that if a person has executed an anatomical gift document, either through a valid will or a stand-alone document, that person’s organs and other tissues intended for donation are available for harvesting. However, several problems exist for the practitioner: first, who determines whether the will is valid; second, without access to the stand-alone document, how is the health care professional to know which organs or tissues are available for harvest; and, finally, in the event the patient has been placed on life support systems, who has the authority to make the decision to remove those systems. The need for statutory immunity is readily apparent.

An examination of the definition of death reveals that removal of an individual from life support is certainly contemplated by the statutes. The actual mechanism for making this decision is found in the Louisiana Natural Death Act, La. R.S. 40:1299.58.1, et seq. This act allows a competent individual to authorize the withholding or withdrawing of life-sustaining procedures if that person has been properly informed, under the normal standards of informed consent. The statute also makes clear that action under this statute will not be construed to be euthanasia and will not be considered suicide. La. R.S. 40:1299.58.10. This is significant in view of Louisiana Constitutional Article 1, section 20, which states in pertinent part that, “no law shall subject any person to euthanasia, . . . .” The key provision of the act that allows it to pass muster in light of this provision is that the act does not allow a third person to deny treatment for a patient which would reverse that patient’s condition, (La. R.S. 40:1299.58.2(8) defining “terminal condition”), but instead allows the withholding of “extraordinary” treatment which would only delay the imminent death process. For an interesting discussion of this issue, see “Louisiana’s Natural Death Act and Dilemmas in Medical Ethics,” Michael Vitello, 46 La. L. Rev. 259 (1985). The distinction seems to be between some active intervention to bring about death quicker versus a refusal to treat the patient so that the patient can naturally die. Most commentators now feel there is little, if any, ethical distinction between withholding aid versus some active intervention. See, *Health Law Cases, Materials and Problems, supra.*

The Natural Death Act, similar to the Anatomical Gift Act, in connection with the donation of organs, provides a method for obtaining consent to withdraw or withhold life-sustaining measures. The decision is made by an individual or class specified by the act and is reserved to the highest class of decision makers available. The Natural Death Act, in La. R.S. 40:1299.58.5 (2) and (3), designates the classes of persons who “have the authority to make a declaration for the patient in the event of the patient’s inability to do so.”

When comparing the classes created under the Natural Death Act and the Anatomical Gift Act, several key differences are noted (see chart above).

The first major difference is that the judicially appointed tutor or curator occupies a very high rank in the National Death Act, second only to a person previously designated by the patient, while the tutor or curator is near the bottom of the class structure under the Anatomical Gift Act.

The second difference deals with the Anatomical Gift Act’s referral to the surviving spouse, as opposed to the National Death Act’s referral to the “patient’s spouse not judicially separated.” It remains to be determined how this will be interpreted in view of the change in divorce laws and procedures. Is a person who has filed a Civ.C. Art. 102 divorce action “judicially separated” under this provision?

Only one parent’s consent is needed to harvest organs, but both parents’ consent is needed to withhold or withdraw life-sustaining measures. An adult brother or sister occupies the next class under the Anatomical Gift Act, while a “sibling” qualifies under the National Death Act. Does sibling include half, step and adoptive siblings; does it include minors since it does not specify adult as does the designation in the Anatomical Gift Act?

Both acts have “good faith attempt” provisions that may obviate many of these...
questions as a practical matter. As a matter of legislative structure, it would seem to be preferable to adopt totally consistent approaches to consent under both these acts unless there is a clearly stated legislative purpose for granting this authority in a different order to somewhat different classes.

Jurisprudence

Litigation in Louisiana has been relatively sparse, but there will be controversies to be decided by the court under these various legislative schemes. One question that has arisen under the Natural Death Act is whether a particular action is a “life-sustaining procedure” or “comfort care.” See, e.g., Pettis v. Smith, 880 So.2d 145 (La. App. 2 Cir. 8/13/04), writ denied, stay denied, 882 So.2d 551 (La. 8/18/04), holding that artificial nutrition and hydration did constitute life-sustaining procedures, and not comfort care, and therefore the decedent’s living will constituted an informed consent for the withdrawal of same.

Another interesting case is Perrier v. Bistes, 650 So.2d 786 (La. App. 4 Cir. 1995). In that case, the decedent’s husband, in keeping with the exclusive class of decision makers under the statute, made the decision to allow the physician to withdraw life support. The decedent had not executed a living will declaration or other permitted advance directive. After the decedent then died, the decedent’s adult children filed suit against their father and the hospital, alleging a cause of action for violation of the Louisiana Natural Death Law. The court dismissed their lawsuit on an exception of no right of action since the plaintiffs were not the legal representatives of the decedent under the statute.

The court in Causey v. St. Francis Medical Center, 719 So.2d 1072 (La. App. 2 Cir. 1998), recognized the right of the next of kin under La. R.S. 40:1299.58.5 to make withdrawal of life support decisions, but found, “The Court as the protector of incompetents, however, can override an intolerable choice by a surrogate decision-maker,” citing In re P.V.W., 424 So.2d 1015 (La. 1982). This reliance was interesting since the In re P.V.W. case was decided before the enactment of the Louisiana Natural Death Act and was decided on the constitutional principles of the right to privacy of the individual as weighed against the state’s legitimate public interest in the protection of life. See, e.g., In matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

An issue that has not been dealt with through any reported decision is how a physician would obtain authority to withdraw life-sustaining measures if there has been a declaration under Title 32 and/or Title 17, but there is no advance directive under Title 40, and an incompetent’s representative under La. R.S. 40:1299.58.5 refuses to grant authority to withdraw life-sustaining measures. Will there be liability for a physician’s unilateral decision to withdraw those measures? Will our courts face a case like Quinlan? Will the immunity provisions of the organ donor statute under Title 17 or Title 32 shield the physician? These and many other questions, if not dealt with by the Legislature, will in due course be presented to our courts.

Conclusion

While there is little doubt that there will be many difficult questions presented to our courts for resolution in this fascinating area of the law, and while there is little question that these will be controversial questions in light of the religious, ethical, moral and personal issues which are raised, the Louisiana Legislature has done a good job of providing a framework within which to make those decisions. The worthwhile objectives of providing healthy organs and tissue for transplant to others, allowing individuals the autonomy to make end-of-life decisions, and of providing a logical methodology by which these objectives can be carried out has been largely achieved. One could say that now is a great time to live, or perhaps even a great time to die.

ABOUT THE AUTHOR

Judge William J. (Rusty) Knight sits on the 22nd Judicial District Court bench. After graduating from Louisiana State University Paul M. Hebert Law Center, he practiced law from 1976 until taking the bench in January 2003. He is currently pursuing his master’s degree in judicial studies from the University of Nevada, Reno, in association with the National Judicial College. This article is an adaptation of a paper prepared for the Health Law Issues course at that institution with Professor Richard A. Bjur, Ph.D. Thanks also to staff attorney Menette Burns for her editorial assistance. (701 N. Columbia St., Room 2062, Covington, LA 70433)
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Is a Cause of Action Against a Product Manufacturer for Negligent Training Barred by the LPLA?

By Andrew D. Mendez and Justin P. Lemaire

On its face, the Louisiana Products Liability Act (LPLA or the Act), La. R.S. 9:2800.51–.60, sets forth the exclusive theories of recovery against a product manufacturer for “damage caused by its product.” Indeed, the second sentence of the Act could be read as an express statutory statement of that principle.¹ Thus, the Act may appear to foreclose a simple negligence claim against a product manufacturer for an injury related to its product. Notwithstanding the language of the LPLA, however, a negligence claim against a product manufacturer for its training of another in the use of its product may be viable in Louisiana. This article discusses such a theory of recovery against a manufacturer.

Negligent Training Theory of Recovery

A party asserting a negligent training theory of recovery could argue that, regardless of whether a manufacturer’s product is “reasonably safe” or “unreasonably dangerous,” a manufacturer should be held liable for damage that occurs as a result of its negligent training of another in the use of its product. If such a theory were accepted by the court, it would be significant for plaintiffs and manufacturers alike because it could open a manufacturer to a negligence standard of liability (in addition to the LPLA standard).
Many product manufacturers undertake to train others in the use of their products. (Note that as used here, “training” means an undertaking by the manufacturer above and beyond providing written warnings or directions in an owner’s or instruction manual.) In some cases, the manufacturer may train third parties, who in turn install or maintain the product for customers. In others, the manufacturer may train customers directly. Such training may be done at additional cost or included in the purchase price. In any event, these practices are widespread. Even a cursory search of the World Wide Web will uncover numerous manufacturers who offer training in the use of their products, including manufacturers of products that are potential sources of personal injury claims if the products are misused, such as chainsaws, construction equipment and monitoring systems. A plaintiff could argue that, in addition (or in the alternative) to the four theories of liability found in the LPLA, a manufacturer should be held liable if it negligently trained another in the use of its product, the product was misused by the trained party, and an injury resulted from the misuse. However, such a theory of liability is viable only if not foreclosed by the LPLA’s exclusive remedy provisions.

Scope of the Louisiana Products Liability Act

As noted above, the Louisiana Products Liability Act “establishes the exclusive theories of liability for manufacturers for damage caused by their products.” Thus, a claimant arguably may not recover from a manufacturer for injuries caused by a product under any theory other than those covered in the Act. No express exception is found in the statute for claims based on negligent training of another, or any other non-enumerated theory.

The Act further provides that the manufacturer is liable for damage to a claimant that is proximately caused by a characteristic of the product that renders it “unreasonably dangerous,” provided that the damage arose from a reasonably anticipated use of the product. An LPLA claim, then, applies to claims with two crucial elements:

- the claim is asserted against a manufacturer;
- the damage was caused by an unreasonably dangerous product.

The LPLA supplies four possible ways that a product can be “unreasonably dangerous” for purposes of the Act:

- in construction or composition (i.e., a manufacturing defect or flaw);
- in design;
- failure to provide adequate warning of a potentially dangerous characteristic; and
- failure to conform to an express warranty.

These are expressly identified as the exclusive grounds for finding a product is unreasonably dangerous, and thereby subjecting the manufacturer to liability under the Act for injuries attributable to the unreasonably dangerous condition.

Very little authority exists on the issue of whether a negligent training theory of recovery against a manufacturer is foreclosed by the LPLA. Whether such a claim is viable may turn on whether, or both, of the two crucial elements of an LPLA claim mentioned above: specifically, whether a negligent training claim lies against a manufacturer defendant who acted in another role separate and apart from that of manufacturer, or whether the damages at issue were not caused by the product or a defective or unreasonably dangerous condition thereof.

The Louisiana Supreme Court has weighed in on the first issue and left open the possibility of holding a product manufacturer who undertakes to train another liable on a negligence theory. In the matter of In re Kaiser Plant Explosion at Kaiser, the Louisiana Supreme Court granted a supervisory writ and reversed summary judgment in favor of a product manufacturer who had successfully argued in the 1st Circuit Court of Appeal that a negligence cause of action, on the basis of the manufacturer’s alleged negligent training of another, was barred by the LPLA’s exclusive remedy provisions. In that case, a product manufacturer moved for partial summary judgment to dismiss a negligence cause of action based on its alleged negligent training of another in the use of its product, arguing that the LPLA was the exclusive remedy and thus barred a negligence cause of action. The trial court denied the motion, but a unanimous panel of the 1st Circuit Court of Appeal granted a writ application by the manufacturer and agreed with its argument, holding that partial summary judgment dismissing the negligence claim on the basis of the LPLA’s exclusive remedy provision was appropriate. Plaintiff sought a writ from the Louisiana Supreme Court, which granted it and unanimously reversed the 1st Circuit. The Supreme Court held, without much elaboration, that a genuine issue of material fact existed as to whether the respondent “acted in a role other than manufacturer.”

The Supreme Court’s short memorandum opinion in In re Kaiser Plant Explosion represents the only guidance to date on whether a negligent training claim is viable in light of the LPLA. The authors could find no other reported decision of a Louisiana state court, or any federal or state court applying Louisiana law, which has addressed the issue. The Louisiana Supreme Court’s decision suggests that a manufacturer may be liable on a negligence theory if it wore multiple “hats,” one as manufacturer and one as trainer. In other words, the Supreme Court’s ruling suggests that where a claim sounds in negligent training, the manufacturer can be sued not only as a manufacturer but also (or in the alternative) as a trainer, whose status as a manufacturer may merely be coincidental. Because the LPLA provides for theories of liability against manufacturers, its statutory exclusive remedy provisions arguably may not apply where a claim is against a party whose alleged negligence was in the course of performing a role other than “manufacturer.”

Another argument why a negligent training claim would not fall under the LPLA (so as to be beyond the scope of
exists if:

- the product materially deviates from the manufacturer’s specifications or performance standards, or from otherwise identical products created by the same manufacturer;16
- a feasible alternative design is available which the manufacturer should have used17 and would prevent the injury suffered by the plaintiff,18 or
- the product injured plaintiff because it failed to conform to an express warranty which induced the plaintiff to purchase the product.19

A product has a “dangerous characteristic” for the LPLA purposes if it has a characteristic which could cause damage, and the manufacturer fails to use reasonable care to provide adequate warning of the characteristic and resulting danger to those who will use the product.20 With either a “defective condition” or “dangerous characteristic,” the plaintiff asserting an LPLA claim would contend that there is something wrong with the product that resulted in injury.

When the claim is negligent training, however, a plaintiff would not necessarily allege that the product itself was defective or had a dangerous characteristic. Rather, the product may have “caused” the damage only in the sense that it was improperly used due to negligent training of the user, and consequently served as a mechanism of injury. Nonetheless, the exclusive remedy provision of the LPLA would arguably still apply to such claims, as those claims could ultimately still be construed as based on damage caused by a product, and therefore within the ambit of the Act’s exclusive remedy provisions.

As noted, the authors were unable to find any authority under Louisiana law that sheds light on the issue of whether a Louisiana court would find the foregoing reasoning persuasive. Some foreign authority, however, suggests claims may fall outside the purview of product liability where damages were not caused by the product itself. For example, in Universal Underwriters Insurance Group v. Public Service Electric & Gas Co.,21 a federal court, applying New Jersey law, addressed a claim that a building was destroyed by fire partly caused by an electric utility’s failure to adequately train and instruct its employees, resulting in inadequate emergency response services.22 The defendant utility argued the New Jersey Products Liability Act (NJPLA) provided the exclusive theory of recovery against it because the claim was based on a problem with a “product” the utility provided, namely, electrical service. Putting aside the question of whether providing electricity is properly construed as a “product” in the first instance, the court disagreed with the utility’s argument that the NJPLA provided the plaintiff’s exclusive remedy, noting that:

[b]ecause this conduct relates to maintenance of the electrical service, and not a defect inherent in the product, it does not qualify as a “harm caused by a product,” and is therefore not cognizable under the NJPLA.23

Whether the same result would be reached under Louisiana law to a negligent training claim against a product manufacturer remains to be seen.

**Conclusion**

While the Louisiana Products Liability Act ostensibly provides the “exclusive theories of liability against manufacturers for damage caused by their products,”24 the Louisiana Supreme Court has recognized that a negligence claim may nonetheless lie against a manufacturer who undertook to train another in the use of its product, and the trainee then improperly uses the product and injures the plaintiff. In addition, it is yet to be determined whether Louisiana courts would accept an argument that a negligence claim for an injury caused by a negligently-trained party’s improper use of a product is outside the LPLA’s scope, because this scenario would not necessarily involve either an “unreasonably dangerous” product or a product with a “defective condition.” How these issues are ultimately resolved by the Louisiana courts could have a substantial impact on defendant-manufacturers and plaintiffs alike.

**FOOTNOTES**

2. For example, training could include manufacturer-sponsored training seminars, phone or Internet terminal supports and the like.
3. These statements are based on a one-hour survey of the World Wide Web using the Google...
search engine and the search terms “manufacturer (training or train) (use or operate or implement or implementation or install or installation).” For specific examples, see STIHL Inc., *Know How*, at www.stihlusa.com (last visited Dec. 13, 2005) (chainsaws); Caterpillar, *Caterpillar Equipment Training Solutions*, Fall 2004, available at www.cat.com (construction equipment); Met One Instruments, *Frequently Asked Questions*, at www.metone.com/faq.htm (monitoring instruments and systems).

