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2007 Judicial Interest Rate is 9.5%

Pursuant to authority granted by La. R.S. 13:4202(B)(1), as amended by Acts 2001, No. 841, the Louisiana Commissioner of Financial Institutions has determined that the judicial rate of interest for the calendar year 2007 will be Nine and one-half (9.5%) percent per annum.

La. R.S. 13:4202(B), as amended by Acts 2001, No. 841, requires the Louisiana Commissioner of Financial Institutions to determine the rate of judicial interest. The commissioner has determined the judicial interest rate for the calendar year 2007 in accordance with § 4202(B)(1).

On Oct. 2, 2006, the commissioner ascertained that the approved discount rate of the Federal Reserve Board of Governors was Six and one-fourth (6.25%) percent and that the rate was approved June 29, 2006.

La. R.S. 13:4202(B)(1) mandates that:

on and after January 1, 2002, the rate shall be equal to the rate as published annually . . . by the commissioner of financial institutions. The commissioner of financial institutions shall ascertain, on the first business day of October of each year, the Federal Reserve Board of Governors’ approved discount rate published daily in the Wall Street Journal. The effective judicial interest rate for the calendar year following the calculation date shall be three and one-quarter percentage points above the discount rate as ascertained by the commissioner.

Thus, the effective judicial interest rate for the calendar year 2007 shall be Nine and one-half (9.5%) percent per annum.

As provided by La. R.S. 13:4202(B)(2), this determination and its publication in the Louisiana Register shall not be considered rule-making, within the intendment of La. R.S. 49:950 et seq., the Administrative Procedure Act (APA), particularly La. R.S. 49:953. Therefore, the general rule-making requirements, as follows, are not required by the APA: (1) a fiscal impact statement, (2) a family impact statement, and (3) a notice of intent.

— John Ducrest, CPA
Commissioner of Financial Institutions
October 3, 2006

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2. If there is any question about whether a particular letter to the editor should be published, the decision of the editor shall be final. If a letter questioning or criticizing Louisiana State Bar Association policies, rules or functions is received, the editor is encouraged to send a copy of that letter to the appropriate entity for reply within the production schedule of the *Louisiana Bar Journal*. If the editor deems it appropriate, replies may be printed with the original letter, or in a subsequent issue of the *Louisiana Bar Journal*.

3. Letters should be no longer than 200 words.

4. Letters should be typewritten, signed and, if applicable, include LSBA member number, address and phone number. Letters from non-members of the LSBA also will be considered for publication. Unsigned letters are not published.

5. Not more than three letters from any individual will be published within one year.

6. Letters also may be clarified or edited for grammar, punctuation and style by staff. In addition, the EB may edit letters based on space considerations and the number and nature of letters received on any single topic. Editors may limit the number of letters published on a single topic, choosing letters that provide differing perspectives. Authors, editorial staff or other State Bar representatives may respond to letters to clarify misinformation, provide related background or add another perspective.

7. Letters may pertain to recent articles, columns or other letters. Letters responding to a previously published letter should address the issues and not be a personal attack on the author.

8. No letter shall be published that contains defamatory or obscene material, violates the Rules of Professional Conduct or otherwise may subject the LSBA to civil or criminal liability.

9. No letter shall be published that contains a solicitation or advertisement for a commercial or business purpose.

10. Letters may be submitted:
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The Myth of Self-Regulation

By Marta-Ann Schnabel

I was recently cross-examined by Loyola University Law School Professor (and Rules of Professional Conduct maven) Dane Ciolino. Seriously. This was not an exchange at a cocktail party or some CLE presentation. I was on the witness stand during the course of a lawyer discipline hearing, the subject of which is not particularly relevant here, espousing — as I sometimes do — about the importance of self-regulation in our profession. On cross-examination, Professor Ciolino challenged my position by pointing out the state Constitution’s provisions about the Supreme Court’s authority in the discipline of lawyers. “We’re not really self-regulating, are we?” he asked. “Well,” I said, “there is some philosophical debate about that.” Professor Ciolino, a talented trial lawyer, knew enough to move on. His demeanor implied, however, that I might be the only one engaged in that debate.

And perhaps I am. But at the risk of revealing the full nature and extent of the delusions under which I operate, I want to say publicly that I do believe that our profession continues to have more control over its own destiny and regulation than virtually any other. I also want to say that we seem to have a troubling disrepute.

A surprising number of readers were touched by my August/September President’s Message, wherein I told the lessons of citizenship that my father — a German Jewish immigrant who arrived in this country in 1939 — had taught me. The essence of those lessons, of course, was that with the privilege and opportunity of citizenship came the responsibility of being an active contributing participant. Virtually all who took the time to call or write endorsed my father’s lessons.¹

And, yet, in October of 2006, there remain 36 seats in the House of Delegates for which no one qualified to run — more than 30 percent of the available seats in this election cycle. Moreover, despite the fact that 118 seats in the House were open for election in the 20th through 40th Judicial Districts, plus Orleans Parish, there is not a single contested race this year. Indeed, there are seats for which no one has qualified in both Orleans and Jefferson parishes! Admittedly, the hurricanes may have played a part in this, but our records show that the net loss of lawyers for Orleans Parish has been only about 600 and Jefferson Parish hovers at about the same lawyer population as it maintained pre-Katrina. Combined, those two parishes are still the home to nearly 7,000 lawyers — about 35 percent of the total number of lawyers in the state. Of the 10 nominating committee districts and subdistricts, there are three in which the race is not contested, and one in which no one qualified at all.

Perhaps I shouldn’t complain. After all, if no member qualifies to run in any given race, the president is obliged to fill the position by appointment. That may mean that my dreams of creating “The World According to Marta” are closer to fulfillment.

This is a pivotal time for our profession. We are confronted by many complex issues that promise to impact how we practice and live for years to come. Lawyer advertising, stricter enforcement of requirements for lawyer admission, rooting the “bad actors” out of the practice, ensuring access to the civil justice system, improving the criminal justice system, deciding on the size and shape of our courts, limiting paraprofessional inroads into our practice areas, and assuring lawyer competency are just a few of the matters which have been a prominent part of my activities in the first six months of my term. With these issues on the table, why would we shrug our shoulders and whine that we have no say in what the Supreme Court or, as an arm of the court, the Disciplinary Board does to us? Why wouldn’t we do everything we can to shape policy?

I am sympathetic to the argument that all of this policy stuff takes way too much time and energy, especially when it is increasingly harder to make payroll each month. And in the post-storm universe, even payroll sometimes takes a back seat to the reconstruction of files, or the financing of new office equipment, or the renovation of office space, or the horror that the phone is not ringing as much as it used to.

My four-person firm effectively became a three-person firm when I was sworn in last June, and my family is still partially living out of boxes and sitting on folding chairs, so I genuinely do understand that there is not an extra second in anyone’s day to devote to unimportant matters.

But here’s the thing: if we decide that...
the House of Delegates, or the Board of Governors, or the Nominating Committee, or any of the active committees of the LSBA are more trouble than they are worth, then we have effectively squandered the last piece of the process that gives us a voice.

For example, a proposal to amend the Rules of Professional Conduct (RPCs) governing lawyer advertising will be presented to the House of Delegates at the LSBA Midyear Meeting in New Orleans next month. The proposal was developed through the Ethics Advisory Service sub-committee of the Rules of Professional Conduct Committee. It has been presented at open meetings across the state for public comment. In addition, public comments have been solicited on the LSBA Web site. In many ways, the proposal mirrors the rules adopted by Florida, which severely restrict lawyer conduct and speech related to advertising. Only the Supreme Court has the authority to amend the RPCs and only the Attorney Disciplinary Board is empowered to enforce the RPCs. But both have enough respect for the lawyers of this state to allow the committee, the House and those who wish to comment to have their say.

Maybe there is no philosophical debate about it. Maybe we should all just tend to making a living and leaving the regulation to others. That way, we’ll be sure to have someone other than ourselves to blame.

FOOTNOTES

1. For you folks, this column will be a variation on the same theme, so accept my advance apology for repetition. This is, apparently, a theme that merits some repetition. The experience as a mother of teenagers has left me with a pedantic streak.

2. To review the proposed new rules and comments online, go to: www.lsba.org/committees/ethicrulescomments.asp.

SOLACE / Support of Lawyers/Legal Personnel All Concern Encouraged

The Louisiana State Bar Association/Louisiana Bar Foundation’s Community Action Committee supports the SOLACE program. Through the program, the state’s legal community is able to reach out in small, but meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience a death or catastrophic illness, sickness or injury, or other catastrophic events. For assistance, contact a coordinator.

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For more information, go to: www.lsba.org/committees/cac-solace.asp.
Note: The Louisiana Bar Journal’s first “Cocktail Party Conversations” articles were published in the December 2004/January 2005 issue. Because the legal landscape is brimming with new questions, many as a result of Hurricanes Katrina/Rita, the Editorial Board decided it was time to handle a few more questions.

The information contained in these articles is intended to be general in nature. Before any action is taken, it is essential that individual, competent and professional legal services be obtained from attorneys in the relevant areas.
The holiday season is rapidly approaching, during which most lawyers attend cocktail parties and other celebrations. When the other guests learn that a lawyer is present, especially after a few of the aforementioned cocktails, they will often ask about whatever legal questions are on their minds.

It is “black-letter law” that lawyers should refrain from answering questions in this context, especially after having a cocktail and in the heat of a personal conversation. When the question is outside the lawyer’s practice area, a demurrer is particularly in order.

Nevertheless, while many lawyers will refer an interlocutor to a lawyer practicing in the relevant field, we all know that many other lawyers will want to give at least some explanation of the options and potential outcomes. For that matter, many attorneys are curious about the answers.

To make it somewhat safer to answer cocktail party questions, we have asked attorneys in various areas of law how they would answer some of the questions we are likely to be asked. Obviously, these answers are neither exhaustive nor applicable to every situation, and the best response is still a referral to a lawyer experienced in the area, but these answers should be enough to get you through the party (and perhaps, to satisfy your own curiosity).

**Criminal Law**

By Richard A. Spears

**If I get pulled over for suspicion of OWI (operating a vehicle while intoxicated), should I take the breathalyzer?**

The short answer is “it depends.” If you have not been drinking and are certain to pass the test, then you should take it. If you have had a little to drink, then it’s probably best not to take any tests, either the standard field sobriety test (walk and turn, one-leg stand) or the Intoxilyzer (breath test). Doing so is handing evidence to the police to help secure a conviction against you.

How little to drink is too little? It’s hard to tell. Since the threshold level was lowered to 0.08 percent, it doesn’t take much. There are penalties for the refusal — your license is automatically forfeited for a longer period of time than for a first offense. This must be weighed against the danger of blowing. My standard answer is, if you are not certain to pass the test, then do not take it and call a criminal defense lawyer with experience in OWI cases.

Of course, in handling these types of cases over the years, I’ve also handled more than a few vehicular homicides. Thus, I know how terrible the consequences of drinking and driving can be. The best advice that I can give anyone is never to drink and drive; the cost of a cab is far cheaper than my fee for an OWI and nothing compared to the potential enormous emotional, legal and financial cost of an alcohol-related accident.

Continued next page
Employment Law

By Michael McGrath Duran, Sr. and Monica V. Bowers

My workforce scattered to the winds with Katrina, but some returned to my now-downsized shop. Now, more than a year later, a pre-Katrina employee has dropped out of nowhere and wants to be reinstated (a problem employee before the storm). What do I do?

Assuming that no union or other employment contract or any clearly stated policy is involved, you would generally be “at-will” to do what you want with this “at-will” employee. That said, there could be circumstances that warrant special caution.

For example, some employers made the generous — but in hindsight, perhaps not too wise — move of promising their pre-Katrina workforce a “place when you decide to come back.” Some employers even did this in widely published newspaper notices. Depending on how lavish and uncircumspect your “come-home” calls were, you may have created — if not a contract claim (see below) — a claim in detrimental reliance. Look closely at your public statements.

Aside from that, you should be careful not to pick and choose whom you take back and whom you reject in such a way that it might appear that the deciding factors were age, race, disability, pregnancy, etc. A discrimination claim could be lurking here.

Workers on disability or FMLA leave at the time Katrina hit should have had their situations resolved by now, but remember the right to reinstatement (under both federal and state law) attaching to members of the military whose tours of duty here and elsewhere may have been complicated by Katrina.

A chef I hired in New Orleans pre-Katrina and signed to a non-compete agreement left with the storm and is now flourishing in Baton Rouge (a “forbidden” parish). I have reopened my restaurant and asked him to come back. If he refuses, can I enforce the non-compete agreement?

Probably not. The Louisiana Civil Code has long recognized the concept of “impossibility” excusing the non-performance of contractual obligations. See La. Civ.C. arts.1873-78. The “force majeure” of Katrina would likely create both a legal out and a sympathetic hook for a judge to rationalize as follows: the storm made it impossible for you to hold up your end of the bargain and provide the chef with paying work for months (e.g., Commander’s Palace in New Orleans re-opened fully 13 months after Katrina), so you cannot expect the chef to sit on his hands for that amount of time and then drop what he has latched onto and put himself back under your yoke. I would not like to be the lawyer answering that question “Yes!” and having to endure the judge’s withering stare.

The story might be different, of course, if the employee also violated a non-solicitation agreement (of your customers or your employees). There, bad faith might creep in and he might get the withering look from the judge.

Does an employment agreement have to be in writing? Or can a binding employment contract be created orally?

In a word, “Yes.”

Just recently I was involved in a case where a recruiter told the plaintiffs over the phone that “the deal is for a year.” The document the plaintiffs signed had all the “no contract of employment,” “no fixed term,” “at-will” disclaimers you might expect, but both before and after their signing they were orally assured that the document was “just a formality” and that “the deal is really for a year.”

The plaintiffs survived summary judgment because the judge found the signed agreement lacking in form (it was not authentic) and therefore subject to interpretation and variance via extrinsic evidence. See La. Civ.C. arts.1831-53, particularly art. 1848.

So, if a binding contract for a fixed term of employment might be construed out of a situation where a written instrument indicated otherwise, it can certainly be formed out of an oral offer and acceptance of a fixed-duration job without a signed document. As an old friend of mine is fond of saying, “People miss countless opportunities to remain silent.”

Looking forward, what can I do as an employer to protect my interests relative to employees in the event of a natural disaster?

A key component is to review and revise your employee handbook relative to (1) emergency contact procedures; (2) separation from employment; and (3) compensation and application of vacation or personal leave benefits.