4. La. R.S. 9:2800.54(B).
5. La. R.S. 9:2800.52.
6. Id.
7. La. R.S. 9:2800.54(A).
8. La. R.S. 9:2800.54(B).
9. In re Kaiser Plant Explosion at Kaiser, 2001-2555 (La. 9/26/01), 797 So.2d 678.

The authors’ firm represented the writ applicants in the Louisiana Supreme Court, and in the appellate and trial courts below. The product at issue in the writ practice discussed here was a programmable relay used in transmission of electrical power at an industrial facility, which was alleged to have been improperly programmed by a third party (an electrical engineering consulting firm) that had been trained in the relay’s use by the manufacturer.

10. The authors’ firm represented the writ applicants in the Louisiana Supreme Court, and in the appellate and trial courts below. The product at issue in the writ practice discussed here was a programmable relay used in transmission of electrical power at an industrial facility, which was alleged to have been improperly programmed by a third party (an electrical engineering consulting firm) that had been trained in the relay’s use by the manufacturer.

11. In re Kaiser Plant Explosion, 797 So.2d at 678.
12. La. R.S. 9:2800.52.
13. La. R.S. 9:2800.52, .54(B).
15. See, e.g., Walsh v. Technotrim, Inc., 34,355 (La. App. 2 Cir. 1/24/01), 778 So.2d 728.

La. R.S. 9:2800.55.
17. La. R.S. 9:2800.56 contains a nuanced balancing test to determine whether the manufacturer should reasonably have adapted an alternative design.
22. Id. at 747.
23. Id. at 748 (emphasis supplied).

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For the seventh 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 LSBA President Marta-Ann Schnabel, LSBA President-Elect S. Guy deLaup, Louisiana Supreme Court justices and P&QL Committee Chair and Vice Chair Shelley Hammond Provosty and Barry H. Grodsky, respectively. 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 Louisiana Supreme Court Justice John L. Weimer III, LSBA President-Elect S. Guy deLaup and P&QL Committee Chair Shelley Hammond Provosty.

Opening remarks at the Loyola University Law School orientation were given by Louisiana Supreme Court Justice Catherine D. Kimball, LSBA President Marta-Ann Schnabel and P&QL Committee Chair Shelley Hammond Provosty.

Opening remarks at Tulane University orientation were given by Louisiana Supreme Court Justice Bernette J. Johnson, LSBA President Marta-Ann Schnabel and P&QL Committee Vice Chair Barry H. Grodsky.

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. (See sponsors’ list on page 189.)

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Louisiana Supreme Court Justice Catherine D. Kimball addressed Tulane Law School students.

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Panelists preparing to meet with students at Louisiana State University Paul M. Hebert Law Center.

Louisiana Supreme Court Chief Justice Pascal F. Calogero, Jr. addressed Loyola University Law School students.

Louisiana Supreme Court Justice John L. Weimer III, left, and Louisiana State Bar Association Professionalism and Quality of Life Committee Chair Shelley Hammond Provosty.

Continued next page
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Continued next page


Southern University panel, from left, William H. Arata, Tarvald A. Smith, Cheryl Hall, Hon. Jewell E. Welch, Jr., Mary D. O’Brien and Linda Law Clark.
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Teaching Louisiana Children to Be Good Citizens

By Hon. Karen Wells Roby
President, Louisiana Center for Law and Civic Education

The general consensus of American parents and educators is that teaching our children about the history of this country and what it means to be a citizen are vitally important. And yet, Louisiana schools require only half of a credit hour in civics before a student can graduate from a high school.

To understand the important implications of where our students are today, a national report was issued by the Center for Information and Research on Civic Learning and Engagement. The report titled “The Civic Mission of Schools” began with the following observations:

For more than 250 years, Americans have shared a vision of a democracy in which all citizens understand, appreciate, and engage actively in civic and political life. . . . In recent decades, concern has grown about the increasing numbers of Americans who are disengaging from civic and political institutions. Young people reflect these trends as they are not as interested in political discussion and public issues.

However, the purpose of teaching Louisiana children civics is to instill in them the cognitive and participatory skills needed to function in a democracy. By requiring only half of a credit hour of information in the area, Louisiana has not been doing an adequate job in helping its students learn how to participate in our democracy. Consequently, a large segment of our youth today operate outside of the democracy and Louisiana citizens have seen a corresponding increase in crime and school dropout rates.

While no one will dispute that math and science are important to the future of the country, civics is equally as important, for, without it, how long could our nation survive in the form intended by our founding fathers?

The Louisiana Center for Law and Civic Education (LCE), through its nationally recognized programming, has been quietly working to improve the content base and participatory knowledge of Louisiana students by providing in-service training to Louisiana teachers in civics, bringing classrooms to the courts, and bringing lawyers, law enforcement officers and judges to the classrooms. The organization has been instrumental in creating three Law Signature Schools in the state.

As members of the legal community who fight for the rights of others daily, each one of us has a lot to offer and can help enhance students’ knowledge of their rights, duties and obligations as citizens. Each one of us can help improve the content base requirement by going to Louisiana lower, middle and high school social studies classes with the goal of explaining how government functions.

As the LCE president for the 2006-07 year, I will continue working to achieve the mission of the organization through the implementation of three new programs. The “Order in the Court’s Program” is designed to enhance the public’s awareness and understanding of the Louisiana judicial system through classroom and/or courtroom visits and by making lesson plans available to judges and educators and serving as a resource center to Louisiana state and federal judges who want to present programs at schools.

The second program is “Y-VOTE?” This program, conducted in partnership with the Louisiana Secretary of State, serves as a supplement to civics instruction on the importance of the right to vote. Louisiana schools will be encouraged to transform school government elections to a voting experience by securing actual voting booths for student council elections. Student candidates will present their campaign speeches to the student body. Students who are not seeking office can serve as poll watchers as their classmates cast their ballots. Louisiana students also will be encouraged to learn about upcoming federal, state and local elections and to participate in Internet mock elections involving actual candidates.

The third program, “Citizenship and You,” is designed to teach Louisiana students about their rights, duties and obligations as United States citizens. In addition to making lesson plans available to Louisiana educators, the LCE will supplement the learning experience on citizenship by granting Internet access to its “Who Wants to be a Million Dollar Citizen” Web game which reinforces student knowledge on the subject.

Additionally, in partnership with the United States District Court for the Eastern District of Louisiana, area students will be encouraged to observe the naturalization ceremony of immigrants. The naturalization ceremony is held in the court’s Ceremonial Courtroom several times a year.

I look forward to advancing the mission of the Louisiana Center for Law and Civic Education and I welcome the support of the legal community as we press forward toward the mark. For more information on the Louisiana Center for Law and Civic Education, go to www.lalce.org.
Secret Santa
Brightening the holidays for needy children.

During the holiday season, the needs of others are more apparent than at other times of the year. For this reason, the Louisiana State Bar Association/Louisiana Bar Foundation’s Community Action Committee is inviting Bar members and others associated with the legal community to help satisfy these needs by participating in the 10th annual Secret Santa Project.

The Project has identified several agencies that serve disadvantaged 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. However, we have made a special effort to include teenagers, up to the age of 18 years old. The teenagers served by the agencies we have identified are likely to be working to support their families, not to buy gifts for themselves. Thus, we ask that you please support us in supporting these children, even though it may mean a little extra effort on your part.

Participation in the program is fun and easy. Anyone who sponsors a child will receive a child’s Christmas Wish List. Sponsoring Santas will then take the list and go shopping. There is no required minimum or maximum and whatever gifts a child receives through the program will be more than he or she is expecting. Each sponsoring Santa will then bring the wrapped gifts directly to the agency or the Louisiana Bar Center on Thursday, Dec. 7, 2006. Details about gift wrapping, drop off, etc., will be included in the Child’s packet that you will receive.

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 Brooke Monaco, Louisiana Bar Center, 601 St. Charles Avenue, New Orleans, Louisiana 70130.**

This Project not only provides holiday cheer to the less fortunate, but also improves the image of the legal profession by developing ongoing relationships with social service agencies who serve our community and by setting an example of generosity. By participating in this program, you will encourage children to dream!

For more information or questions about the Project, contact Brooke Monaco at (504)619-0118 or bmonaco@lsba.org.

Name: ____________________________________________
Firm/Company: ____________________________________
Address: __________________________________________
City/State/Zip: _____________________________________
Phone: _________________________________
Fax: _________________________________
E-mail: ________________________________________
I would like to sponsor ______ children.

It is most convenient for me to deliver gifts to this area:

- [ ] Designated Agency
- [ ] Louisiana Bar Center

To participate, fax this form to (504)566-0930
As Soon As Possible
The Louisiana State Bar Association’s Law Office Management Assistance Program (LOMAP) is up and running online, offering a variety of resource materials for both new and experienced attorneys. The program is designed to help lawyers increase the quality of legal services they provide to their clients as well as avoid potential disciplinary problems stemming from poor law office management.

At present, LOMAP offers both a lending library and resources online. Members in good standing may browse through the lending library’s selections and borrow up to three titles per session. Attorneys can order the materials online and have them mailed or packaged for pickup at the Louisiana Bar Center, 601 St. Charles Ave., New Orleans. The list of materials currently available covers a variety of topics, from help with procrastination like “Eat That Frog” to “Flying Solo: A Survival Guide for the Solo Lawyer.” Members may review the current list of materials, read the Lending Library Policy or request publications to add to the library, all by going online at: http://www.lsba.org/member_services/lpm.asp.

Other online resources are offered to members and are downloadable. The LSBA’s recently updated Practice Aid Guide: The Essentials of Law Office Management is now available. Other checklists and materials are posted as well. There is also an area with a compilation of links to make it easier for attorneys to find information via the Web.

LSBA President Marta-Ann Schnabel encourages members to utilize the program. “Wayne Lee and I co-chaired the Practice Assistance and Improvement Committee at its inception some years ago, and, while our primary focus at that time was on establishing a program that never fear! Your Bar is here! Let us assist you with your day-to-day practice dilemmas.

practices, online mentoring of new attorneys, and phone consultations available for attorneys seeking law office management assistance. The LSBA’s Practice Assistance and Improvement Committee recently created a subcommittee to work on these additional aspects of the LOMAP program. The Law Office Management Subcommittee consists of Ernest Svenson, Philip G. Hunter and Charles J. Boudreaux, Jr. The Mentoring Subcommittee consists of Brett A. Bonin and Twilia A. Andrews.

“The LOMAP program is an effective tool not only to assist lawyers in their practices but also to prevent lawyer misconduct,” LSBA Professional Programs Director Cheri Cotogno Grodsky said. She also encourages members to use the law office management resources and provide feedback as the program is a work-in-progress.

The LSBA offers other practice assistance services to members, including the Ethics Advisory Service, the Lawyer Fee Dispute Resolution Program and Fastcase, the free online legal research program.
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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 06-RPCC-009

Funds or Property of Missing Client

When a lawyer has lost contact with a client or former client but is still holding funds or other property for that person, the lawyer is obligated to continue to safeguard those funds or property while also making reasonable attempts to make prompt delivery to that person. The effort made to locate the client to effect delivery should be proportionate to the amount at issue. In the event that reasonable search efforts have been or will be exhausted in attempting to locate the missing client, the lawyer should review and consider the Uniform Unclaimed Property Act of 1997, La. R.S. 9:151, et seq.

What is the ethical obligation of a lawyer to a client or former client when the lawyer is holding funds belonging to the client but has lost contact with him?

Rule 1.15

Rule 1.15 of the Louisiana Rules of Professional Conduct (2004) requires: “...a lawyer [to] hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property...”; “[... funds shall be kept in a separate account maintained in a bank or similar institution ...]”; “[... upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person ...]”; and “[... except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive...].” Rule 1.15 thus requires that funds in which the client has an interest be maintained in a separate bank account — i.e., a client trust account, IOLTA unless exempt — and also requires the lawyer to promptly deliver those funds to the client.

Reasonable Attempt to Make Prompt Delivery

Prompt delivery is not always feasible. When the lawyer has lost contact with the client, for example, we believe the Rule mandates reasonable attempts to make prompt delivery.4 The effort made to locate the client to effect delivery should be proportionate to the amount at issue. A letter sent to the client’s last known address is an obvious starting point. Additional steps which should be considered include telephone calls to all phone numbers known or discoverable for the client, the client’s family members, friends, acquaintances, co-workers or neighbors. Likewise, sending letters to all known or discoverable addresses for those same persons, seeking information about the client’s current whereabouts, might be appropriate. Internet “people finder” search engines, court records, Social Security death benefit records,5 the U.S. Postal Service6 and/or driver’s license/vehicle registration records might inexpensively and without major effort help to locate the missing client. It would also be prudent to periodically make renewed efforts of a similar nature to attempt to locate the missing client in order to deliver the funds, unless doing so would clearly be futile.7

If the funds being held are substantial in amount, reasonable attempts might include purchasing advertisements in a newspaper of general circulation, as curators ad hoc typically do, visiting the client’s last known address to interview...
the current residents and neighbors, or even hiring a private investigator to search for the missing client. Naturally, if the expense of performing those efforts would likely equal — if not exceed — the total amount of the funds being held, such measures would not be appropriate, as they would effectively negate the value of the efforts to deliver the funds to the client.

Also, if the funds are substantial, or it is expected that the period of time during which they will be held will be lengthy, the funds may be placed in an interest-bearing account.8

**Continue to Hold or Not?**

In the event that reasonable search efforts have been or will be exhausted in attempting to locate the missing client, the lawyer should review and consider the Uniform Unclaimed Property Act of 1997, La. R.S. 9:151, et seq. There does not appear to be any other law, procedure or policy which would allow the lawyer to donate to charity, confiscate or otherwise dispose of the client’s funds when the client remains missing and cannot be found.

**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.


3. Rule 1.0(h) of the Louisiana Rules of Professional Conduct (2004) defines “reasonable”: “... reasonable or reasonably when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer. . . .”

4. See also Rule 1.3 of the Louisiana Rules of Professional Conduct (2004), which indicates that “... a lawyer shall act with reasonable diligence and promptness in representing a client . . . .”

5. Available online at http://www.ntis.gov/products/ssa-online.asp?loc=4-0-0-limited. At the time of publication, the cost for a single search was $10.

6. The post office serving the last known address for the missing client may be able to provide information in response to a letter from a lawyer with a legitimate need, even though such information is not generally divulged to the public.

7. Id., Rule 1.3.

8. Id., Rule 1.15. See also Iolta Rules, effective Jan. 1, 1991, included as part of Rule 1.15: “... (3) The following principles shall apply to clients’ funds which are held by attorneys and firms . . . (b) Upon the request of the client, earnings may be made available to the client whenever possible upon deposited funds which are neither nominal in amount nor to be held for a short period of time; however, traditional attorney-client relationships do not compel attorneys either to invest clients’ funds or to advise clients to make their funds productive . . . .” It is suggested that the client or former client would choose to earn interest on such sums, if available and presented with that option.

**Alcohol and Drug Abuse Hotline**

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

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<td>Baton Rouge</td>
<td>Steven Adams</td>
<td>(225)753-1365, (225)924-1510</td>
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<td>(225)751-7927, (225)753-3407</td>
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<td>(225)715-5438, (225)744-3555</td>
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<td>Lafayette</td>
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**The Lawyers Assistance Program, Inc. provides confidential assistance with problems such as alcoholism, substance abuse, mental health issues, gambling and all other addictions.**
Despite speaking on professionalism for many years, it always seems difficult to approach this topic without appearing to proselytize or seem pedantic. When I have been asked to speak on professionalism at continuing legal education seminars, I have always been aware of the skepticism and cynicism of a group of experienced and seasoned lawyers who are being required to listen to another lawyer speak on professionalism as if the lecturing lawyer invented the concept of professionalism (and perhaps even the Internet) and is on a personal mission to spread “the good word of professionalism.” To remain mindful of this negative perception, I always think of a classic Woody Allen quip: “Those that can’t do, teach; those that can’t teach, teach P.E.; and those that can’t teach P.E., speak on professionalism.”