In the aftermath of Hurricanes Katrina/Rita, many employees had difficulty contacting their
Family Law
By Kevin E. Broussard

I have physical custody of my children almost 40 percent of the time. Shouldn’t I be entitled to a reduction in my child support for the amount of time the children spend with me?

Most likely you will not be entitled to a reduction. It is presumed that the child support guidelines contemplate some form of typical visitation between the child and the non-domiciliary parent.

A reduction in child support may be warranted when the non-domiciliary parent has the child(ren) for an “extraordinary” amount of time each year or in a “shared custody” arrangement. First, the court must determine whether the visitation is in fact extraordinary warranting a downward deviation. Second, the court must determine whether the non-domiciliary parent has increased expenses directly related to the child(ren) and at the same time whether the domiciliary parent has a lesser/decreased financial burden. Third, if those two factors are met, then the court must determine if the application of the guidelines would not be in the child(ren)’s best interest or be inequitable to the parties.3

Prior cases have stated that 43 percent would not be enough time with the child(ren).2 Courts seem to prefer a shared custody arrangement with the non-domiciliary parent sharing physical custody as much as 49 percent of the time. Note, however, that the courts have found that 45.5 percent of the year does meet the definition of “shared custody.” In that case, the father still had to pay the full amount of child support through the school year; however, he did not have to pay child support for the entire summer holiday.3

A petition for divorce was filed after my wife and I recently separated. We subsequently went out together and then had sexual relations on more than one occasion. Do those actions wipe out the divorce action?

Probably not. It must first be understood that a cause of action for divorce is extinguished by the reconciliation of the parties.4 Reconciliation occurs when there is a mutual intent to re-establish the marital relationship on a permanent basis. The motives and intentions of each party are a question of fact for the trial judge.

If the parties did not both intend to reconcile and resume the marriage, there would be no reconciliation. Occasional sexual encounters or going out socially does not constitute reconciliation.5 Therefore, the divorce action is not extinguished. It appears that you can make love and war at the same time.

FOOTNOTES
2. Lea v. Sanders, 890 So.2d 764 (La. App. 3 Cir. 2004).
5. Lemoine v. Lemoine, 715 So.2d 1244 (La. App. 3 Cir. 1998).

Continued next page
Real Estate Law
By Robin L. Jones

A few weeks ago, during a heavy rainstorm, several large branches from a water oak in my neighbor’s backyard fell into my backyard and damaged my fence. It also smashed my utility shed. Can I make my neighbor pay for the repairs to the fence and for replacement of my shed?

If the water oak was healthy before the rainstorm, and it was only the high winds and heavy rain associated with the storm that caused it to fall and damage your property, then you probably cannot hold your neighbor liable. However, if your neighbor’s tree was decayed, diseased or in an otherwise dangerous condition before the storm, then you can probably hold your neighbor liable for the damages. If the tree posed an unreasonable risk of harm, and your neighbor was or should have been aware of its deteriorating condition, he had a duty to take steps to prevent the tree from falling over.

If you knew the tree was diseased and in poor condition, and you put your neighbor on notice of this, he certainly should have done something about the tree. If he didn’t, he can be held liable for the damage to your property, regardless of the fact that the storm ultimately caused the tree to fall.

Regardless, either your or your neighbor’s homeowners insurance policy should cover the damages, less any deductible.

My wife and I live in a relatively new subdivision. Our homeowners’ association recently denied our request to build a utility shed in our backyard, saying it violated the rules regarding height and size. A quick stroll through our neighborhood reveals that there are several sheds that violate the same restriction the association is now trying to enforce against us. I am certain several of these sheds were built after the association’s rules were written. If I bring these violations to the attention of the homeowners’ association, is it legally obligated to force the other residents to comply with this rule? What happens if the association doesn’t force the other residents to modify or tear down their sheds? Do I have a cause of action against the association based on arbitrary and selective enforcement of the rules?

When a homeowners’ association fails to enforce a particular restriction enough times, that failure can amount to a waiver of the restriction. This means that, even though there is technically still a restriction on the books, it would no longer be enforceable against the residents. Unfortunately, it is not completely clear how many violations it takes for a restriction to be waived.

In your case, I would suggest meeting with the association’s board of directors at a regularly scheduled meeting. At that meeting, you should voice your concerns and discuss the other sheds throughout the neighborhood that violate the association’s rules. Be sure to point out to the board members that it is unfair for them to deny your request if they did not take steps in the past to prevent other owners from building similar sheds.

Of course, there could be a variety of reasons the board has done nothing about the other sheds you mentioned. It is possible that the board has taken steps to address those violations or taken legal action against one or more of the other owners. It is also possible that the other owners simply never asked for approval.

If, after discussing your concerns and questions with the board, you are not satisfied with the board’s decision and/or explanation, you should meet with an experienced real estate attorney. Your lawyer may be able to suggest other legal options available to you, given your particular situation.

Is it legal for a landlord to stipulate that he does not rent to roommates or college students?

With regards to rental property, the Fair Housing Act prohibits individuals from taking certain actions based on a person’s race, color, national origin, religion, sex, familial status or handicap.

For example, a landlord cannot refuse to rent or sell someone a house because of his race, sex, religion, etc. A landlord also cannot set different terms or conditions for the rental of a property based on the tenant’s race, religion, etc. College students, however, are not one of the classes protected by the Fair Housing Act.

Many landlords simply don’t want to rent to college students because oftentimes students don’t have a substantial income or they are relying on a third party, such as their parents, to support them. If a landlord has a valid, non-discriminatory reason for not renting to you, then he is probably not violating the Fair Housing Act.

Landlords can always select tenants using criteria based on valid business reasons. For example, it is not unreasonable for a landlord to require that his tenants have a minimum income or positive references from previous landlords, so long as these standards are applied equally to all tenants.
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It’s always nice to be appreciated by our clients. Clients who appreciate what we do for them may say favorable things about our work, may refer new clients or may even give us gifts. But there is a rule about gifts that we ought to keep in mind to avoid disciplinary problems.

A Rule About Gifts

The basic rule about client gifts is set forth in Rule of Professional Conduct 1.8(c). It says:

A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, or grandparent.

The rule has two main elements. The first element is a prohibition against soliciting a gift. This first element represents a relatively recent change. Prior to March 1, 2004 — the effective date of a number of amendments to the Rules of Professional Conduct1 — Rule 1.8(c) did not expressly prohibit solicitation of gifts.2 Now it does, at least if the gift is substantial. The second element is a prohibition against preparing an instrument that gives a gift and has always been a part of Rule 1.8.

The Reason for the Rule

One of the principal treatises on the professional responsibilities of lawyers has the following to say about the reason for Rule 1.8(c):

From time to time, clients seek to give their attorneys inter vivos or testamentary gifts. When this happens, the clients are usually motivated by respect and friendship or by a desire to provide a bonus for excellent legal work, apart from legal fees already paid. With testamentary bequests in particular, clients often wish to express their appreciation to an attorney for loyal service over a long period of time. Yet, because lawyers know their clients’ affairs intimately and meet with them behind a veil of secrecy, there is an undeniable risk of overreaching and manipulation.

In response to this risk, Model Rule 1.8(c) establishes a general prohibition against a lawyer’s soliciting or drafting an instrument giving the lawyer or a close relative a substantial gift from a client.3
A comment to the ABA’s version of Rule 1.8 confirms that concerns about “overreaching and imposition on clients” are behind the generation of the rule. Keeping those purposes in mind could assist a lawyer, or a disciplinary authority, in determining whether or not the rule applies in a particular instance.