So, why read any further? Because it is not my intent to preach on professionalism. Rather, this article contains a summary of traits of professionalism that have been recognized by legal scholars and jurists alike. It should come as no great surprise that a majority of these rules or principles are set forth in the Louisiana State Bar Association’s Code of Professionalism. Many of these “rules” of professionalism are often simply overlooked by the offending attorney; however, whoever happens to be on the receiving end of such unprofessional conduct rarely forgets such an encounter. So, how do we avoid acting unprofessionally? Perhaps, a good start would be to adhere to the following judicially recognized rules of professionalism.

1 Act Professionally in Depositions

In 2004, Article 1443 of the Louisiana Code of Civil Procedure was amended to impose rules of professionalism in taking depositions. These amendments were intended to ensure professional conduct by attorneys during depositions. The 2004 amendments resulted in four changes and/or clarifications with respect to the manner in which depositions are conducted. These changes addressed (1) proper objections during depositions; (2) mandatory professional conduct during depositions; (3) the power of the court to regulate deposition conduct; and (4) the limited grounds for instructing a witness not to answer a question.

The amendment to Article 1443 prohibits “speaking objections” and requires that such objections be made solely for the purpose of stating the legal basis of the objection. All counsel must “cooperate with and be courteous to each other and to the witness and otherwise conduct themselves as required in open court . . . .” This amendment codifies the obligation of all counsel attending the deposition to treat each other and the witness, and otherwise conduct themselves, in a professional manner as though they were in open court. This provision also serves as a basis for finding counsel in contempt of court. In addition, this amendment provides that “counsel . . . shall be subject to the power of the court to punish for contempt.” This provision empowers the court with the authority to invoke sanctions for improper and/or unprofessional conduct.

2 Stipulate to Matters Not in Dispute

With complaints about the increase in legal expenses and the delays caused by protracted litigation, this should be an easy one. Nevertheless, all too often lawyers are unwilling to stipulate to matters that are not in dispute. Whether the unwillingness to make such concessions is tactical or personal, the Louisiana Code of Professionalism specifically provides that counsel should “readily stipulate to all matters not in dispute.” Consistent with such a trait of professionalism, courts have recognized that stipulating to matters not in dispute “shows the mark of good lawyers.”

3 Do Not File or Oppose Pleadings to Delay or Harass

The Louisiana Supreme Court suspended the license of an attorney who filed numerous bad faith and meritless motions to harass and intimidate the plaintiff. Consistent with such a ruling, the Louisiana Code of Professionalism admonishes counsel to “not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party.” The Code of Professionalism further encourages counsel to “not use the threat of sanctions as a litigation tactic.”

4 Do not Make Misleading or False Representations to the Court or Counsel

The Louisiana Supreme Court suspended the license of an attorney who made false representations to the court and other counsel and engaged in ex parte communications with a represented party. The Code of Professionalism begins with the following pledge from counsel, recognizing the importance of truthfulness at all times: “My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.”

Continued next page
5

Be Punctual in Communicating with the Court and in Honoring Scheduled Appearances

We all know how frustrating it can be when another lawyer is notoriously late for depositions and court appearances. While such tardiness is often solely at the expense of others, the Louisiana 4th Circuit’s decision in State v. Marshall illustrates the importance of punctuality if not for the sake of others then for your own sake. In Marshall, an attorney who was hours late for a trial was denied a request for a continuance and allowed to participate in the trial only in an “advisory position.”

6

Contact Counsel Before Obtaining a Default Judgment

The Louisiana Supreme Court has held that obtaining a default judgment against a represented party without first attempting to notify counsel constitutes an “ill practice” within the meaning of Article 2004 of the Louisiana Code of Civil Procedure, thereby permitting the annulment of final judgment obtained by fraud or ill practices. In Russell, the Louisiana Supreme Court noted that:

the fact that the Code of Civil Procedure does not mandate that counsel attempt to notify opposing counsel of his intent to seek a default judgment against opposing counsel’s client did not mean that the failure to notify him was not an ill practice.

Conclusion

The increased demands imposed by the practice of law may challenge one’s ability to always remain professional and courteous. The rise in competition and the consequential belief that one must win at all costs generates the misconception that one must be a “Rambo” litigator in order to truly be successful as a lawyer. To the contrary, it has been noted that incivility does not always make for effective advocacy.

Even more regrettably, I fear too many lawyers are buying into the notion that incivility makes for effective advocacy. There has been no shortage of articles and speeches calling for greater civility among lawyers. I concur wholeheartedly in that sentiment. Lawyers should see themselves engaged in a noble profession. They should conduct themselves with dignity and courtesy. They should be invariably honest and straightforward. Why? It should be enough that it is the right thing to do, and a more satisfying way to practice — a better way to live, for that matter. Those whose lawyering strategy is to inflict maximum misery often make themselves most miserable of all. But I write to suggest one additional reason for adhering to the highest standards of courtesy and professionalism. Civility, dignity, and honesty not only make for a more fulfilling professional life, but for more effective advocacy.

FOOTNOTES

2. In re DuBarry, 2001 – 2836 (La. 4/12/02), 814 So.2d 1273; see also Wright v. Pratt, 33,471 (La. App. 2 Cir. 8/23/00), 766 So.2d 668 (appellate court dismisses appeal “considered frivolous”).
3. In re Bilbe, 2002 – 1740, p. 18 (La. 2/7/03), 841 So.2d 729, 740.
4. State v. Marshall, 2002 – 1453 (La. App. 4 Cir. 3/19/03), 843 So.2d 469, writ denied, 2003-1280 (La. 5/14/04), 872 So.2d 506.
6. Id. at 819.

Alan J. Yacoubian is a partner in the New Orleans law firm of Johnson, Johnson, Barrios & Yacoubian. He graduated with honors from Tulane Law School in 1985. He is a member of the Louisiana State Bar Association’s Professionalism and Quality of Life Committee, as well as a member of the American Bar Association, the New Orleans Bar Association, the American Judicature Society, the Defense Research Institute, the Federal Bar Association and the Louisiana Association of Defense Counsel. He is a Fellow of the Louisiana Bar Foundation and serves on its Kids’ Chance Committee. He has spoken at various legal seminars and has written numerous articles on various legal topics including ethics, professionalism, insurance law and workers’ compensation law. He can be reached at (504)528-3001 or via e-mail at afy@jjbylaw.com.
Alternative Dispute Resolution

Louisiana Department of Insurance Establishes Hurricane Mediation Program

The Louisiana Department of Insurance has established, pursuant to Emergency Rule 22, a mediation program to help resolve disputes between insurers and Louisiana policyholders arising from damages to residential property caused by Hurricanes Katrina and Rita. Insurance companies are required to notify policyholders with claims or disputes about the program regardless of whether a check has been issued. Mediation costs are paid by the insurance company. The program, administered by the American Arbitration Association (AAA), is free to the policyholders. The mediators are those trained professionals who appear on the “approved register” of mediators maintained by the Louisiana State Bar Association’s Alternative Dispute Resolution Section or who are qualified under the Louisiana Mediation Act, La. R.S. 4106. The person to be contacted regarding the Emergency Rule is Barry E. Ward, Senior Attorney, Division of Legal Services, Department of Insurance, P.O. Box 94214, Baton Rouge, LA 70804-9412; phone (225)219-4750. Those individuals interested in filing a claim or becoming a mediator in the program may contact the AAA at (504)522-8781 or at http://www.adr.org.

Workers’ Compensation
Hearing Officer May Not Preside in Case Where She Served as Mediator

Rodrigue v. Lafourche Parish School Bd., 06-0459 (La. 5/5/06), 928 So.2d 533.

After the parties participated in a workers’ compensation mediation that resulted in an impasse, the mediator for the Office of Workers’ Compensation, who had conducted the mediation, was appointed as hearing officer in the case. The defendant filed a motion to recuse the hearing officer, which was denied. The court of appeal denied the application for a supervisory writ.

The Louisiana Supreme Court, in a per curiam decision, granted the writ recusing the hearing officer. The court found an analogy to La. C.C.P. art. 151(B)(3), which provides that a judge may be recused if he “[h]as performed a judicial act in the cause in another court.” Finding that the hearing officer’s role was analogous to that of a district judge, the Supreme Court found that the hearing officer’s actions in the case as a court-appointed mediator disqualified her from serving as presiding officer.
Second Thoughts After Mediation Conference Does Not Rescind Written Agreement

LeBlanc v. State Farm Ins. Co., 05-1086 (La. App. 3 Cir. 5/10/06), 930 So.2d 296.

After a mediation conference that resulted in a written settlement agreement, the plaintiffs contested the validity of the settlement, claiming that it was invalid because their attorney threatened, coerced and intimidated them into accepting the settlement. The defendants involved in the mediation settlement filed a motion to enforce the settlement. At the hearing on the motion, the plaintiffs alleged that the mediation settlement form did not satisfy the requirements of a transaction and compromise as provided in La. Civ.C. art. 3071. That article states that a transaction or compromise that is designed to put an end to a lawsuit must be either reduced to writing or recited in open court and capable of being transcribed from the record of the proceeding. Finding that the settlement was valid, the trial court ordered the plaintiffs to execute settlement documents. The plaintiffs’ writ application to the court of appeal was denied.

Cancellation of Contract Within 3-Day Rescission Period Not Subject to Arbitration

Johnson v. Blue Haven Pools, 05-0197 (La. App. 1 Cir. 2/10/06), 928 So.2d 594.

The plaintiff signed a contract for the construction of a swimming pool and made a 10 percent down payment on the contract price. The one-page, standard-form swimming pool contract contained an arbitration clause stating that the agreement was subject to arbitration. The plaintiff placed her initials on a line next to the arbitration provision. The contract also had a provision stating that the buyer could cancel the transaction at any time prior to midnight of the third business day after the day of the transaction. After signing the contract, the plaintiff sued, seeking the return of the down payment. The defendant responded to the lawsuit by filing a motion to stay the proceedings pending arbitration and a dilatory exception raising the objection of prematurity based on the arbitration clause in the contract.

The trial court denied the exception of prematurity as well as the motion to stay, stating that the arbitration clause refers to disputes that often arise with pool companies repeatedly, such as workmanship issues. The defendant appealed, contending that the trial court committed manifest error when it denied its exception and motion. While acknowledging that arbitration is a substitute for litigation and that the parties agreed that the contract was to be subject to arbitration, the court of appeal affirmed the judgment of the trial court, finding that the dispute over cancellation of the contract was not arbitrable. The court of appeal found that the arbitration clause referred only to disputes involving the actual contract such as the construction of the pool, equipment for the pool, the agreed-upon payment schedule, the time frame for building the pool, or any of the other numerous disputes that may arise during the construction of the pool. Also important to the court of appeal’s interpretation of the contract was that the notice of cancellation form allowed the buyer to cancel “without any penalty or obligation” within three business days of the contract date. Consequently, the notice of cancellation explicitly and positively cancelled any obligation under the contract, including the obligation that the plaintiff had to arbitrate. Thus, the arbitration clause did not, as written, apply to any dispute regarding the timeliness of the notice of cancellation of the contract and/or the return of the down payment.

Divorce and Juvenile Mediation Qualification Statutes Amended by Louisiana Legislature

La. R.S. 9:334, which provides the qualifications of mediators in child custody and visitation disputes, was amended by the Louisiana Legislature during the 2006 Regular Session. Act 471 of the 2006 Regular Session requires a mediator who is not licensed as an attorney, psychiatrist, psychologist, social worker, marriage and family counselor, professional counselor or clergymen to possess a “four-year” college degree before being allowed to mediate child custody and visitation cases. Prior law simply required such mediators to possess a “college degree.” Act 471 also made it clear that an hour of mediation training means a period of at least 60 minutes of actual instruction. Prior to the change, many
organizations interpreted an hour to be at least 50 minutes of actual instruction. In recognition of the change from the 50-minute “hour” to the 60-minute “hour,” R.S. 9:334 now requires mediators to complete a minimum of 12 hours of general mediation training instead of the previously required 16 hours. Thus, licensed professionals who mediate child custody and visitation disputes are now required to receive a total of 40 hours of mediation training, while those simply possessing a four-year college degree are now required to receive a total of 68 hours of mediation training.

Act 472 of the 2006 Regular Session of the Louisiana Legislature made similar changes to Louisiana Children’s Code art. 439, the qualifications statute for those who mediate disputes arising under the Louisiana Children’s Code. Art. 439 was modeled after R.S. 9:334. Additionally, Act 472 also requires mediators who mediate Children’s Code cases to receive instruction in substantive state and federal laws relating to the Adoption and Safe Families Act of 1997. Finally, Act 472 requires the Louisiana State Bar Association’s Alternative Dispute Resolution Section to prepare and maintain an approved roster of Children’s Code mediators to be made available to participating courts, as well as to provide an appeal process for those persons denied listing on the approved register.

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**Appellate Law**

**Publishing Unpublished Opinions**

Act 644 of 2006, enacting new C.C.P. art. 2168, requires the Louisiana Supreme Court and appellate courts to publish “unpublished” opinions on their Web sites. The act declares that all such opinions may be cited as authority.

**Judgment Format**

In the August/September 2006 Louisiana Bar Journal (Recent Developments, Appellate Law, pages 124-125), Martin A. Stern noted a decision requiring decretal language in judgments for them to be appealable. So State v. Beaudoin, 06-0088 (La. App. 5 Cir. 6/29/06), ___ So.2d ____, comes as no surprise.

A defendant filed a motion to set aside a judgment of bond forfeiture. The trial judge heard it and orally denied it in open court. The trial judge did not sign a written judgment, but someone wrote “Denied” on the motion. That penned-in ruling was initialed, but not by the trial judge. This did not satisfy La. C.C.P. art. 1911. If it does not terminate the case, it is a partial final judgment. Art. 1915 A(1) of partial final, nonappealable judgments. But Part B of the article explains the effect in the trial court of partial final, nonappealable judgments. It allows certifying them to make them appealable. But Part B then seeks to define judgments that are not appealable, both in B(1) and B(2), and uses different terminology in each. Inevitably, part B and part A do not perfectly dovetail. Indeed, after a 1999 amendment to B(2) removing the word parties, B(1) and B(2) are not in full accord.

This schizophrenic code article is causing much litigation and expense. The definitions of nonappealable judgments in part B will always cause confusion, and are just didactic. One possible solution is to abandon the attempt to define partial final, nonappealable judgments in part B and refer only to judgments not listed in part A.

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**Trouble at 1915**

Louisiana Code of Civil Procedure article 1915 continues to cause confusion as to what judgments are appealable, and Strother v. Continental Casualty Co., 06-0302 (La. 6/2/06), 930 So.2d 948, highlights the problem. By agreement, the parties severed the plaintiffs’ claim against one of the defendants. After a trial, the trial judge signed a judgment against the other defendants. Was this judgment appealable? Art. 1915 A(1) declares a judgment appealable if it dismisses the suit as to less than all the parties. But section B(2) says a judgment that “adjudicates . . . the rights and liabilities of fewer than all the parties” is not appealable unless certified as such. The Supreme Court in Strother applied B(2). It held that a judgment holding some of the defendants liable to the plaintiffs was not appealable until it was certified. The decision seems correct. The 3rd Circuit had held the contrary, and obviously counsel disagreed.

A final judgment is one that speaks to the merits of the case, as opposed to preliminary matters. La. C.C.P. art. 1841. When it is in written form, signed by the trial judge, and terminates the case in the trial court, it is appealable. La. C.C.P. art. 1911. If it does not terminate the case, it is a partial final judgment. Art. 1915 A lists partial final judgments that are immediately appealable. Part B of the article explains the effect in the trial court of partial final, nonappealable judgments. It allows certifying them to make them appealable. But Part B then seeks to define judgments that are not appealable, both in B(1) and B(2), and uses different terminology in each. Inevitably, part B and part A do not perfectly dovetail. Indeed, after a 1999 amendment to B(1) removing the word parties, B(1) and B(2) are not in full accord.

This schizophrenic code article is causing much litigation and expense. The definitions of nonappealable judgments in part B will always cause confusion, and are just didactic. One possible solution is to abandon the attempt to define partial final, nonappealable judgments in part B and refer only to judgments not listed in part A.

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Bankruptcy

In re Cortez, 457 F.3d 448 (5 Cir. 2006).

In a case commenced prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) that may have greater significance for Chapter 7 cases filed under BAPCPA, the U.S. 5th Circuit held that post-petition events including “improvements in earnings can be taken into account and should be taken into account up until the point at which the discharge is entered.”

In deciding an abuse determination under 11 U.S.C. § 707(b), the 5th Circuit determined that, although Mr. Cortez was unemployed at the time the Chapter 7 case was filed and the debtors’ monthly expenses exceeded their net income at the time of filing, the employment of Mr. Cortez four days after filing should be taken into account in determining whether the debtors were entitled to Chapter 7 relief. The inclusion of Mr. Cortez’s income from the employment he gained post-petition resulted in sufficient disposable income to fund a Chapter 13 plan. The bankruptcy court did not include the income from the post-petition employment and denied the U.S. trustee’s motion to dismiss brought under § 707(b).

The court reversed the bankruptcy court, and the 5th Circuit affirmed the district court in remanding the case for conversion to a Chapter 13 proceeding or dismissal.

The key facts in Cortez were stipulated in the proceedings before the bankruptcy court. At the time Mr. and Mrs. Cortez filed their Chapter 7 case on April 18, 2004, Mr. Cortez had been unemployed since Jan. 1, 2004. Mrs. Cortez was earning $4,147 per month. Schedule J reflected expenses of $5,320.91 per month. Schedule I reflected that Mr. Cortez “believes he will be employed this month, but has not started working yet.” On April 12, 2004, Mr. Cortez was offered a job, which he accepted, with a salary of $95,000 per year, starting bonus of $5,000 and a company car. On May 10, 2004, Mr. Cortez testified to such at the § 341 meeting of creditors. Mrs. Cortez reduced her hours working as a nurse, reducing her net income to $750 per month. When Mr. Cortez’s employment post-petition was considered with his wife’s reduced income, the debtors’ combined net income exceeded their expenses by $1,325 per month. On July 9, 2004, the trustee filed the motion to dismiss under § 707(b), asserting that the Cortezes had the means to repay a substantial portion of their debts through a Chapter 13 plan and that it would be a substantial abuse to grant relief under Chapter 7. On March 4, 2005, while the case was on appeal, Mr. Cortez lost his job and, as of May 2, 2006, he was still unemployed.

The 5th Circuit stated that while “granting of relief” is undefined in § 707(b), in the context of § 707(b), it is referring to a Chapter 7 discharge and not an order for relief associated with the commencement of the case under § 301. Although, pre-BAPCPA, there was a “presumption in favor of granting the relief requested by the debtor” contained in § 707(b), the bankruptcy courts are “gatekeepers” who examine the worthiness of debtor petitions, dismissing those deemed abusive.

According to the 5th Circuit, the pre-BAPCPA language of § 707(b) conditioned the granting of relief, as opposed to dismissal, on whether the relief would result in “substantial abuse.” As “sub-
stential abuse” was not defined, the 5th Circuit proceeded to discuss how “substantial abuse” should be determined. The 5th Circuit agreed with the 6th and 9th Circuits that “a debtor’s ability to repay his debts out of future income is a primary factor to be considered in determining whether to dismiss for substantial abuse.” Under Federal Rules of Bankruptcy Procedure 1017(e), the trustee’s motion to dismiss under § 707(b) must be filed within 60 days of the § 341 meeting of creditors, unless the court extends the deadline.

The court noted other provisions of the Bankruptcy Code that consider post-petition events, such as § 1325(b)(1)(B), which allows the trustee to seek a subsequent modification of a plan based on an increase in the debtor’s income. The court distinguished the exclusion of post-petition disaster-relief payments that are not property of the estate within the meaning of § 541(a)(6) and the exclusion of post-petition events from a Chapter 7 estate as being “an independent issue from whether debtors had the ability to repay their debts.” Rather, “post-petition improvements in earnings” and “post-petition events should be considered up until the date of discharge.”

With the BAPCPA amendment of § 707(b), the word “substantial” has been deleted, although it remains in § 1017(e). The BAPCPA amendment of § 707(b) also removed the “presumption in favor of granting the relief requested by the debtor.” In addition to the inclusion of post-petition events, the combination of the deletion of “substantial” and the removal of the presumption in favor of granting relief is likely to further lower the threshold for the denial of a debtor’s discharge under Chapter 7.

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Prescriptive Period for Failure to Deliver Shares

An action by a purchaser of shares of stock for delivery of the stock certificate evidencing those shares is subject to a 10-year prescriptive period. Mercer v. Mercer, 40,995 (La. App. 1 Cir. 6/9/06), 80 So.2d 348.

Jerry Mercer and his brother, Tommy Mercer, purchased shares in Snake Ridge Partnership, Inc. (Snake Ridge), a corporation formed for the purpose of acquiring land for a hunting club. Jerry sued Tommy to compel him to transfer his shares of Snake Ridge stock to Jerry as consideration for Jerry’s payment of Tommy’s pro rata share of certain expenses incurred by Snake Ridge. Tommy argued that the claim was time-barred by the three-year prescriptive period applicable to actions for money lent. The district court denied the exception after finding that the three-year prescriptive period was interrupted for a sufficient amount of time to make Jerry’s suit timely.

The 2nd Circuit upheld the district court’s ruling that the suit was timely, but disagreed with the district court’s rationale. The court found that the prescriptive period applicable to a suit to have title to shares transferred was a res nova issue. The court concluded that the claim was personal in nature and therefore subject to the general 10-year prescriptive period provided in La. Civ.C. art. 3499. After reviewing the legislative history and finding no expression that a shorter prescriptive term should be applied, the
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THE SECURITY TITLE
GUARANTEE CORPORATION OF BALTIMORE

Blue Sky Law Updated

In June 2006, the Governor of Louisiana signed Act 361 into law, which gives the Louisiana Commissioner of Securities the power to assess civil monetary penalties against any person who violates the Louisiana Securities Law. Prior to the enactment of Act 361, the commissioner had the power only to issue cease-and-desist orders. The act also allows the commissioner to issue written interpretative opinions and grant no-action letters. Oral opinions also may be given, but they are binding on the commissioner only if they are “accurately and promptly” confirmed in writing by the requesting person.

The Louisiana Legislature also expanded the scope of the Louisiana Securities Law by enacting Act 543, which requires each representative of an investment adviser registered in the state of Louisiana to pass a written exam prescribed by the commissioner, unless the representative is employed by an investment adviser registered with the Securities and Exchange Commission. The commissioner is further authorized to exempt any currently registered investment adviser representative from the requirement to pass the written exam for a period of up to two years.

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Criminal Law

Parens Patriae Overpowers Minimum Contacts

State ex rel. V.L.S., 41,514 (La. App. 2 Cir. 8/10/06), ____ So.2d ____.

The state of Louisiana, through the Department of Social Services, brought an action to terminate the parental rights of John Sipes. Sipes was alleged to be an absentee whose address, whereabouts, date of birth and age were unknown, and a curator was appointed to represent him.

In response to the petition, the curator filed an exception of lack of personal jurisdiction, arguing that the state would be unable to present any evidence that Sipes had even minimal contacts with the state so as to justify the exercise of per-

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sonal jurisdiction. At the hearing of the exception, the state failed to present any evidence regarding Sipes’ contacts with the state of Louisiana. The only testimony presented was a case manager, who had no knowledge of whether Sipes ever resided in or was even in Louisiana. The trial court denied the exception without providing reasons, and the curator lodged an appeal. The court of appeal noted that the curator originally filed an appeal, but the denial of the exception was not subject to certification under La. C.C.P. art. 1915(B), so the court converted it to a writ application.

The court of appeal affirmed the judgment of the trial court, explaining that:

Each state, in its role as sovereign, has a rightful and legitimate concern in the protection of children domiciled within its borders whose health and welfare has significant social importance. Accordingly, in its capacity as Parens patriae, the state by virtue of its authority over its domiciliaries and its interest in the welfare of children domiciled within its borders, can alter the parent-child relationship even though the parent is not subject to the personal jurisdiction of the court.

Assuming the form and nature of the notice meet the requirements of due process and the uncontested domicile of the children in Louisiana, there is no constitutional prohibition to the State’s proceeding against Mr. Sipes to terminate his parental rights regardless of his lack of contacts with Louisiana.

The court did not cite any Louisiana case law, but instead reached out to the jurisprudence of other states.

Reasonable Efforts in Termination of Parental Rights

State ex rel. A.T., 06-0501 (La. 7/6/06), __ So. ___.

In October 2002, Ms. A advised OCS that she could no longer take care of her children, ages 15, 7 and 10 months. She and her husband were separating, and she was being evicted from her rented trailer and the utilities had been shut off. OCS had provided three months of rent-free housing to try to keep the family together, but Ms. A could not find a suitable place to rent after that. The children remained in custody and were adjudicated in need of care, and Ms. A was given a case plan including treatment for spousal abuse, drug screens, and a child-support order of $50 per month in favor of the State. Ms. A moved in with her grandmother in a two-bedroom trailer that was unsuitable for the children.

In June 2005, the state filed a petition to terminate parental rights. The alleged areas of non-compliance with the case plan were failure to get suitable housing and failure to provide support for a six-month period. No testimony was adduced regarding OCS’s provision of housing or lack of referrals. The trial court terminated parental rights on lack of housing and failure to support. The court of appeal reversed, finding that the OCS case plan failed to meet the statutory requirements, in that there was no attempt by OCS to assist Ms. A in acquiring suitable housing. The court of appeal further found that terminating parental rights based on the failure to pay child support for a six-month period was error, as the non-support period was during the break-up of Ms. A’s marriage and eviction from her residence. Finally, the court of appeal found that termination was not in the children’s best interest. OCS applied for a writ of certiorari, which was granted.

The Supreme Court affirmed the court of appeal, noting that reasonable efforts must be made prior to and after removal of the children from the home. The state had not moved to be relieved of reunification efforts under Louisiana Children’s Code art. 672.1, and so had a continuing duty to provide services to try to reunify the family. The record showed only that OCS provided short-term housing prior to the removal of the children, and no housing assistance was given after removal. If Ms. A was simply unwilling to get housing, there would be grounds to terminate, but this was not proved by clear and convincing evidence. As to the non-payment of support, the Supreme Court pointed out that poverty, by itself, cannot be considered neglect, nor grounds for termination of parental rights.

Justices Knoll and Traylor dissented, with Justice Knoll assigning reasons. Although Justice Knoll did not doubt the love of this mother for her children, she found fault with Ms. A’s failure to obtain a steady job and suitable housing, or to establish the financial wherewithal to support her children in their best interest.

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Environmental Law

Remediation of Oilfield Sites

The Louisiana Legislature adopted Act 312 during the 2006 Regular Session establishing procedures for judicial resolution of claims for environmental damage to property arising from activities at oilfield sites (exploration and production sites). The act was signed by Governor Blanco on June 8, 2006, and became effective upon her signature.

Under Act 312, any litigation concerning claims of environmental damage to property arising from activities subject to the jurisdiction of the Louisiana Department of Natural Resources (LDNR), Office of Conservation, must follow the new procedures set forth in La. R.S. 30:29. Prior to this legislation, only suits for damages involving contamination or threatened contamination of “usable ground water” required notification to state agencies, development of a remediation plan with stage agency involvement and court control over funds for remediation. The new legislation mandates a two-phase process: determination of liability by the court for environmental damage at oilfield sites followed by determination of the remediation plan and damages with input from LDNR and the court.

At the onset of the case, the act requires the party making a judicial demand arising from or alleging environmental damage to provide timely notice to the commissioner of conservation and the Louisiana attorney general. The litigation is then stayed for 30 days once return receipt of the notice is filed with the court. The attorney general and LDNR are given the opportunity to intervene in the suit or institute an independent civil or administrative enforcement proceeding. The act also provides that no judgment or order granting any relief may be entered, nor may the litigation be dismissed, until timely notice is received by the state of Louisiana.

Once liability is established for environmental damage in the case, the act sets forth procedures regarding approval of a remediation plan and how monies for remediation are to be handled. First, the court will order the liable parties to develop a plan for remediation and to submit the plan within a reasonable time to LDNR and the court. The plaintiff or any other party will have an opportunity to review the plan submitted by the liable parties and make comments or submit a separate plan. LDNR must then consider all plans, comments or responses provided timely by any of the parties. Within
60 days from the last day any party provides a plan, comment or response to a plan, LDNR must conduct a public hearing. After the hearing, LDNR must approve or structure a plan that is the most feasible to evaluate or remediate the environmental damage and to protect the health, safety and welfare of the people. In addition, LDNR must provide written reasons supporting the plan it approved or structured. The plan must be based upon the evidence submitted.

The court must adopt the plan approved by LDNR unless a party proves by a preponderance of the evidence that another plan is more feasible to adequately protect the environment and the public health, safety and welfare. The court will then adopt a plan, providing written reasons for its decision. The court must order the party or parties admitting responsibility or found legally responsible to fund the implementation of the plan. Once a judgment adopting a plan and ordering funds to be deposited in the registry of the court is issued, the judgment is considered a final judgment for purposes of appeal. Any appeal will be reviewed de novo by the appellate court. The appellate court may confirm the trial court’s plan or may adopt another plan and issue written reasons for its decision.

After a plan is finally approved, the damages or payments awarded for the evaluation or remediation of environmental damage are paid exclusively into the registry of the court. During the remediation, the court must ensure that these funds are actually expended in a manner consistent with the adopted plan. The court can require more funding from liable parties if needed to complete the remediation. After the remediation is complete, any funds that remain in the registry will be returned to the depositor.

Parties admitting liability or found legally responsible are also liable for other costs. For example, LDNR and the attorney general are entitled to recover all costs incurred that relate to their involvement in the matter. In addition, a party providing evidence upon which the judgment is based is entitled to recover all costs from responsible parties attributable to producing the evidence, including but not limited to expert witness fees, environmental evaluation, investigation and testing, the cost of developing a plan of remediation and reasonable attorney fees.

The act provides that a party can still recover damages related to a contract that imposes remediation obligations in excess of the requirements of LDNR. Further, under the act, a party can still maintain private claims that do not fall under the act such as diminution of property value or personal injury.

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Family Law

Custody

Luplow v. Luplow, 41,021 (La. App. 2 Cir. 2/28/06), 924 So.2d 1135.

Although the trial court stated that it was “untrained” in making a custody determination, and thus deferred to the social worker/custody evaluator’s report in naming the father as the domiciliary parent, the court of appeal found no abuse of discretion and deferred to the trial court’s finding. It added that because the trial court warned the father to comply with the mother’s visitation schedule, any violation of the judgment was a basis for a contempt rule or a petition to modify custody.

Leaf v. Leaf, 05-0592 (La. App. 4 Cir. 3/2/06), 929 So.2d 131.

The trial court and court of appeal found that Ms. Leaf’s request to relocate should be denied because she had consistently thwarted Mr. Leaf’s visitation with the minor child. She had fought strenuously and claimed numerous times that his visitation should be supervised but, when she wanted to relocate, she proposed that he have seven weeks’ unsupervised visitation during the summer. The courts found this to be an “insincere and disingenuous” about-face. Further, the quality of life for her and the child would not be enhanced by a move, the relationship between the daughter and father could not feasibly be preserved, and Mr. Leaf was not in a position to relocate with her.

Leard v. Schenker, 06-1116 (La. 6/16/06), 931 So.2d 355.

Failure to object at trial to the qualifications of the court-appointed independent custody evaluator waives any objections thereto on appeal.

Rao v. Rao, 05-1523 (La. App. 1 Cir. 11/4/05), 927 So.2d 391.