Risks of Rule Violation

The risks of violating Rule 1.8(c) are well-illustrated by a pair of Louisiana cases that arose out of the preparation of a will. The first case, Succession of Parham, involved a challenge to a will. In 1996, Parham executed a will that had been prepared by Grevemberg, her attorney and friend. Thereafter, Parham’s health declined, and she became less accessible to members of her family.

In 1997, Parham executed a new will, purportedly revoking all prior wills. The new will was prepared and notarized by Grevemberg. It named him as executor. It also named him as a legatee of Parham’s cash, bank accounts, and in 85 percent of her real estate. The will also said that if any of the bequests made to the attorney were prohibited or if there was a conflict of interest, the bequest would go to his wife.

Litigation over the will commenced a few months after Parham’s death. The trial court invalidated all bequests to the attorney and his spouse, and invalidated the appointment of the attorney as executor. On appeal, the court observed that the gift to the attorney violated Rule 1.8(c), and said that the Rules of Professional Conduct have the force and effect of substantive law. It concluded that the trial court had been correct to use 1.8(c) to nullify all aspects of the 1997 will benefiting the Grevembergs. It also upheld the invalidation of the attorney’s appointment as executor.

But this is not the end of the story. The second case, In re Grevemberg, was one in which the same attorney was charged with a disciplinary offense based on Rule 1.8(c). In defense of the charge, the attorney claimed that he had been unaware of Rule 1.8(c) at the time he drafted the will, so that any violation of the rule came as a result of negligence. The Louisiana Supreme Court was not impressed with this contention. “Ignorance of the Disciplinary Rules,” it said, “is no excuse.” In any event, the court was of the view that the attorney had become aware of the rule at some point but “refused to acknowledge its applicability.” In his testimony during the civil trial, the attorney had said the following:

My wife has property rights, and I don’t subscribe that 1.8 makes sense. They can disbar me if I violated the ethics. They can discipline me if I violate the ethics. But when it comes to property rights, I am entitled to a hearing on property rights.

The court, in suspending the attorney for a year, held:

We conclude this testimony reveals a conscious decision by respondent to disregard his ethical obligations under Rule 1.8(c) by continuing litigation at a time when he was clearly aware he was in violation of the rule. Quite simply, respondent placed his hopes of potential recovery under the will ahead of any disciplinary sanctions he might receive for violating the professional rules.

Avoiding Rule Violations

These two cases show that violating Rule 1.8(c) can have serious repercussions, both from a monetary perspective and from a disciplinary one. However, if we have a client who insists upon giving us a gift, there are ways to receive the gift without violating the rule. There are a number of gift arrangements that would not violate Rule 1.8(c).

Gifts from Family Members

The rule includes an exception for gifts from close family members. It also tells us who qualifies: a spouse, child, grandchild, parent or grandparent of the lawyer. Accordingly, it would not be a violation of the rule for a lawyer to solicit a gift from one of these family members or to prepare an instrument on behalf of one of them that effects the transfer of a gift to the lawyer. But the lawyer could not do these things with respect to the lawyer’s rich uncle, or aunt, because they are not listed in the rule.

Solicitation of Gifts from Non-Clients

The rule prohibits solicitation of gifts from clients. It says nothing about soliciting them from non-clients. A lawyer would not have any particular leverage over a non-client, so the rule does not prohibit this action.

The situation is trickier if the solicitation might result in the preparation of a document to effect the gift. At first blush, it might be thought that it would be all right for the lawyer to prepare a document on behalf of a non-client to effect the giving of the gift. However, the very act of preparation could trigger application of the rule by making the donor a client.

An obvious example would be a will. Suppose that a gift-giver, who has not previously been a client, wishes to give a testamentary gift to a lawyer, and asks the lawyer to prepare the will to effect the gift. However, the preparation of the will would make the donor a client, regardless of whether the lawyer charges a fee for the will. The client status of the donor would then trigger the rule’s application.

Gifts That Are Not Substantial

The rule kicks in only when the gift is “substantial.” So it would not be a violation of the rule for the lawyer to solicit an insubstantial gift from a client or to prepare an instrument on behalf of the client that gives an insubstantial gift to the lawyer.

But what is a “substantial” gift? We can safely assume that the rule is not concerned about the physical size or weight of a gift, but rather is concerned about its value. A comment to the ABA’s version of Rule 1.8 tends to confirm this by distinguishing between a “simple gift such as a present given at a holiday or as a token of appreciation” (which the
comment indicates is all right) and “a more substantial gift” (which the comment indicates is not).9

This still does not give us much of a standard for determining whether a gift is substantial. Should we look at whether the value of the gift would be substantial from the client’s perspective, or from the lawyer’s perspective, or both? The Restatement of the Law Governing Lawyers, which has a somewhat different rule regarding client gifts,10 weighs in on the side of doing both:

In determining whether a gift to a lawyer is substantial . . . the means of both the lawyer and the client must be considered. To a poor client, a gift of $100 might be substantial, suggesting that such an extraordinary act was the result of the lawyer’s overreaching. To a wealthy client, a gift of $1,000 might seem insubstantial in relation to the client’s assets, but if substantial in relation to the lawyer’s assets, it suggests a motivation on the part of the lawyer to overreach the client-donor, or at least not to have fully advised the client of the client’s rights and interests. Under either set of circumstances, the lawyer violates the client’s rights by accepting such a gift.11

This approach seems sensible enough and appears to be consistent with the apparent purpose of Rule 1.8(c). But the Restatement does not have any binding legal effect, and it is not certain that disciplinary authorities will see the issue in quite the same way.

Gifts That Do Not Involve the Preparation of Instruments

Another kind of gift to a lawyer that would not violate the rule would be one that does not involve the preparation of an instrument to accomplish the giving of the gift. Even if the gift is substantial, so long as the lawyer did not solicit it, the lawyer would not run afoul of the rule by accepting such a gift. A cash gift, for example, would be one that the lawyer could accept without violating Rule 1.8(c).12

Whether or not the lawyer solicited such a gift, of course, would be a matter of evidence. It might be a good idea for a lawyer who receives a substantial unsolicited gift to send a note to the client expressing surprise and thanks (and to keep a copy of the note).

Instruments Prepared by Others

Even if a gift does involve the preparation of an instrument to effect it, the lawyer could avoid rule violation if the instrument were to be prepared by someone else. For example, Rule 1.8(c) would prohibit a lawyer from receiving a new BMW from a client, as a gift, if the lawyer handled the paperwork to effect the title transfer. But if the client took care of the paperwork, or engaged someone else to take care of it, the client could simply deliver the BMW to the lawyer and hand over the keys.

The same would be true with respect to the client’s will. If the client wishes to leave the lawyer a large gift in the client’s will, that would be permissible if the lawyer who is to receive the gift does not prepare the will. However, there is an imputed disqualification issue to watch for in this circumstance. For example, it will not do to say, when the wealthy client asks you to write up her will, that although you cannot prepare the document, your partner can. If you have a 1.8(c) conflict, your partner does, too.13

The imputed disqualification principle finds expression in the last subpart of Rule 1.8. Rule 1.8(l) provides, rather simply, “While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (k) that applies to any one of them shall apply to all of them.” One of the “foregoing paragraphs,” of course, is 1.8(c).14

Waiver

Could the application of Rule 1.8(c) be waived? After all, some of the other rules regarding conflicts of interest expressly contemplate waiver by means of informed client consent.15 Applying the informed consent concept to Rule 1.8(c), a lawyer who is to be on the receiving end of a gift might send a letter to the client stating something like:

1) I am aware that you have proposed to give me a substantial gift;
2) I have not solicited the gift;
3) Rule 1.8(c) of the Rules of Professional Conduct provides that a lawyer is not to prepare an instrument on behalf of the client giving the lawyer a substantial gift;
4) you desire that I prepare such an instrument anyway;
5) I have advised you that it would be a good idea to consult with another lawyer about the proposed gift and the application of the rule; and
6) by signing this letter in the space indicated below, you acknowledge the foregoing and expressly waive the protections of Rule 1.8(c).
Will something like this work? Not likely. There is no hint of a waiver opportunity in the language of 1.8(c). In contrast, other parts of 1.8 expressly contemplate waivers. For example, Rule 1.8(a), the rule about business transactions with clients, generally prohibits a lawyer from entering into a business transaction with a client, but then goes on to provide how the lawyer might go about doing so. One of the requirements is to obtain “informed consent in a writing signed by the client.” [Rule 1.8(a)(3)] Comparable waiver provisions are set forth in Rule 1.8(b), 1.8(f), 1.8(g) and 1.8(h). The absence of such a provision in 1.8(c) indicates that the rule was not intended to be waivable.¹⁶

**Undue Influence**

Another issue that could arise with respect to gifts from clients is that of undue influence. The comment to the ABA’s version of Rule 1.8 provides, in part:

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent.¹⁷

The reference to presumptive fraud comes out of a common law tradition. The Louisiana Civil Code provides for nullity of donations that are procured though undue influence.¹⁸ In a case where the Louisiana undue influence doctrine applies, a gift to the lawyer would be null even if it did not violate the provisions of Rule 1.8(c).

**Conclusion**

Problems related to client gifts are most likely to come up when a lawyer is asked to prepare a will on behalf of a client. However, as this article has indicated, Rule 1.8(c) has a broader reach than will preparation. Lawyers who are tempted to solicit, or to receive, gifts from clients ought to remember the disciplinary rules to avoid problems associated with such gifts.

**FOOTNOTES**


2. However, prior to the change, Rule 1.8 included some prefatory language that might have been applied, in at least some cases, to solicitation of gifts from clients:

As a general principle, all transactions between client and lawyer should be fair.

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and reasonable to the client. Furthermore, a lawyer may not exploit his representation of a client or information relating to the representation to the client’s disadvantage.

The language about exploiting information to the client’s disadvantage might have applied to some gift situations. But the language about “transactions” might not have worked quite as well. A standard definition of “transaction” is “something transacted,” and refers specifically to “a business deal or agreement.” Webster’s New World Dictionary (3d College ed. 1988). Neither the solicitation of nor the giving of a gift fit well into this definition. The new version of Rule 1.8 does not include the language that is quoted in this footnote.

4. See Model Rules of Professional Conduct 1.8, Comment.
5. 755 So.2d 265 (La. App. 1 Cir. 1999), writ denied, 755 So.2d 240 (La. 1999).
6. 838 So.2d 1283 (La. 2003) (per curiam).
7. See also In re Blair, 840 So.2d 1191 (La. 2003) (per curiam) (lawyer suspended, in part for preparing a will containing a legacy in favor of the lawyer’s spouse).
8. The Model Rules, on which our current rules are based, permit a lawyer to accept gifts from “other” individuals “with whom the lawyer or the client maintains a close, familial relationship.” See Model Rules of Professional Conduct, 1.8(c). The Louisiana version of the rule is not as permissive. Neither is it as vague.
10. The Restatement rule is different from Rule 1.8(c) in several respects. Like Rule 1.8(c), the Restatement prohibits lawyers from drafting instruments on behalf of clients to effect gifts to themselves. However, the Restatement appears to prohibit this with respect to any gifts, regardless of how substantial they are, unless the lawyer is a relative of the donee or “other natural object of the client’s generosity.” Even there, however, the gift cannot be “significantly disproportionate” to other gifts given to other donees who are similarly related to the donor. Moreover, instead of prohibiting solicitation of gifts, the Restatement prohibits their receipt, unless some requirements have been satisfied, one of which is that the value of the gift be “insubstantial in amount.” Here is the complete text of the Restatement Rule:

§ 127. A Client Gift to a Lawyer
(1) A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client’s generosity and the gift is not significantly disproportionate to those given other donees similarly related to the donor.
(2) A lawyer may not accept a gift from a client, including a testamentary gift, unless:
(a) the lawyer is a relative or other natural object of the client’s generosity;
(b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or
(c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.

11. Id. § 127, Comment f.
12. Though there might be other considerations to take into account. Federal money-laundering statutes, for example, might have some application to receipts of large amounts of cash, under some circumstances. See, e.g., 31 U.S.C. § 5316.
13. In Successions of Tanner, 895 So.2d 584 (La. App. 4 Cir. 2005), writ denied, 899 So.2d 11 (La. 2005), an attorney had asked a lawyer friend, who worked in the same building as he, to effect the will. The two were not partners. Although the trial court noted “it doesn’t look good,” the 4th Circuit affirmed the trial court’s ruling that there was insufficient evidence to prove either undue influence or a Rule 1.8(c) violation.
14. But see, In re Cabibi, 922 So.2d 490 (La. 2006) (per curiam), for a lawyer-favorable outcome on rather unusual facts. A non-attorney employee prepared language for a client’s holographic codicil, giving her attorney-boss a substantial gift from the client. Although the attorney did not know of his employee’s actions at the time the client executed the codicil (he found out about it later), disciplinary authorities concluded that he had violated Rules 1.8(c) and 8.4(a). Upon review, however, the Louisiana Supreme Court considered the attorney’s long-standing, close personal relationship with the client’s family, and the extremely limited interaction between the client and attorney, and decided the case did not warrant formal discipline. However, the court did say that “objectively” the conduct constituted a violation of Rule 1.8(c) and 8.4(a).
15. For example, Rule 1.7, the basic conflict of interest rule, includes client consent provisions.
16. See also 1 Geoffrey C. Hazard, Jr. and W. William Hodes, The Law of Lawyering §12.8 (3d ed. 2004) (“[W]hen Rule 1.8(c) applies, it is not subject to client waiver, which distinguishes it from many of the other conflicts of interest rules.”)
17. Model Rules of Professional Conduct, Rule 1.8, Comment.
18. The Civil Code article provides:

Art. 1479. Nullity of donation procured through undue influence
A donation inter vivos or mortis causa shall be declared null upon proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor.

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Worldwide, airlines lose 30 million bags each year, roughly six per thousand. About 200,000 of those bags will never be found. While most bags are eventually located, the delay is frustrating to the victims. Virtually everyone traveling does so for a reason and needs the packed items immediately on arrival or at the start of business the next morning. Even vacationers lose enjoyment of precious days of their holiday when deprived of their wardrobe, sporting gear and medications.

Clothing, toiletries and vital medicines typically do not arrive until late the next day. The average delay is 31.2 hours from the passenger’s filing of the lost luggage report.