The 1st Circuit held that because when enacting the relocation statutes the Legislature did not address the Bergeron standard, and because the Supreme Court in Curole v. Curole, 02-1891 (La. 10/15/02), 828 So.2d 1094, did not address Bergeron in the relocation context, the standards of burden of proof established by the former cases do not apply in the special, limited circumstances of parent relocation specifically addressed by the legislature.

However, if Bergeron is applicable, its standards are “inherent” in the relocation factors.

Gerace v. Gerace, 05-1300 (La. App. 3 Cir. 4/5/06), 927 So.2d 622.

The 3rd Circuit held that when parties have joint custody, “changes in the time spent with each parent need only be in the best interest of the children,” and the party moving to change the physical custody schedule does not need to show a change of circumstances. It upheld the trial court’s decision after hearing the case that “there was no need” for the
court to appoint a psychologist to evaluate the parties at that time.

**Child Support**

_Salles v. Salles_, 04-1449 (La. App. 1 Cir. 12/2/05), 928 So.2d 1.

At the time a German child-support judgment was rendered, Mr. Salles’ children were already receiving Social Security benefit payments from the United States. He could not later claim the payments as an offset to his child support arrearages as he had the opportunity to raise the offset at the time he agreed to the award but did not. Thus, he could not now use the benefits to collaterally attack the judgment. On his motion to reduce the child support, though, he was entitled to an offset from the basic child-support obligation for the Social Security payments under La. R.S. 9:315.7, overruling _Kelly v. Kelly_, 99-2478 (La. App. 1 Cir. 12/22/00), 775 So.2d 1237, which took the offset from the father’s share.

**Spousal Support**

_Coffman v. Coffman_, 40,992 (La. App. 2 Cir. 4/12/06), 926 So.2d 809.

The trial court conducted this interim spousal-support hearing by questioning the parties and their attorneys himself, and then having the parties sworn in to affirm that their statements were true. Counsel for the parties were not appropriately allowed to cross-examine the opposing party. The court of appeal found that this improper procedure required vacating the trial court’s judgment and remanded for a proper trial.

**Property**

_Young v. Young_, 06-0077 (La. App. 3 Cir. 5/31/06), 931 So.2d 541.

The court of appeal reversed the trial court’s ruling that Mr. Young’s Social Security disability benefits were community property, finding that the anti-attachment provision of the federal statute awarding such benefits and the federal Supremacy Clause precluded the benefits from being subject to such classification. The court, however, remanded to the trial court to address immovable property that had been partially purchased with such funds, which the trial court had classified as community property; and to decide whether Ms. Young was entitled to an allocation of property equal to the value of his benefits prior to the division of the remainder of the property, pursuant to La. R.S. 9:2801.1. The trial court’s order that some of Mr. Young’s separate property be transferred to Ms. Young to equalize the partition was reversed because an equalization must be made by a “sum of money.” La. R.S. 9:2801(A)(4)(d).

_Rao v. Rao_, 05-0059 (La. App. 1 Cir. 11/4/05), 927 So.2d 356, _writ denied_, 05-2453 (La. 3/24/06), 925 So.2d 1232.

Ms. Rao argued that because the trial court found her testimony more credible on the fault issue than Dr. Rao’s, it should not have believed him on the community property issues, but the court of appeal held that a:

credibility assessment made for the purpose of determining a dispositive issue is generally not itself an adjudicated issue upon which collateral estoppel or issue preclusion can rest. A stockholder’s agreement fixing an “arbitrary” stipulated stock value in the event of divorce of one of the stockholders is not contra bonos mores and binds both spouses as to that value in a community property partition, even if only the shareholder spouse signs the agreement.

_Melancon v. Melancon_, 04-2569 (La. App. 1 Cir. 12/22/05), 928 So.2d 10, _writ denied_.

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denied, 06-0150 (La. 5/5/06), 927 So.2d 310.

Stock options awarded during the community but not vested until after termination, based on Mr. Melancon’s continued employment with the company, were pro-rated as community and separate property based on the length of employment between the grant date and the vesting date of each option.

— David M. Prados
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— Ryan N. Ours
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Ammunition for Trademark Owners Battling Unfair Competition

Smack Apparel Co. sells T-shirts with color schemes, designs and word content that obviously refer to historical successes or particular games of the football teams of Louisiana State University, Oklahoma University, Ohio State University and the University of Southern California. The color schemes and indicia are admittedly intended to create a mental association with those universities. In Board of Supervisors v. Smack Apparel Co., No. 04-1593 (E.D. La. 7/18/06), plaintiffs allege unfair competition under the Lanham Act and common law, unfair trade practices under the Louisiana Unfair Trade Practices Act (as to LSU only), and related claims.

Judge Mary Ann Vial Lemmon found that Smack’s use of the color schemes violated 15 U.S.C. § 1125(a), which prohibits the use in commerce of “any word, term, name, symbol, or device, or any combination thereof” that is:

- likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities . . . .

The analysis of trademark or trade-dress infringement centers on determining likelihood of confusion; that analysis is fundamental to claims of federal and state law unfair competition as well.

The court’s analysis began with a discussion of secondary meaning. Colors or combined color schemes find protection only if the plaintiff proves secondary meaning. The court noted a mark acquires secondary meaning if it “has become distinctive of the applicant’s goods in commerce.” Two Pesos, Inc. v. Taco Cabana, Inc., 112 S.Ct. 2753 (1992).

The court found plaintiffs enjoy secondary meanings in the minds of their consumers through their color schemes, logos and designs, based on:
- the length of time the color schemes have been used by the universities (more than 100 years for each school);
- the sales revenue generated by each university through licensed products using those color schemes, logos and designs;
- advertising efforts of the universities and magazine and newspaper references to the schools’ colors; and
- use of the color schemes over many years as a shorthand reference for the universities themselves.

The court then ruled that plaintiff proved the likelihood of confusion among consumers. Using the “digits of confusion” test, the court found the color schemes are strong marks; the marks, products, retail outlets and advertising media are virtually the same; Smack’s efforts to create a mental link between its products and the universities established intent to create confusion; and the inexpensive nature of the products translated to a reduced level of care and scrutiny in determining the source of the products, which increases the possibility of confusion.

The court’s recognition that the universities’ trademark interests extend beyond the registered marks, to its colors and indicia in the context of merchandise referring to the universities or other accomplishments, is a powerful deterrent to future infringers. Note, however, that the matter is still pending, and this ruling may be subject to an appeal after trial on the remaining claims.
The United States Supreme Court, in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S.Ct. 2405 (2006), has addressed the scope and standard applicable for retaliation claims under Title VII of the Civil Rights Act of 1964. Under the facts of the case, the plaintiff (Ms. Sheila White) was initially hired as a track laborer for the defendant (Burlington). The position involved manual labor and was characterized as “more arduous and dirtier” work. White subsequently obtained an assignment to a forklift operator position. The forklift operator position was considered a skilled position and was less labor-intensive than the track laborer position.

Within three months of initially being hired, White made a complaint to management about derogatory comments made by her immediate supervisor. Management conducted an investigation and suspended White’s supervisor. At the same time, however, management removed White from her forklift operator position and returned her to the track laborer position.

White subsequently filed a complaint with the EEOC. While the charge was pending, White had a disagreement with another supervisor and, in response, White was suspended, without pay, for 37 days on the grounds of insubordination. Upon submission of a grievance, management determined that insubordination did not occur and Burlington provided White with back pay.

In its analysis, the Supreme Court addressed the specific language of the retaliation provision in Title VII and noted that its prohibition addresses discrimination against an employee because the employee has opposed an unlawful practice, has asserted a charge of discrimination or has testified, assisted or participated in an investigation. The general discrimination provisions of Title VII, however, refer to taking discriminatory action with regard to compensation, terms, conditions or privileges of employment. The Supreme Court concluded that because the retaliation provision does not specifically refer to the terms and conditions of employment but speaks, more broadly, of discrimination (i.e., treating someone differently), the scope of the retaliation prohibition in Title VII extends beyond workplace-related or employment-related retaliatory acts and harm. As such, both employment-related and non-employment-based retaliatory acts may give rise to a cause of action.

In characterizing how harmful an act of retaliatory discrimination must be in order to fall within Title VII prohibitions, the Supreme Court held:

The anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm. . . . In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, “which in this context means it well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’” . . . We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth “a general civility code for the American workplace.” . . . An employee’s decision to report discriminatory behavior cannot immunize that
employee from those petty slights or minor annoyances that often take place at work and that all employees experience.

Id. at 2414-2415. (Citations omitted).

The Supreme Court emphasized that the objective of the anti-retaliation provision in Title VII is to prevent an employer’s interference with an employee’s unfettered access to Title VII’s remedies and that the focus relates to employer actions that are likely to deter an individual from exercising protected rights.

The Supreme Court also established that the standard for judging retaliatory action is based on a reasonable employee and that the standard for judging harm must be objective. The Supreme Court also emphasized that the significance of any particular retaliatory action is dependent upon the particular circumstances and that “[c]ontext matters.” Id. at 2415.

As a result, the Supreme Court establishes that the harm produced by retaliatory acts must be material and must be judged under a reasonable employee, objective standard as measured against the particular facts and circumstances presented in each case.

With regard to the particular facts presented to the Supreme Court, the court concluded that a reasonable jury could find that job reassignment of White was material because the track laborer job was more difficult and was considered less desirable work by her coworkers than that of the forklift operator position. The court also concluded that a 37-day suspension without pay (even if the employee is reinstated with back pay) is material because the loss of income occurring during an indefinite suspension could act as a deterrent to an individual objecting to unlawful practices under Title VII. As a result, the Supreme Court affirmed the court of appeals ruling that upheld the jury’s verdict against Burlington.

— Joel P. Babineaux
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Professional Liability

2006 Legislation

Act No. 694, amending La. R.S. 40:1299.41(A)(3), (8) and (9)

Blood and plasma donors are now considered “patients” under the Medical Malpractice Act. Negligent acts or omissions occurring during the procurement of blood or blood components are considered “malpractice,” and any treatment relating to the procurement of human blood or blood components is considered “health care.”

This statute overrules Delcambre v. Blood Sys., Inc., 04-0561 (La. 1/19/05), 893 So.2d 23, and became effective on Aug. 15, 2006.

Act 323, amending La. R.S. 40:1299.47(B)(1)(c) and adding La. R.S. 40:1299.47(B)(1)(d) and (N) became effective Aug. 15, 2006

These amendments provide for an option for expedited medical-review panels. Some pertinent provisions are:
1. All parties must agree to the expedited panel.
2. Evidence must be submitted within 90 days after the third health-care provider is selected.
3. The opinion of the panel must be issued within one year of the date of the selection of the panel chair.
4. The term of the panel cannot be extended, and suit can be filed when the life of the panel expires.
5. The patient has 10 days and the respondent five days from the date of request for an expedited panel within which to appoint a panel member, and those two health-care providers then have 15 days to nominate the third.
6. The patient must provide medical authorizations to obtain medical records. Failure to do so will result in loss of the expedited panel status, and the process will revert to ordinary panel proceedings.
7. The patient must identify all health-care providers who treated him or her within the last three years from the date of the alleged malpractice.
8. Neither depositions nor interrogatories are permitted.
9. The panel opinion is not admissible at trial, the panelists cannot be deposed or called to testify at trial, and the panelists have absolute immunity.
Summary Judgment


Following rendition of a medical-review panel’s opinion in its favor, and almost three years after the filing of the petition for damages, Ochsner filed a motion for summary judgment to dismiss the plaintiff’s lawsuit. Ms. Wilson opposed the motion on two grounds.

Ochsner contended that Wilson had not identified any expert witness to testify that there was a harmful breach of the standard of care. Wilson answered that her responses to interrogatories identified three health-care providers who would so testify. Ochsner contended interrogatory answers were insufficient, as once the absence of factual support was pointed out, the plaintiff was obliged to present sworn testimony, i.e., by affidavit or deposition, and in this case she had not done so. The trial court agreed and held that the mere naming of experts without providing evidence of their testimony is not evidence sufficient to establish that the patient would be able to satisfy her evidentiary burden of proof at trial.

The plaintiff also alleged that the trial court had erred in granting summary judgment because the defendant had not filed a “statement of uncontested facts.” The appellate court held that in this particular case the uncontested facts were recited in open court and the failure to file such a statement should not preclude summary judgment.

Untimely Appointment of a Chairperson

Estate of Nicks v. Patient’s Compen. Fund Oversight Bd., 05-1624 (La. App. 1 Cir 6/21/06), ___ So.2d ____.

The parties were unable to agree on a chair, and the plaintiffs instituted the “strike” procedure. The PCF notified counsel that irrespective of the ongoing strike procedure, the chair must still be chosen and appointed prior to one year from the date of the filing of the request for review. The strike procedure was never completed, but prior to the one-year anniversary, counsel for one health-care provider wrote to all parties advising that they were now in agreement as to the chair. That lawyer then sent a letter to the PCF nominating a chair, but the letter was postmarked more than one year from the date of the filing of the request for review. The PCF notified counsel that it had “closed” the file for failure to appoint a chair within the allotted time.

The plaintiffs’ counsel then filed a writ of mandamus requesting that the trial court order the PCF to reopen the file. The trial court granted the writ and ordered the PCF to reinstate the request for the formation of the medical-review panel. The PCF appealed.

The plaintiffs argued on appeal that the initiation of the strike process interrupted the one-year limitation for selecting the attorney chair. The appellate court disagreed, observing that it is the appointment of the chair within one year that governs whether the life of the panel expires. La.R.S. 40:1299.47(C) and (A).

The 1st Circuit reversed the trial court’s decision. The majority opinion chose to “express no opinion” as to whether the parties, by their failure timely to appoint the chairperson, had waived the use of a medical-review panel. Two judges wrote concurring opinions, each stating that the only effect of the dismissal of the claim by the PCF for failure timely to appoint the chair was waiver of the use of the medical-review panel system.

— Robert J. David
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Predial Servitude Establishing Use Restrictions Upheld

**RCC Properties, L.L.C. v. Wenstar Properties, L.P.**, 40,096 (La. App. 2 Cir. 06/06/06), 30 So.2d 1233.

In **RCC Properties**, the plaintiff brought an action against the defendant dominant estate holder to declare invalid a predial servitude that restricted the owner of the servient estate from operating a business that derived 15 percent or more of its gross sales from the sale of hamburger or chicken sandwiches.

In 2002, AZT Winsboro LA, Inc. sold a tract of land to Wenstar Properties and granted a predial servitude in favor of the tract sold that prohibited the use of adjacent property as a restaurant with a drive-through pick-up window, the primary business of which is the sale of hamburgers, hamburger products or chicken sandwiches (or any combination thereof). “Primary business” was defined as 15 percent or more of gross sales consisting of hamburgers, hamburger products or chicken sandwiches (or any combination thereof).

In 2004, AZT sold the adjacent property burdened by the predial servitude (the servient estate) to RCC Properties, L.L.C. Thereafter, RCC received an offer to purchase the servient estate from a Kentucky Fried Chicken (KFC) franchisee, provided that RCC obtained a release of the predial servitude. In response, RCC instituted the instant action. The trial court invalidated the predial servitude, finding it unclear and ambiguous. The 2nd Circuit reversed the trial court, finding that “the title document clearly reflected the intention of the parties to create an obligation in favor of the dominant estate” and that the servitude was effective as written. The 2nd Circuit did, however, note that the method to measure “primary business” was unclear. In particular, the title document does not specify the time period for measuring the 15-percent threshold for sales of hamburgers, hamburger products or chicken sandwiches. Since the franchisee’s figures never exceeded this threshold, the servitude did not prohibit the construction or operation of a KFC Restaurant. Notwithstanding, the 2nd Circuit declined to address how it would decide if KFC or any other restaurant exceeded this sales threshold during any time period.

— Alvin C. Miester III
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**Public Premiere on 1960 Baton Rouge Sit-Ins Documentary Set for Nov. 10**

A 60-minute documentary on the historical events surrounding the first sit-in demonstration case to be successfully argued before the United States Supreme Court will have its public premiere in November.