Causes of Lost or Delayed Luggage

Lost luggage is usually caused by negligence. More sinister causes include offloading passenger baggage to accommodate cargo. The attitude here is let the passenger who has already paid be damned, just take the cargo for yet more revenue. Airlines also have been known to “ferry” fuel, buying more than they need for the flight in a city where fuel is cheaper, carrying it to destinations where fuel is costlier. Passenger baggage may be offloaded to accommodate fuel.

On one commuter flight, it was announced that the airplane was “overweight,” even though there were 13 empty seats on the flight! Being “overweight” with empty seats is almost a sure sign of bumping baggage to accommodate cargo.

Exacerbating the delay is a reluctance to forward misdirected luggage via the next flight out on any carrier, waiting instead for the next flight on their own airline, perhaps next day.

Applicable Law

International flights are governed by the Warsaw Convention of 1929, as amended, a multilateral treaty. The treaty imposes strict liability.

The domestic segment of an international flight is subject to Warsaw. A person flying on one ticket from, say, Baton Rouge to Atlanta, and there connecting to London, is considered in international travel from the time he boards the flight in Baton Rouge.

Rules differ between domestic and international travel.

The first step in either case is to give the airline prompt written notice of claim, preferably by certified mail to its legal department, listed in Westlaw’s or Lexis’s directory of corporate counsel. Attach exhibits to the letter including, as applicable, copies of:

- the ticket;
- any boarding passes;
- baggage claim checks;
- the lost baggage report;
- any e-mail sent to the airline to confirm a claim is being made; and
- receipts for expenses such as clothing, toiletries, repairs to luggage and the like.

Liability for Domestic Travel

If the trip is entirely domestic, Warsaw is inapplicable.

The case may sound in contract or tort. The U.S. 5th Circuit has held the Airline Deregulation Act does not preempt state-law-based claims for injury.
from falling cabin cargo. In a case asking both tort and contract damages, including mental distress, the 4th Circuit Court of Appeal wrote:

Since this is a claim under federal statutes and regulations the next question is whether such a claim may be asserted in the state court. If there were any doubt before, this has been resolved by the United States Supreme Court in *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 110 S.Ct. 1566, 108 L.Ed. 2d 834 (1990), and *Tafflin v. Levitt*, 493 U.S. 455, 110 S.Ct. 792, 107 L.Ed. 2d 887 (1990). In these cases the court held that under our system of dual sovereignty state courts have the inherent power, and are presumptively competent, to adjudicate claims arising under the laws of the United States. The court held that to give federal courts exclusive jurisdiction over a federal cause of action, Congress must affirmatively divest state courts of concurrent jurisdiction.

We find nothing in the Federal Aviation Act which prevents the state courts from adjudicating a claim for consequential damages flowing from the delay in delivering luggage by the airline carrier.

Where the claim is for more than $75,000, diversity jurisdiction is available. An attempt to remove a luggage claim to federal court based on federal-questions failed in the 1976 case of *Security Insurance Co. of Hartford v. National Airlines, Inc.* Judge Alvin Rubin wrote:

> The plaintiff might have chosen to proceed in state court, and relied solely on state law, removability is tested by the face of the complaint. Based on this criterion, the case was not properly removed and hence it is REMANDED.


There is a relevant federal regulation. 14 C.F.R. § 254.4 reads as follows:

**Carrier liability.**

On any flight segment using large aircraft, or on any flight segment that is included on the same ticket as another flight segment that uses large aircraft, an air carrier shall not limit its liability for provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger’s personal property, including baggage, in its custody to an amount less than $2,800 for each passenger.

A “large aircraft” is any aircraft having more than 60 seats.

This regulation alone, unless pleaded in the petition, would not appear to justify removal. If the plaintiff wishes to file in federal court, the petition should articulate the federal nature of the claim, citing 14 C.F.R. § 254.4 and the *Sam L. Majors* case. If the plaintiff wishes to avoid federal removal, the petition should sound in state law and waive damages of more than $75,000.

Windle Turley, in the book *Aviation Litigation*, says:

> Under the well-pleaded complaint rule, federal jurisdiction will lie only if the federal law upon which jurisdiction is based appears clearly on the face of the plaintiff’s complaint. Under the rule, federal jurisdiction cannot be based upon the likelihood that a federal issue will be addressed during the course of the litigation or that the defendant will plead a federal law in defense.

In *Lowe v. Trans World Airlines*, plaintiffs filed for wrongful death in New York state court. The airline sought federal-question removal. The court held federal preemption of the subject matter insufficient because “preemption is a matter of defense to a state law claim, and not a ground for removal.”

If the defense removes to federal court, plaintiff may move to remand. Or plaintiff may consider demanding a jury. Jury trial is available in federal court on any federal-question case involving more than $20. No jury fee or bond is required.

A prudent airline will not wish to wear out its welcome at the federal courthouse by removing to federal court for possible jury trial every small claims suit for a $500 dented suitcase.

The defense may answer raising a “company policy” defense. The U.S. 5th Circuit has upheld an airline’s right to limit liability in its contract of passage.

While other state courts have held limitation-of-damages clauses in airline tickets are governed by federal law, fine print on the ticket may not apply unless actually read by the passenger. In *Gauthier v. Allright New Orleans, Inc.*, Louisiana’s 4th Circuit held a limitation of liability on a parking lot’s claim check does not bind a customer who never read it.

Federal courts hold that where notice on an airline ticket is “printed in such a manner as to virtually be both unnoticeable and unreadable,” limited liability does not apply. So, too, if the notice is “camouflaged in Lilliputian print.”

The plaintiff wishing to go the state court route should avoid mention of 14 C.F.R. § 254.4, waiting for the defense to raise the contractual limitation defense. Only after the 30-day window for removal has passed should plaintiff file the regulation.
Travel restrictions in this post-9/11 world have become the norm. Frequent fliers may think they know them by rote, but rules can change weekly. On Aug. 10, a foiled terrorist plot in Britain created ripples in the travel industry and new bans on the transport of liquids, aerosols and gels were activated.

But, on Sept. 26, the Transportation Security Administration (TSA) adjusted the ban on liquids, aerosols and gels. First, travelers may now carry through security checkpoints travel-sized toiletries (3 ounces or less) that fit comfortably in one, quart-sized, clear plastic, zip-topped bag. Second, after clearing security, travelers may bring beverages and other items purchased in the secure boarding area onboard the aircraft.

The list of permitted and prohibited items is long and is often predicated on whether the items will be carried in hand luggage through security checkpoints or packed in checked baggage.

The easiest way to learn of the latest updates is via the Internet. The TSA’s Web site includes the full list of allowable and prohibited items and general suggestions on how to make your screening experience hassle-free.

For the list of permitted/prohibited items, go to: http://www.tsa.gov/travelers/airtravel/prohibited/permitted-prohibited-items.shtm#0.

For general information on security screening, go to: http://www.tsa.gov/travelers/airtravel/screening/index.shtm.

Even though some travel restrictions have been relaxed a bit, you are still required to remove your shoes before entering the walk-through metal detector!
Once written notice is timely given, the passenger has two years from his arrival at the ultimate destination to file suit.61

In the case of baggage carried by different airlines on one ticket, Warsaw provides:

As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage, or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.62

Warsaw contains a venue provision.63 It “allows suit in the location where the consignor or consignee.62

Actions under Warsaw may be brought in state court.65 An argument against removal can be made under the language of removal improper.66

It “allows suit in the location where the carrier who performed the carriage in that location.”64

It “allows suit in the location where the consignor or consignee.62


The required contents of the ticket are detailed, and it is highly possible that many electronic tickets do not comply. The result would be to render caps on damages inapplicable.