“Taking a Seat for Justice: The 1960 Baton Rouge Sit-Ins,” a documentary produced by Rachel L. Emanuel, director of publications and electronic media at Southern University Law Center, will premier at 7:30 p.m. Friday, Nov. 10, in the Manship Theatre in the Shaw Center for the Arts, 100 Lafayette St., Baton Rouge.

The premiere is part of the opening of the Southern University Law Center’s Civil Rights and Justice Institute. Plans are also in the works for the documentary to be aired on Louisiana Public Broadcasting networks.

In March 1960, 16 Southern University students conducted sit-ins at Sitman’s Drugstore, Kress Department Store and the Greyhound Bus Station in Baton Rouge in protest of racial segregation laws. The students were arrested, charged with disturbing the peace, indefinitely suspended from Southern and convicted in state district court. The case was appealed by NAACP attorneys, including Alexander Pierre Tureaud of New Orleans, and resulted in the first such case to be decided by the U.S. Supreme Court in 1961. The court’s ruling in **Garner v. Louisiana** overturned the students’ convictions and helped end racial segregation at public facilities throughout the nation.

For more information about the premiere, contact John Pierre, associate vice chancellor for special projects, Southern University Law Center, at (225)771-4900 or e-mail jpierre@sulc.edu.
FREE to LSBA Members!

To access all the FREE services, go to:
www.lsba.org/Member_Services/fastcase.asp
Mark E. Morice

In preparing for my year as chair of the Young Lawyers Section, I was reading through some older Louisiana Bar Journals and I came across an article published in 1995 titled “Young Lawyers Section Provides Aid to Flood Victims.” Sounds familiar? Well, it should because, in response to Hurricane Katrina, New Orleans-based attorney Beth Abramson, our Louisiana representative to the American Bar Association Young Lawyers Division (ABA-YLD) Executive Council, helped organize the Disaster Legal Assistance Hotline for tens of thousands of displaced Louisiana residents.

This first hotline at the Baton Rouge Bar Association offices began taking calls on Sept. 1, 2005, with the use of three phone lines. Because of demand, the Call Center was relocated to the Louisiana State University Paul M. Hebert Law Center on Oct. 14, 2005, with eight phone lines taking incoming calls. Within a month, 15 phone lines were in place to accept calls. All intake was done by staff members of the Louisiana State Bar Association (LSBA) and by law school students from LSU, Southern, Loyola and Tulane being paid by the LSBA. Calls were returned by attorneys hired to staff

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YLS Chair’s Message
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the call center or those volunteering their services on site or from around the state and country. For a period of time after the storms, the Call Center was open for 12 hours each day, six days a week.

Since opening on Sept. 1, the Call Center has assisted more than 13,000 callers in conjunction with legal service programs throughout the state. The Call Center continues to be run through the coordinated efforts of the LSBA and FEMA.

Today, the Call Center receives 200 to 300 calls per week, with more than 100 of those calls representing new cases. Through the response of the approximately 500 attorney volunteers, in addition to volunteers from the various Louisiana legal service corporations and legal pro bono organizations, tens of thousands of our Louisiana citizens have directly benefited from the service. A story of success only made possible through volunteering.

Truth, Honor, Confidence, Justice

These are just words in our Lawyer’s Oath until a lawyer places them into action. Through these recent troubled times, the clear path of opportunity for lawyers around our state has arisen. This is especially true in a time when, in my opinion, our profession is struggling with a culture of greed that threatens the very basis of advocacy and assistance upon which our system of justice relies.

Like many of you, I have witnessed firsthand the trembling voices of our elderly, our displaced, our Louisiana neighbors who just needed a response to a question that we are so well prepared to answer. I have heard the rejoicing and seen the tears of our neighbors when given the comforting advice from an attorney, a counselor an advocate. Our citizens have become more dependent upon attorneys as educated and well-reasoned members of society to give guidance in many of life’s most important decisions. I find that our obligation to reach out and participate locally with pro bono organizations, legal services programs, our community centers, nonprofit organizations and our churches has never been greater. We must seek out the needy and volunteer to assist with access to justice in our courts.

The Young Lawyers Section has served as the “volunteer arm” of the LSBA for many years, and we are proud to announce that we have chosen three more prominent programs this year to reach out and assist additional members of our community. They are:

► “Wills for Heroes,” a program providing free legal services in the areas of wills and asset management to first responders, including firemen, police officers and paramedics. (Contact Mark E. Morice at moriceman@aol.com.)

► “Barristers for Boards,” a program to assist Louisiana nonprofit organizations by matching up young lawyers interested in volunteering time to improve Louisiana’s nonprofit sector and their individual missions. (Contact Melanie M. Mulcahy at mmulcahy@derbeslaw.com.)

► “Choose Law,” a program designed to promote diversity in the practice of law by empowering our youth through education to understand the importance of diversity in the legal profession and society as a whole. (Contact Chaunis T. Jenkins at cjenkins@phjlaw.com.)

Thinking back, I have met some of my dearest friends and most admired colleagues while serving as a volunteer in various organizations. My professional goal is to give back to the practice of law as much as I have received. My oath hangs on my office wall as a reminder of the great responsibility and charge upon me as a member of our Louisiana Bar. In fact, the closing line of our oath is uniformly used by many state bars around our country and reads, “I will never reject, from any consideration personal to myself, the cause of the defenseless or the oppressed ...”

My colleagues, you can lend your support to your neighbors and our profession by contacting any of the persons or agencies mentioned above. Now more than ever, our Louisiana needs you. Please volunteer — at any level.

LOCAL AFFILIATES

New Orleans Bar & Grille: Bar Teams Up with Amateur Chefs for Annual Cook-off

The New Orleans Bar Association’s (NOBA) Young Lawyers Section hosted the fourth annual New Orleans Bar & Grille cooking contest in City Park on June 10. Teams of amateur chefs from law firms and local businesses competed for prizes in specialized categories. Attendees were treated to live music, a silent auction and samplings of the dishes entered.

Proceeds from the event will benefit the New Orleans Legal Assistance Corp., a nonprofit organization handling the legal needs of people with low incomes.

Judging the entries were U.S. District Court Eastern District Judge Lance M. Africk, Orleans Parish Civil District Court Judge Nadine M. Ramsey, Dickie Brennan, Jennifer Powell and Poppy Tooker.

The team from Irwin Fritchie Urquhart & Moore won “Best Overall” with a duck confit over fried eggplant medallions with hoisin sauce. The team from IVIZE won “Most Creative” with champagne-roasted oysters. The team from Liskow & Lewis took the honors for the “Best Dessert” with chilled peach soup. The “Best Local Favorite” was awarded to the team from Environmental Resources Management for its cassas. The Leake & Andersson team received top honors for the “Best Booth Design.”

The New Orleans Bar & Grille is organized by the NOBA Young Lawyers.
Section and sponsored by the New Orleans Bar Foundation, whose mission is to support the work performed by lawyers.

The 2006 chairs of the New Orleans Bar & Grille were Alina Pagani, Conrad Meyer and Maurice C. Ruffin. Silent Auction chairs were Elizabeth “Attie” Carville and Aylin A. Maklansky.

**NOBA YLS Sponsors Annual Mayoral Luncheon**

The New Orleans Bar Association’s Young Lawyers Section (NOBA YLS) sponsored its annual Mayoral Luncheon with New Orleans Mayor C. Ray Nagin on July 19. More than 200 people attended to hear an update from the mayor on the state of the city.

NOBA President Carmelite M. Bertaut introduced Mayor Nagin who spoke on the condition of New Orleans post-Katrina. The mayor then opened the floor for questions and comments.

Carey L. Menasco chairs the YLS Mayoral Luncheon Committee.

New Orleans Bar & Grille winners of the “Best Overall” are the husband-and-wife team of Ben Gersh and Cami Capodice, who, along with team member Missy Thornton (not pictured), picked up the award on behalf of Irwin Fritchie.

**Volunteer for SOLACE**

SOLACE is Support of Lawyers/Legal Personnel — All Concern Encouraged.

Find out more about the program at: [http://www.lsba.org/committees/cac-solace.asp](http://www.lsba.org/committees/cac-solace.asp).

If you are interested in becoming a SOLACE volunteer, contact Brooke Monaco at (504)619-0118 or bmonaco@lsba.org.

**Need CLE?**

The Louisiana State Bar Association can help. Contact CLE Coordinator Annette C. Buras at (504)619-0102 or (800)421-5722, ext. 102, or e-mail aburas@lsba.org. Information on CLE seminars also can be found on the LSBA’s Web site. Go to: [www.lsba.org/cle-1/cle-1.html](http://www.lsba.org/cle-1/cle-1.html).
Appointments

David L. Sigler and William C. Kalmbach were appointed, by order of the Louisiana Supreme Court, to the Louisiana Board of Legal Specialization for terms of office ending on June 30, 2009.

Louis Graham Arceneaux was appointed, by order of the Louisiana Supreme Court, to the Committee on Bar Admissions for a term of office that began on July 1 and will end on June 30, 2011.

Retirement

Fifth Circuit Court of Appeal Judge James L. Cannella retired effective July 15 to serve as city attorney for Kenner. He served as judge for the 24th Judicial District Court from 1982 until his election to the 5th Circuit Court of Appeal in 1991. A 1966 graduate of the University of New Orleans, he earned his JD degree from Loyola University Law School in 1967.

Deaths

Retired 19th Judicial District Court Judge Frank J. Saia, 61, died June 19. He earned his undergraduate degree from Louisiana State University in 1967 and his JD degree from Loyola University Law School in 1970. He served as chief public defender and then as assistant district attorney for East Baton Rouge Parish. In 1983, he was elected to the 19th Judicial District Court and was re-elected without opposition in 1985 and 1991 before his retirement in 1996. Following his retirement from the bench, he maintained a private practice until his death.

Retired 3rd Circuit Court of Appeal Judge Minos D. Miller, Jr., 85, died July 1. He served as a combat pilot for the U.S. Navy during World War II where he earned a Purple Heart after he was shot down by enemy fire, spending 30 hours in the water and eventually captured and held in a prison camp. After being among the first Louisiana prisoners liberated and repatriated, he immediately began taking correspondence courses to continue his studies. In 1947, he received both his undergraduate and LLB degrees from Louisiana State University. Prior to his military service, he attended Louisiana State University and was a member of many honorary, scholastic and leadership organizations, including Phi Delta Phi legal fraternity, Omicron Delta Kappa leadership fraternity and Phi Eta Sigma scholastic fraternity. He was first elected to the bench of the newly created 31st Judicial District Court in 1953 and was re-elected without opposition in 1954, 1960 and 1966, serving as the only judge for that district during that time and earning recognition for maintaining a current docket with no backlog of cases while serving a population of nearly 60,000. In 1968, he was elected to the 3rd Circuit Court of Appeal where he served until his retirement in 1977. He was a past president of the Louisiana District Judges Association and served on the Louisiana Judicial Council. He worked on various projects of law revision conducted by the Louisiana Law Institute and in 1967 served as a faculty advisor for the National College of State Trial Judges at the University of Pennsylvania. He served by special appointment on the Louisiana Supreme Court in 1958 and also by special appointment on the 1st, 3rd and 4th Circuits of the Courts of Appeal. He was appointed by the Louisiana Supreme Court as an interim judge with the 1st Circuit Court of Appeal in 1961-62. He was active in a number of civic, charitable and community organizations including service as commander of the Jennings American Legion Post, vice president of the Southwest Louisiana Bar Association and chair of the Jeff Davis district of the Boy Scouts of America, earning the Silver Beaver, one of scouting’s highest awards.

Need computer help?

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e-mail: thorne@thornedharrisiii.com
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., announces that James H. Daigle and Kenneth M. Klemm have joined the firm as shareholders in the New Orleans office and Robert S. Emmett has joined the firm as of counsel in the New Orleans office.

Anthony M. DiLeo, A Professional Corporation, has relocated its offices to Ste. 2750, 650 Poydras St., New Orleans, LA 70130; phone (504)274-0087.

Baton Rouge attorney Franklin J. Foil has formed the Foil Law Firm, located at 320 Somerulos St., Baton Rouge; phone (225)382-3264. Frank Foil is of counsel to the firm.

The Forest and Little Law Office has relocated to 233 North College Road, Lafayette, LA 70506; phone (337)234-1932.

Jones, Walker, Waechter, Poitevent, Carrère & Denège, L.L.P., announces that Luis A. Leitzelar has joined the Baton Rouge office as a special counsel in the business and commercial litigation practice group.

F. Gerald Maples announces that Stephen M. Wiles has become a member of Maples & Kirwan, L.L.C., in the firm’s New Orleans office.

Robert N. Markle has joined the Office of Immigration Litigation in the Civil Division of the U.S. Department of Justice in Washington, D.C.

McGlinchey Stafford, P.L.L.C., announces the appointment of Donna G. Klein as the new managing partner in the firm’s New Orleans office.


Mediation Arbitration Professional Systems, Inc. (MAPS) announces that Blaine A. Doucet and Yul D. Lorio have joined the MAPS mediator panel. Both are founding partners of Doucet, Lorio & Moreno, L.L.C.

Terri M. Miles announces the reformation of her law practice in the name of Terri M. Miles, L.L.C., Attorney at Law, located at 310 Weyer St., Gretna, LA 70053; phone (504)367-7250.

Milling Benson Woodward, L.L.P., announces that Paul Douglas Stewart, Jr. and William S. Robbins have joined the firm as partners in the bankruptcy practice group.

The Pendley Law Firm announces that the firm has become Pendley, Baudin & Coffin, L.L.P., located in Plaquemine, La. Also, the firm announces that Allen M. Edwards is now of counsel to the firm.

Rossway Moore & Taylor in Vero Beach, Fla., announces that Louis J. Lupin has been admitted to the Florida Bar and has joined the firm.

Seale & Ross, A.P.L.C., announces that Richard L. Traina has joined the firm in its Hammond office.

Smith Haughey Rice & Rogge of Grand Rapids, Mich., announces that Thomas W. Aycock has joined the firm’s litigation department.

Staines & Eppling, A.P.L.C., announces that Eric M. Barrilleaux and Ryan E. Beasley have become associates in the firm’s Metairie office.
Bernard E. Boudreaux, Jr., a partner with the firm Breazeale, Sachse & Wilson, L.L.P., in Baton Rouge, was inducted into the Louisiana Justice Hall of Fame in July. Housed in the Louisiana State Penitentiary Museum, the Hall of Fame honors Louisiana residents who have served their communities, state and nation in the law enforcement, judiciary and corrections professions.

George L. Clauer III, an attorney practicing in Greenville, S.C., with Skinner & Associates Law Firm, L.L.C., has been named to the board of directors of Compass of Carolina.

John W. deGravelles, with the firm deGravelles, Palmintier, Holthaus & Frugé in Baton Rouge, has been inducted into the International Academy of Trial Lawyers.

Cristy Corbino Edwards, an attorney in the Houston office of Vinson & Elkins, L.L.P., has been named a “2006 Texas Rising Star” attorney by Texas Monthly magazine.

Robert S. Eitel has been appointed by U.S. Secretary of Education Margaret Spellings to the position of deputy general counsel of the U.S. Department of Education in Washington, D.C.

John J. Gillon, Jr., a senior attorney with the U.S. Patent and Trademark Office, has been awarded an Erasmus Mundus Fellowship by the European Union to earn a European master in bioethics in 2006-07.

Bedouin L. Joseph, an associate with Adams and Reese, L.L.P. in New Orleans, has been selected by the White House to participate in the White House Fellows program. One of only 14 people nationwide invited to participate, he will spend one year in Washington, D.C., working as a special assistant to a senior White House staff member, Cabinet secretary or other government official.

Mark N. Mallery, a member of McGlinchey Stafford, P.L.L.C., has been appointed management chair of the American Bar Association’s Labor and Employment Law Section’s Employment Rights and Responsibilities Standing Committee.

Named to the 2006 edition of Chambers USA: America’s Leading Business Lawyers:

Gainsburgh, Benjamin, David, Meunier & Warshauer, L.L.C.: The firm and Gerald E. Meunier.


People Deadlines & Notes

The deadlines for submitting People announcements (and photos):

<table>
<thead>
<tr>
<th>Publication</th>
<th>Deadline</th>
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</thead>
<tbody>
<tr>
<td>Feb./March 2007</td>
<td>Dec. 4, 2006</td>
</tr>
<tr>
<td>April/May 2007</td>
<td>Feb. 2, 2007</td>
</tr>
<tr>
<td>June/July 2007</td>
<td>April 4, 2007</td>
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<tr>
<td>Aug./Sept. 2007</td>
<td>June 4, 2007</td>
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Announcements are published free of charge for members of the Louisiana State Bar Association. Members may publish photos with their announcements at a cost of $50 per photo.

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 70130-3404

Or e-mail
dlabranche@lsba.org

www.lsba.org

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FUND PAYMENTS

CLIENT ASSISTANCE FUND PAYMENTS / DECEMBER 2005 THROUGH MAY 2006

<table>
<thead>
<tr>
<th>Attorney</th>
<th>Amount Paid</th>
<th>Gist</th>
<th>Description</th>
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<tbody>
<tr>
<td>Phillip Lucius Alleman</td>
<td>$797.55</td>
<td>#785 - Conversion of funds in</td>
<td>garnishment matter</td>
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<tr>
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<tr>
<td>Phillip Lucius Alleman</td>
<td>$1,000.00</td>
<td>#791 - Unearned fees in a</td>
<td>child support matter and community property matter</td>
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<tr>
<td>Phillip Lucius Alleman</td>
<td>$3,000.00</td>
<td>#773 - Unearned fee in a custody</td>
<td>matter</td>
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<tr>
<td>Phillip Lucius Alleman</td>
<td>$500.00</td>
<td>#775 - Unearned fee in a domestic</td>
<td>matter</td>
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<tr>
<td>Phillip Lucius Alleman</td>
<td>$734.00</td>
<td>#776 - Unearned fee in a</td>
<td>bankruptcy matter</td>
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<tr>
<td>Phillip Lucius Alleman</td>
<td>$200.00</td>
<td>#777 - Unearned fee in a</td>
<td>bankruptcy matter</td>
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<tr>
<td>Roxanne D. Andrus</td>
<td>$2,060.00</td>
<td>#752 - Unearned fee in</td>
<td>a criminal matter</td>
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<tr>
<td>C. Justin Brown, Jr.</td>
<td>$130.00</td>
<td>#727 - Unearned fee in</td>
<td>a criminal matter</td>
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<tr>
<td>Keith J. Labat</td>
<td>$25,000.00</td>
<td>#731 - Conversion of client</td>
<td>funds</td>
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<tr>
<td>Keith J. Labat</td>
<td>$25,000.00</td>
<td>#732 - Conversion of client</td>
<td>funds</td>
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<tr>
<td>Alex O. Lewis III</td>
<td>$800.00</td>
<td>#686 - Unearned fee in a</td>
<td>bankruptcy matter</td>
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<tr>
<td>Alex O. Lewis III</td>
<td>$3,000.00</td>
<td>#683 - Unearned fee in a</td>
<td>criminal matter</td>
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<tr>
<td>George E. Lucas, Jr.</td>
<td>$1,400.00</td>
<td>#749 - Unearned fee in a custody</td>
<td>matter</td>
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<tr>
<td>Michelle Dionne McKee</td>
<td>$300.00</td>
<td>#753 - Unearned fee in a</td>
<td>bankruptcy matter</td>
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<tr>
<td>Claud E. Phelps, Jr.</td>
<td>$450.00</td>
<td>#766 - Unearned fee in a</td>
<td>domestic matter</td>
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<tr>
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<tr>
<td>Stevens J. White</td>
<td>$300.00</td>
<td>#618 - Unearned fee in a</td>
<td>collision claim</td>
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</tbody>
</table>

Dispute Over Legal Fees?

The LSBA Lawyer Fee Dispute Resolution Program may be able to help.

Avoid the pitfalls of legal fee disputes such as disciplinary complaints or civil litigation by submitting your legal fee to binding low cost fee arbitration with the Louisiana State Bar Association. For more information on the process, go to LSBA.org/consumer_services/lawyer_dispute_resolution_program. or simply contact Bill King, Practice Assistance Counsel, at 504-619-0109 or bking@lsba.org.

Quick, Inexpensive, Informal, and Final resolution of attorney/client and attorney/attorney fee disputes.
What is the Louisiana Client Assistance Fund?
The Louisiana Client Assistance Fund was created to compensate clients who lose money due to a lawyer’s dishonest conduct. The Fund can reimburse clients up to $25,000 for thefts by a lawyer. It covers money or property lost because a lawyer was dishonest (not because the lawyer acted incompetently or failed to take certain action). The fund does not pay interest nor does it pay for any damages done as a result of losing your money.

How do I qualify for the Fund?
Clients must be able to show that the money or property came into the lawyer’s hands.

Does the Fund cover fees?
The Fund will reimburse fees only in limited cases. If the lawyer did no work, fees may be covered by the Fund. Fees are not reimbursable simply because you are dissatisfied with the services or because work was not completed.

Who can, or cannot, qualify for the Fund?
Almost anyone who has lost money due to a lawyer’s dishonesty can apply for reimbursement. You do not have to be a United States citizen. However, if you are the spouse or other close relative of the lawyer in question, or the lawyer’s business partner, employer or employee, or in a business controlled by the lawyer, the Fund will not pay you reimbursement. Also, the Fund will not reimburse for losses suffered by government entities or agencies.

Who decides whether I qualify for reimbursement?
The Client Assistance Fund Committee decides whether you qualify for reimbursement from the Fund, and, if so, whether part or all of your application will be paid. The committee is not obligated to pay any claim. Disbursements from the Fund are at the sole discretion of the committee. The committee is made up of volunteer lawyers who investigate all claims.

How do I file a claim?
Because the Client Assistance Fund Committee requires proof that the lawyer dishonestly took your money or property, you should register a complaint against the lawyer with the Office of Disciplinary Counsel. The Disciplinary Counsel’s office will investigate your complaint. To file a complaint with the Office of Disciplinary Counsel or to obtain a complaint form, write to: Disciplinary Counsel, 4000 South Sherwood Forest Blvd., Suite 607, Baton Rouge, LA 70816-4388. Client Assistance Fund applications are available by calling or writing: The Client Assistance Fund, 601 St. Charles Ave., New Orleans, LA 70130-3427, (504)566-1600 or (800)421-5722. Applicants are requested to complete an Application for Relief and Financial Information Form.

Are there other avenues to explore to obtain reimbursement?
Depending on the circumstances, you may be able to file a civil lawsuit or criminal charges against the lawyer. You should consult a new lawyer or the district attorney’s office about these matters. Note that there are deadlines for starting this process.

I don’t know another lawyer. How can I find someone?
Call the Lawyer Referral service in your area. These services are listed in the Yellow Pages of the telephone directory.

Is there any charge for seeking Client Assistance Fund help?
No. The process is free.

Do I need an attorney to seek Client Assistance Fund help?
You do not need a lawyer to apply but you may consult one if you wish. Also be aware that if you have a specific legal problem, you should not try to apply or interpret the law without the aid of a trained expert who knows the facts because the facts may change the application of the law.

We Want Your News!

Mail or e-mail your material to:
Publications Coordinator Darlene M. LaBranche
Louisiana State Bar Association
601 St. Charles Ave., New Orleans, LA 70130-3404
e-mail dlabranche@lsba.org.

Public matters are reported to protect the public, inform the profession and deter misconduct. Reporting date Aug. 3, 2006.

**Decisions**


**Vincent P. Blanson**, New Orleans, (05-B-2561) **Six-month suspension** ordered by the court on June 2, 2006. JUDGMENT FINAL and EFFECTIVE on June 2, 2006. Gist: Lack of diligence; failure to communicate with client; and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

**Michael K. Boudreaux**, Bush, (05-DB-049) **Public reprimand** by ruling of the Louisiana Attorney Disciplinary Board dated May 23, 2006. JUDGMENT FINAL and EFFECTIVE on May 23, 2006. Gist: Settling a claim for malpractice liability with an unrepresented client or former client without first advising that person in writing that independent representation was appropriate; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and violating the Rules of Professional Conduct.

**Brian Philip Brancato**, New Orleans, (2006-B-0124) **Disbarment** ordered by the court on May 26, 2006. JUDGMENT FINAL and EFFECTIVE on June 9, 2006. Gist: Failure to act with reasonable diligence and promptness in representing a client; failure to communicate with a client; and failure to cooperate with the Office of Disciplinary Counsel in its investigations.

**Pressley C. Calahan**, New Iberia, (2006-B-0005) **Disbarred** by order of the court dated May 17, 2006. JUDGMENT FINAL and EFFECTIVE on May 31, 2006. Gist: Filing petition with allegations not approved by client; failure to communicate with the client; unreasonable fees; failing to communicate whether fee was to be contingent or hourly; failing to have contingency fee in writing; failure to comply with obligations upon termination of representation; meritorious claims and contentions; making false statements to a tribunal; lack of truthfulness in statements to others; knowingly violating or attempting to violate the Rules of Professional Conduct; commission of a criminal act especially one that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

**Richard B. Cook**, Cockeysville, MD (2006-B-0426) **Suspension for three years with all but 18 months deferred** by order of the court on June 16, 2006. JUDGMENT FINAL and EFFECTIVE on June 30, 2006. Gist: Filing repetitive and unwarranted pleadings in ongoing litigation; and making frivolous and harassing discovery claims against third persons not involved in the litigation.


**John S. Keller**, Metairie, (2006-OB-1222) **Permanent resignation in lieu of discipline** ordered by the court on June 20, 2006. JUDGMENT FINAL and EF-
Discipline Report
Continued from page 222

Effective on June 20, 2006. Gist: Commission of a criminal act especially one that reflects adversely on the lawyer’s honesty, trustworthiness or fitness; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and violating or attempting to violate the Rules of Professional Conduct or knowingly assisting another to do so.

Mitchell Reid Landry, Metairie, (2005-B-1871) Six-month suspension with all but 30 days deferred, followed by six-month period of unsupervised probation subject to conditions, ordered by the court on July 6, 2006. Judgment final and effective on July 24, 2006. Gist: Knowingly making a false statement of fact or law to a tribunal; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct prejudicial to the administration of justice.


Joel G. Porter, Baton Rouge, (2005-B-1736) Suspended for a year by order of the court dated March 10, 2006. Rehearing denied on June 23, 2006. Judgment final and effective on June 23, 2006. Gist: Failure to act with reasonable diligence and promptness in representing a client; failure to communicate with a client; lack of candor toward the tribunal; knowingly making a false statement of material fact or law to a third person; violation of the Rules of Professional Conduct; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct prejudicial to the administration of justice.


Edward Eugene Sumpter, Lake Charles, (2006-B-0576) Suspension for one year and one day, deferred in its entirety, ordered by the court on June 2, 2006.

Continued next page
Discipline Report
Continued from page 223

2006. JUDGMENT FINAL and EFFECTIVE on June 17, 2006. Gist: Neglect of a client’s bankruptcy matter; failure to communicate with client; misled client as to status of her case; failed to promptly refund unearned fee; and failure to properly withdraw from representation upon closure of his private practice.

Samuel M. Yontner, Kenner, (2005-B-1737) Suspension for one year and one day ordered by the court on June 2, 2006. JUDGMENT FINAL and EFFECTIVE on June 17, 2006. Gist: Failure to abide by his agreement to place disputed funds into the registry of the court; conversion of funds owed to a third party; and failure to make restitution until ordered to do so by the trial court.

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

<table>
<thead>
<tr>
<th>No. of Violations</th>
<th>Description</th>
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<tbody>
<tr>
<td></td>
<td>Failure to comply with the minimum requirements of continuing legal education as prescribed by Louisiana Supreme Court</td>
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<td></td>
<td>Unauthorized practice of law</td>
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<tr>
<td></td>
<td>Engaging in conduct that is prejudicial to the administration of justice</td>
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<tr>
<td></td>
<td>Unlawfully obstructing another party’s access to evidence or unlawfully altering, destroying or concealing a document or other material having potential evidentiary value</td>
</tr>
<tr>
<td></td>
<td>Conflict of interest</td>
</tr>
<tr>
<td></td>
<td>Lack of diligence</td>
</tr>
<tr>
<td></td>
<td>Lack of communication</td>
</tr>
<tr>
<td></td>
<td>Settling a case without the client’s consent to do so</td>
</tr>
<tr>
<td></td>
<td>Failure to safekeep a client or third person’s property</td>
</tr>
</tbody>
</table>

TOTAL INDIVIDUALS ADMONISHED ........................................................................ 5

Ethics Advisory Service

• Unsure of your ethical obligations as a lawyer?
• Worried about doing the right thing or wrong thing?
• Need some advice or just someone to bounce your ideas off of before going forward?

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Call, email, fax or write us with questions about your own prospective conduct. Don’t struggle by yourself with these difficult questions- we’re here and ready to help you!

Louisiana State Bar Association
Ethics Advisory Service
601 St. Charles Avenue
New Orleans, LA 70130

Phone: (504)619-0144 Fax: (504)598-6753 Email: Rlemmler@lsba.org

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Small-town firm of three attorneys seeks associate attorney to run satellite office with established clientele. Three to six years’ experience preferred with concentration in general civil practice and some real estate. Excellent writing and communication skills required. Great opportunity for motivated and ambitious self-starter; good benefits package. Qualified candidates should submit résumé to C-Box 210.

AV-rated law firm seeking attorney with minimum three years’ experience in bankruptcy and commercial litigation. Competitive salary and excellent benefits offered. Please submit résumés to: Ste. 114-374, 201 St. Charles Ave., New Orleans, LA 70170.
Schully, Roberts, Slattery & Marino, a small New Orleans AV-rated firm, seeks senior attorney (10 years of experience or more preferred) for oil and gas transactional/title work. Full benefits and compensation commensurate with experience. Send résumé to Elizabeth A. Drescher, Office Administrator, Schully, Roberts, Slattery & Marino, Ste. 1800, 1100 Poydras St., New Orleans, LA 70163-1800, or e-mail to ldrescher@schullyroberts.com.

CBD plaintiff law firm is seeking an experienced paralegal to support senior partner in busy white-collar criminal defense and corporate practice. Candidate must have excellent oral and written communication skills, strong computer capabilities and should be extremely organized. Salary commensurate with experience. Excellent benefits package including paid parking. Please fax résumé with cover letter to Litigation Administrator, (504)581-7635, or e-mail jml@mbfirm.com.

Small CBD litigation firm seeking experienced legal secretary with minimum five years’ litigation experience. Pay commensurate with experience. Must be professional and organized. Benefits include paid parking and retirement plan. Please e-mail cover letter, résumé and references to Ms. Lea Green at ldg@theyoungfirm.com or fax to her at (504)680-4101.

Texas attorney, LSU Law 1985. Admitted in Louisiana and Texas. I am available to attend hearings, conduct depositions, act as local counsel and accept referrals for general civil litigation in the Houston area. Contact Manfred Sternberg, Jr. at (713)622-4300.

Louisiana attorney with 27 years’ experience in general practice concentrating primarily in civil litigation available to assist other attorneys throughout Louisiana in overflow work or problem areas of law by preparing memoranda, motions, briefs, appeals, pleadings, pre-trial orders, trial notebooks, legal research, etc.; New Orleans office; $75/hour. Résumé available. (985)788-3736.

Briefs/Legal Research/Analysis of Unusual or Problem Cases
Honors graduate of top 10 law school, lead counsel on numerous reported cases, federal judicial clerk, 20 years’ litigation experience, creative legal thinker, references on request. Catherine Leary, (504)436-9648.

Legal research/writing. Top of spring 1967 class, LSU; LLM, Yale, 1968. Writings include briefs, memoranda and pleadings at courts of all levels, plus law review articles. Experience includes both general civil practice and major litigation. Statewide e-mail service. References upon request. William T. Tête, (504)891-6064.