Conclusion

Victims of luggage mishandling are not without recourse. The legal profession can help make the airlines aware of their obligations.

FOOTNOTES

4. Id.
5. The applicable regulation provides that an airplane must carry enough fuel to reach its intended destination, then to continue thereafter to an alternate airport, and then to fly for an additional 45 minutes. 14 C.F.R. § 91.167.
8. Id. art. 1 (3).
12. Id. at 552.
16. Id. at 494.
18. 117 F.3d 922 (5 Cir. 1997).
26. Id. at 12.
27. 28 U.S.C. § 1447 (c).
28. U.S. Const., amend. VII.
34. Warsaw, supra note 7.
38. Warsaw, art. 18 (2). See also Montreal Convention, art. 17 (2).
39. Id. art. 19. See also Montreal Convention, art. 19.
40. Warsaw, arts. 22 (2)(a) and 22 (5).
41. Warsaw, art. 23 (1).
42. Warsaw, art. 25.
43. Warsaw, art. 3. The required contents of the ticket are detailed, and it is highly possible that many electronic tickets do not comply. The result would be to render caps on damages inapplicable.
44. Warsaw, art. 4.
46. Id.
48. In re Air Crash Disaster Near New Orleans, 789 F.2d 1092 (5 Cir. 1986).
49. Warsaw, art. 3, requires that the ticket
ABOUT THE AUTHOR

M.R. Franks is a professor of law at Southern University Law Center in Baton Rouge. He was formerly associate professor of law at Université de Cergy-Pontoise in Paris, France. He holds his BS and JD degrees from the University of Memphis. He also holds an airline pilot’s license (ATP certificate). He is working on a longer article on this subject for law review publication. He may be contacted at mf@franks.org.

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52. While the author is unaware of any reported case involving intentional offloading, one reported decision holds refusal to unload baggage at the passenger’s destination constitutes “willful misconduct” but does not warrant damages for mental suffering. Cohen v. Varig Airlines, 62 A.D.2d 324, 405 N.Y.S.2d 44 (App. Div. 1973).
56. Id.
57. Id.
61. Warsaw, art. 29 (1).
62. Warsaw, article 30 (3).
63. Warsaw, art. 28 (1).
Attorneys Apply for Legal Specialist Certification

Pursuant to the rules and regulations of the Louisiana Board of Legal Specialization, notice is hereby given that the following attorneys have applied for certification as legal specialists. Any person wishing to comment upon the qualifications of any applicant should submit his or her comments to the Louisiana Board of Legal Specialization, 601 St. Charles Ave., New Orleans, LA 70130 no later than Dec. 31, 2006.

It is also requested that any knowledge of sanctions or other professional action against an applicant be reported during this comment period.

Consumer Bankruptcy Law
Elizabeth G. Andrus .............................. Lafayette
Hilary Beth Bonial ................................. Dallas, TX
Raymond Lee Landreneau, Jr. ........................ Houma

MCLE Committee Sending Preliminary Transcripts Via E-Mail

The Mandatory Continuing Legal Education (MCLE) Committee will send preliminary transcripts to the Bar membership in the form of an e-mailed (e-blast) notification. Because all member data has been made available online for several years, the committee believes this is the most efficient way to proceed.

But Bar members do not have to wait for the reminders to check their records online. Bar members may check their records at the committee’s Web site, www.lascmcle.org. The transcript login is located in the upper right hand corner. To gain access, members must provide their five-digit bar number and date of birth.

Members are encouraged to go to www.lsba.org/membership/members login.asp to verify e-mail addresses on file with the LSBA.

Because some Bar members do not have e-mail addresses, the committee will send notification forms to these members via regular mail service, advising them to check their records online.

The MCLE program also has a new benefit that many providers are using — online attendance recording. When a program sponsor enters course attendance via a secure site, that provider receives e-mailed confirmation of attendance within one day after it is received by MCLE. Once this information is confirmed by the MCLE staff, the attorneys who attended also receive e-mailed notification of the credits they received for that particular course. This removes any delays for posting records. But the program sponsor must first be a participant and members’ e-mail addresses must be up-to-date to qualify for this service.

Direct questions about MCLE requirements to (800)518-1518 or (504)828-1414.

LSBA/TechnoLawyer Partnership Offers Free Services to Bar Members

The LSBA has partnered with TechnoLawyer, an online resource with more than 13,000 members in which legal professionals can share their knowledge and experiences with their peers and access volumes of archived articles and information to assist with technology in the practice of law.

TechnoLawyer has now made its entire archive of information available to LSBA’s membership at no charge. TechnoLawyer is the leading online resource for legal technology and practice management information, including product reviews, lawyer-to-lawyer tech support and a variety of other helpful information.

To access TechnoLawyer, go to www.lsba.org and click on the TechnoLawyer icon on the Bar’s home page.

Updated Practice Aid Guide Available Online

An updated version of the Practice Aid Guide: The Essentials of Law Office Management is available online at:

As the Louisiana Center for Law and Civic Education’s (LCE) apple travels across Louisiana to instill in our students the importance of being good citizens, one school, Alexandria Middle Magnet School (AMMS), shines above the rest. AMMS, in Alexandria, La., is one of our state’s stars that shine in civic education as it has recently added a law and civics curriculum to its already existing magnet program.

The school-wide program is offered to students in grades sixth through eighth as exploratory and elective classes. Imagine being in the sixth grade and taking a law class entitled “Introduction to Law” and learning about the differences between civil and criminal law and court procedures. Imagine being a seventh grade student and having that CSI experience learning “Law and Forensic Science” for an entire semester.

AMMS also has a complete law class curriculum based on criminal law and juvenile justice. If you were an eighth grade student at AMMS, you could actually take a semester course on “Civics and Constitutional Law.”

Not only does AMMS provide true law-related education for its students, the school also has a courtroom where the students listen to presentations and perform mock trials. The courtroom was completed in April 2006 and has actively been used by the students in the law classes. The students also have a research/project room to research and prepare for trials and other classroom projects.

The local law-related community has embraced and supplemented AMMS’ program. In fact, the legal community has taken an active leadership role by providing school resource officers, police and sheriffs’ department officers with the K-9 units, detectives and SWAT team members, attorneys, secretaries and judges. The members of our bar have “left a lasting impression on the students by serving as career guest speakers, presenting lessons, answering questions, and donating materials for the classrooms,” said teacher Stephanie Goodrich.

AMMS’ sixth and eighth grade students also are experiencing great co-curricular activities as they presented a bill before Louisiana’s Senate and House Committees after receiving instructions from their teacher Sandra Goldich. The bill was actually received and later passed. AMMS truly demonstrates civics in action.

Another example of civics in action is the eighth grade civics class of Joel Stevison. The class placed first in the state competition of Project Citizen after placing second last school year.

Where does the knowledge and energy demonstrated by the AMMS educators in the areas of civics and government come from? It comes from the training and programs offered by the LCE. For the past two years, sixth and seventh grade students also have attended Law Day in New Orleans and Alexandria sponsored by the LCE.

While enroute to the Law Day program in New Orleans, these students have had the wonderful experience of witnessing the Louisiana Senate in session as guests of Senator McPherson. They were allowed to sit in the side gallery and observed government in progress. As an added experience, they were introduced to the full Senate.