Former federal court law clerk. More than 30 years’ experience, civil practice and brief writing, before Louisiana state and federal courts, including U.S. Supreme Court. More than 15 years’ experience in insurance policy interpretation. Proficient in both electronic and manual research. Available for research and/or writing. Can work within time constraints. Mail, fax or e-mail delivery. A fresh mind frequently brings fresh ideas. Contact Wayne Scheuemann, (504)737-4175, or e-mail: WScheuerma@bellsouth.net.

Licensed in Louisiana, Texas and Washington
Licensed in Louisiana, Texas and Washington-Order of the Coif. Experienced trial attorney available to assist with all aspects of litigation from pleadings and research to depositions and court appearances. Résumé, references, rates and writing sample available. Estelle Mahoney, (985)209-8500; estelm@aol.com.

Florida beach home for sale. New construction, four bedrooms, 3.5 baths, $795,000, in the gated community of Parasol West Subdivision in Perdido Key, Fla. Subdivision offers pool, pier and boat launch ramp, with easy access to Gulf. Contact Mike Thiel with RMI, Realty Marts International, at cell (850)304-6084, or office (850)932-5376, for more information.

Michael J. Riley, Sr. has applied for readmission to the Louisiana State Bar Association. Individuals concurring in or opposing this application may file their concurrence or opposition with the Louisiana Attorney Disciplinary Board, Ste. 310, 2800 Veterans Memorial Blvd., Metairie, LA 70002, within 30 days.
LSBA 2006-07 CLE Seminar Calendar

The Louisiana State Bar Association has planned a year’s worth of continuing legal education seminars to fit all tastes and needs. For more information on any program, contact CLE Coordinator Annette C. Buras at (504)619-0102 or (800)421-5722, ext. 102, or e-mail aburas@lsba.org. Information on CLE seminars also can be found on the LSBA’s Web site. Go to: www.lsba.org/cle-1/cle-1.html. Upcoming seminars are:

6th Annual Class Action/Mass Tort Symposium
Oct. 20, 2006 • New Orleans

Bridging the Gap
Oct. 26-27, 2006 • New Orleans

Breaking Down the Walls of Separation — A Day of Dialogue: What Judges and Lawyers Can Learn From Each Other
Nov. 3, 2006 • New Orleans

Professional Liability in the 21st Century
Nov. 10, 2006 • New Orleans

Be the First in Line for Workers’ Compensation Updates
Nov. 16, 2006 • Baton Rouge

New York/New York Multi-Topic CLE
Nov. 19-21, 2006
Grand Hyatt New York
New York, N.Y.

Ethics & Professionalism: Watch Your P’s and Q’s
Dec. 1, 2006 • New Orleans

Summer School Revisited
Dec. 7-8, 2006 • New Orleans

Mediation Seminar
Feb. 2, 2007 • New Orleans

HIPAA
Feb. 16, 2007 • New Orleans

Destination Disney!
Feb. 19-21, 2007
Lake Buena Vista, Fla.

Domestic Law
March 9, 2007 • New Orleans

Estate Planning
March 16, 2007 • New Orleans

Practicing Law: The Early Years
March 23, 2007 • New Orleans

ADR
April 13, 2007 • New Orleans

Evidence
April 20, 2007 • New Orleans

CLE for New Admittees
April 23, 2007 • Baton Rouge

Jazz Fest
April 27, 2007 • New Orleans

Summer School for Lawyers
June 3-6, 2007
Sandestin, Fla.

Ethics & Professionalism Summer Re-Run
June 22, 2007 • New Orleans

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**LSBA Solo and Small Firms Section Regrouping, Making Plans**

The Louisiana State Bar Association’s (LSBA) Solo and Small Firms Section has been working to regroup following the 2005 hurricanes. Although the officers’ regular meeting place (a coffee house) was damaged by eight feet of water and still has not been rebuilt, the officers have been able to meet and make plans and are now looking to locate and increase the membership and diversify across the state, said Section Chair Faun Fenderson. Among the items discussed:

**CLE.** The Section conducted a CLE program on Sept. 15 on Fastcase, the online legal research tool offered free to LSBA members, and resources available at the Supreme Court’s Library. The Section is planning other CLE programs, including luncheon seminars for the end of the year on professionalism and ethics.

**Membership.** The Section waived membership dues for this year. “Just write to the Bar and tell them you want to be a member of the Solo and Small Firms Section, and you will be on the list. Also, visit our Web site at www.solo-smallfirms.org to make sure we have your e-mail address. Notices are regularly sent out via e-mail for speed and to keep costs down. Our regular dues have only been $20 per year, so it’s something everyone can afford,” Fenderson said.

**More Activities.** The Section would like to increase activities in all parts of the state and is open to all ideas. Anyone wanting to set up a luncheon, CLE program or other program, either sponsored solely by the Section or in conjunction with a local bar or group, should contact Fenderson at Ste. 2556, 909 Poydras St., New Orleans, LA, 70112; call (504)525-4361; fax (504)525-4380; or e-mail faun@faunfenderson.com.

**Newsletter.** The Section is looking for submissions, authors and editors for a newsletter to be distributed primarily via e-mail but periodically by regular mail. Articles should be short and concise and topics can be anything of interest to other solos and small firm practitioners. “If you come across a ‘gotcha’ law or a new use of a computer program we all have, or have good leads on process servers or investigators, let us know and we will share with others in similar situations,” Fenderson said.

**Officers.** The Section is looking for people to take a more active role in the organization. This includes members throughout the entire state to help coordinate seminars, disseminate information and work towards making the Section a stronger voice in the state.

**Ideas.** “Send us your ideas. We are open to new ideas and suggestions. The Solo Section was established to help small practitioners. We regularly call on each other for quick advice, assistance and comradeship. If we can help you, please let us know,” Fenderson said.

In addition to Fenderson, other Sec-

**McKay to Serve on Executive Council of National Conference of Board Presidents**

Michael W. McKay, a partner with McKay, Lutgring & Cochran, L.L.C., in Baton Rouge, was sworn in as an executive council member of the National Conference of Board Presidents (NCBP) in August during the Association’s Annual Meeting in Hawaii.

The Executive Council is the board of directors of the NCBP. Members of the council serve three-year terms and work with the NCBP officers to govern and administer all NCBP programs.

“It is an honor to serve as a board member for the National Conference of Board Presidents,” McKay said. “The board feels an obligation and responsibility to ensure that all bar association presidents have the information they need to effectively advance their members’ interests.”

McKay served as president of the Louisiana State Bar Association in 2004-05. He served as the president of the Baton Rouge Bar Association in 1992-93. He received the LSBA President’s Award for outstanding service in 1997 and the LSBA Pro Bono Publico Award in 1994. He is a master in the Wex Malone Inn of Court, a member of the American Bar Association’s House of Delegates and a member of the American Board of Trial Attorneys.

McKay received his BA degree in 1971 from Louisiana State University and his JD degree in 1974 from LSU Paul M. Hebert Law Center. He was admitted to practice in Louisiana in 1974.
tion officers are Thorne D. Harris III, Carl Selenberg, Tom Stirewalt, Courtney Wilson, René deLaup, Deborah Faust and James Willeford.

Bar Members Inducted into Louisiana Justice Hall of Fame

Several Louisiana State Bar Association members were inducted into the Louisiana Justice Hall of Fame in July. The Hall of Fame, opened in 2005, is housed in the Louisiana State Penitentiary Museum and is a project of the Louisiana State Penitentiary Museum Foundation.

Inducted were Helen G. Berrigan, chief judge, United States District Court for the Eastern District of Louisiana; Bernard E. Boudreaux, Jr., partner with the law firm of Breazeale, Sachse & Wilson, L.L.P., in Baton Rouge; Catherine D. Kimball, associate justice, Louisiana Supreme Court; Harry Lee, Jefferson Parish sheriff; Kaliste J. Saloom, Jr., former Lafayette City Court judge and currently of counsel with Saloom & Saloom Law Firm in Lafayette; and E. Gordon West (posthumously), judge of United States District Court for the Middle District of Louisiana for 31 years.

The Hall of Fame honors the men and women of Louisiana who have served their communities, state and nation in the professions of law enforcement, judiciary, corrections and related fields.

Jefferson Bar Auxiliary Elects New Officers

Barbara McManus was installed as 2006-07 president of the Jefferson Bar Association Auxiliary. Also serving as officers are Glory Toups, vice president; Tish Steib, recording secretary; Renee Haase, corresponding secretary; Candace Kytle, treasurer; Stephanie Levenson, financial secretary; and Marian Offner, parliamentarian.

The 2006-07 committee chairs are Nadine Higgins, Carole Dunn and Jan Ranson, program; Cathy Landwehr and Gail Veters, decorating; Mary Ann Sherry, philanthropic; Stephanie Levenson, membership; Carolyn D’Antonio, Gail Giacobbe and Beth Gardner, telephone; Marian Offner, Barbara Dallam and Barbara McManus, nominating; Amanda Offner, yearbook; and Jenny Peytavin and Antoinette Wilkinson, publicity/scrapbook.

McGoffin Receives LSBA Crystal Gavel Award

Gary McGoffin, a partner of Durio, McGoffin, Stagg & Ackermann law firm in Lafayette, received the Louisiana State Bar Association’s Crystal Gavel Award for his commitment to improving the public education system in Lafayette. The awards ceremony was in May during the Eggs & Issues Meeting of the Lafayette Chamber of Commerce.

The Crystal Gavel Award recognizes outstanding lawyers and judges who have been unsung heroes in their communities, who have performed services out of a sense of duty, responsibility and professionalism, and who have made a difference in their local communities, local organizations or even in the life of one person.

McGoffin served as 2004 chair of the Greater Lafayette Chamber of Commerce and began several initiatives during his term that have positively affected the Lafayette community while focusing on the Lafayette Parish school system. He put his efforts into the school system because he believes that Lafayette Parish should have the best possible educational system, which in turn will benefit the community as a whole. One key initiative was the wiring of all schools for Internet use to bring technology into the classrooms.
Lafayette Parish Bar Association Holds Past Presidents’ Dinner

The Lafayette Parish Bar Association (LPBA) is celebrating its 34th year of service and the past presidents of the association met earlier this year to discuss the future of the association by renewing their commitment to their motto, “Motivated by Justice, Inspired by Service.” The association is comprised of 850 attorneys in the Acadiana area. Past presidents attending the dinner included, front row from left, Norman Foret, Jennifer Kleinpeter, Margaret Ritchey, John McElligott, Gary McGoffin; and Kenny Oliver, LPBA current president. Second row from left, Pat Ottinger; Joseph Oelkers, LPBA immediate past president; Glenn Armentor and Lee Leonard. Third row from left, Dean Cole, Tom Porter, Joe Giglio; Susan Holliday, LPBA executive director; and Mike Hebert. Back row from left, Richard Becker, LPBA president-elect; Richard Broussard; Miles Matt, LPBA secretary/treasurer; John Swift, Lamont Domingue, Greg Voorhies, Tommy Hightower, Judge Thomas Duplantier and Frank X. Neuner, Jr. Not in photo, Judge Marilyn Castle, Greg Tonore, Lane Roy, Ralph Kraft, Dean Domingue, Harmon Roy and John Bivins.

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Louisiana Bar Foundation Aids in Legal Recovery Efforts

The Louisiana Bar Foundation (LBF) awarded more than $300,000 to legal services agencies providing services to hurricane victims throughout Louisiana. Receiving grants were Acadiana Legal Service Corp., Baton Rouge Bar Foundation, Capital Area Legal Services Corp., Louisiana Civil Justice Center, Metropolitan Battered Women’s Program, Southeast Louisiana Legal Services, Southwest Louisiana Legal Services and The Pro Bono Project. The funds will be used for salaries and benefits for staff attorney, paralegal or coordinator positions directly providing legal services or facilitating the provision of legal services to the affected people.

In addition, the LBF awarded the Louisiana Civil Justice Center a grant for marketing initiatives to promote awareness of its Call Center, which is offering legal information, advice and/or assistance to hurricane victims. The Call Center is staffed by attorneys, law students and support staff. To date, more than 14,000 calls have been handled.

The LBF is requesting proposals from individuals for the collection and analysis of data retrieved from the Call Center and legal agencies providing disaster-related services and for development of a report discussing the legal issues faced by affected citizens.

The LBF awarded a $50,000 grant to the Orleans Indigent Defender Board. The grant will be used for implementation of a case management infrastructure which includes equipment, technology and IT support.

LBF Hires AmeriCorps Attorneys

Susan Saba and Kathleen McNelis were hired by the Louisiana Bar Foundation (LBF) as Law Student Pro Bono Opportunity Coordinators.

They will collaborate with community legal aid providers and law schools to develop quality pro bono opportunities and programs; recruit and train law students to volunteer with pro bono projects; and provide ongoing management and coordination of those pro bono projects and volunteers.

Saba can be reached at susan@raisingthebar.org.

McNelis can be reached at kathleen@raisingthebar.org.

LBF Welcomes New Fellows

The Louisiana Bar Foundation welcomes the following new Fellows:

Daniel A. Claitor .......... Baton Rouge
H. Alston Johnson III ...... Baton Rouge
David A. Marcello .......... New Orleans
NEW YORK
NEW YORK
A Multi-Topic Seminar

Nov. 19-21, 2006
Grand Hyatt
New York, N.Y.

Book your flight early to get the best airfare!


For more information on any program, contact CLE Coordinator Annette C. Buras at (504)619-0102 or (800)421-5722, ext. 102, or e-mail aburas@lsba.org.
INTERVALS

By Vincent P. Fornias

Most of us with a fax machine or a laptop were favored recently with a discovery edict issued by the Hon. Gregory A. Presnell of the Middle District of Florida. Exercising a Solomonic flair available with impunity to those members of the federal judiciary, Judge Presnell ordered that certain parties, who were unable to decide upon a location for a deposition, “engage in one (1) game of ‘rock, paper, scissors.’ The winner of this engagement shall be entitled to select the . . . location.”

According to our own confidential sources, this ground (and scissor?)-breaking decision has set in motion yet another amendment to the Federal Rules of Civil Procedure, and specifically Federal Rule 711A(3)(c)iii, providing for other available methods of ADR available to the Feds:

**Rune Readings.** These were first used more than 1,500 years ago by the Visigoths and later appeared throughout northern Europe. Since the word “rune” itself comes from an Anglo-Saxon word meaning “secret” or “mystery,” this procedure dovetails nicely with the intelligibility of the rest of the Federal Rules.

**Trial by Water.** In the tradition of equally arbitrary tribunals located a few hundred years ago in Salem, Mass. and its environs, a party accused of wrongdoing will be immersed in a vat of pure Kentwood spring water. If the party floats, this is prima facie proof of his guilt or fault, since the purified water has cast out his evil spirits. If, however, he sinks to the bottom, the party, though technically drowned, is officially exonerated of guilt or fault.

**Splitting the Bench Book.** This procedure is accomplished by the local federal marshal utilizing any sharp object that was confiscated in courthouse security screenings occurring in the past 30 days. Parties are thereby restricted in their presentation of evidence to those exhibits that are part of their “split” of the bench book.

**Fortune Cookies.** If the written message does not substantially dispose of the dispute (example: “You are a big fat loser”), the parties must then compute the series of numbers on the back of said fortune, multiply by 1,000, and derive the hypotenusal logarithm of its square root.

**Divining of Entrails.** Each federal district shall have its Designated Sacrificial Animal. The Eastern District of Louisiana animal shall be one Jefferson Parish nutria. Leftovers may be disseminated to the jury venire.

**Horoscope.** After due authentication of the respective dates of birth of each litigant, their horoscopes, as they appear in the official grocery journal of the District on the first day of trial, shall be read in open court. The jury will then decide whose fortune is the most favorable, and rule accordingly. The losing party must clean up the mess left by the nutria.

You think this is off-the-wall? Wait until the Mandatory IRS Audit procedure gets amended next year!
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