AMMS students also are learning how to judge other teens as a group of eighth grade students were recently trained to participate in the local Teen Court as jurors.

The teachers at AMMS have worked closely with the LCE when creating these classes and specialized curriculum. They have attended the summer institutes sponsored by the LCE and have incorporated many activities and lesson plans into the law and civics classes.

The teachers also have attended other state and national conferences suggested and supported by the LCE, including the Supreme Court Summer Institute in Washington, D.C. As demonstrated by the hands-on experience in how government functions, AMMS’ students and teachers are enjoying a more enriching civics and government experience as they are benefiting from the exciting lessons, materials and overall experiences provided by the LCE. The LCE apple is making a difference across the state in civics by making civics come alive in the classroom.

Karen Wells Roby is the 2006-07 president of the Louisiana Center for Law and Civic Education. Stephanie Goodrich is a teacher at Alexandria Middle Magnet School.
This year it is estimated that more than 100 Louisiana workers will die on the job. More than 45,000 will be injured, leaving half of those injured disabled. Families of these individuals will face difficult challenges as they struggle to overcome the financial burden of these losses. Often a child’s dream of going to college is crushed because of unexpected income loss and/or the necessity to forfeit an education for work to financially support other family members. To these children, the future can appear frightening. Already confronting difficult emotions, they often have to confront the hurdle of funding their education beyond high school.

The Louisiana Bar Foundation (LBF) Kids’ Chance Scholarship Program, which operates primarily through lawyer volunteers, is helping these kids achieve their dreams. The program provides scholarships to the children of Louisiana workers who have been killed or permanently and totally disabled in an accident compensable under a state or federal Workers’ Compensation Act or law. Since 2004, the program has awarded 49 scholarships totaling $81,000.

Tonya, a second-year scholarship recipient, attends the University of Louisiana at Monroe and plans to major in kinesiology. Her father suffered a broken back and ankle when his scaffold fell 32 feet to the ground. “It is a miracle my dad is alive because he was not predicted to survive,” she says. “I was lucky and blessed not to have to pay anything my first and second semesters at school. I am so happy that finances weren’t a burden on my shoulders,” she says.

A third-year scholarship recipient, Sally Anne, is using her scholarship to attend Louisiana State University and major in business management. After her father was killed in a work-related car accident, Sally Anne needed money for tuition, books and basic living expenses.

Now Sally Anne is focused on graduating. It’s all part of her father’s legacy. “My dad was always a very hard worker. I know that he intended for me to continue my education and follow my dreams. By hard work and determination, I am able to show people a part of who he was,” she says.

LBF Kids’ Chance scholarships range from $500 to $3,000 and can be used for tuition, books, fees, room and general living expenses. The funds are paid directly to the school where the student is enrolled and recipients must maintain a “C” average. Applicants must be between the ages of 16 and 25, pursuing a degree or vocational education and training from an accredited Louisiana university, community, technical or vocational college and/or state-approved proprietary school and applying for other state or federal financial aid.

The deadline for submitting the 2007-08 application and supporting documents is Feb. 28, 2007. Applications can be downloaded at www.raisingthebar.org.

“The LBF is a conduit for lawyers to do good things for the community. Our Kids’ Chance Scholarship Program is a shining example of lawyers making a difference in young lives,” says John (Jock) Scott, LBF president.

The first program, Kids’ Chance, Inc., was established in 1988 by the Workers’ Compensation Section of the Georgia State Bar. Today, there is a collection of independent programs in 28 states. The LBF Kids’ Chance Program was started in 2004.

In April 2006, the LBF hosted the third National Kids’ Chance Conference in New Orleans at the historic Bourbon Orleans hotel in the French Quarter. The conference was originally scheduled in early February, to coincide with the American Bar Association convention. After Hurricanes Katrina and Rita crippled...
the ability of New Orleans to host large conventions, the LBF rescheduled the conference in an effort to boost tourism and welcome visitors back to the city.

The majority of funding for LBF Kids’ Chance comes from individual and corporate donors such as the Louisiana Workers’ Compensation Corp. who hosts a yearly golf tournament benefiting the program.

If you would like to make a donation to this program, contact Dennette Young at the Louisiana Bar Foundation, (504)561-1046 or dennette@raisingthebar.org.

LBF Kids’ Chance scholarship checks were presented in the Senate chamber of the State Capitol in Baton Rouge. From left, Kimberly Rider, LBF Kids’ Chance scholarship recipient; Sen. Gerald J. Theunissen; and LBF 2004-05 President David F. Bienvenu.

In April 2006, the Louisiana Bar Foundation hosted the third National Kids’ Chance Conference in New Orleans at the Bourbon Orleans hotel in the French Quarter. Conference participants are on the balcony of the hotel.

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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: R Lemmler@lsba.org.

PUBLIC Opinion
06-RPCC-0101

Lawyer’s Duty to Report Professional Misconduct of Another Lawyer

A lawyer is obligated to report promptly to the Office of Disciplinary Counsel knowledge of misconduct by another lawyer where the conduct raises a question as to that other lawyer’s honesty, trustworthiness or fitness as a lawyer and where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred.

In Re: Michael G. Riehlmann, the Supreme Court of Louisiana was presented with an opportunity to outline a lawyer’s duty to report professional misconduct of a fellow lawyer. The version of Rule 8.3(a) of the Louisiana Rules of Professional Conduct which was in effect in 2001 at the time formal charges were filed in Riehlmann provided as follows:

“A lawyer possessing unprivileged knowledge of a violation of this Code shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.”

The Riehlmann Court clarified the requirements of the Rule and ultimately held that Rule 8.3(a) required knowledge, rather than a mere suspicion of ethical misconduct; that the knowledge must be reported promptly; and that the report must be made to the Office of Disciplinary Counsel. These same requirements are stated in the current version of Rule 8.3(a). As noted by the Riehlmann Court, changes to Rule 8.3(a) were made effective March 1, 2004. The Rule currently provides:

“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Office of Disciplinary Counsel.

Although the revision changed the wording of the Rule, it does not appear to have altered the conclusions set forth in the Riehlmann decision. The following is a discussion of each of the requirements of Rule 8.3(a).

Knowledge

An absolute certainty of ethical misconduct is not necessary to trigger the reporting requirement; yet, a lawyer must base his report on more than a mere suspicion of improper behavior. The Riehlmann Court held that “...a lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred...” The standard of determining “knowledge” is measured objectively and not according to the subjective beliefs of the lawyer reporting the misconduct.

In some cases, a lawyer will not have clear and convincing evidence of a colleague’s wrongdoing. The Rule relaxes the standard of certainty to one in which a reasonable lawyer could infer that improper behavior more than likely occurred. It is important to keep in mind, however, that a report of misconduct should not be based on a mere suspicion. A lawyer should have a legitimate degree of knowledge of another’s misconduct in
order to file a report with the Office of Disciplinary Counsel.

When Should a Lawyer Report the Misconduct?

Louisiana Rule 8.3(a) does not state a specific time period within which a report of misconduct must be made. But, as noted by the Court in Riehlmann, reporting should be made promptly because the public and the profession must be protected against future misconduct by the offending lawyer. “. . . This purpose is not served unless Rule 8.3(a) is read to require timely reporting under the circumstances presented . . . .”

Report to Whom?

In Riehlmann, the applicable version of Rule 8.3(a) failed to define the term “tribunal or other authority” to which the report of misconduct should be made. The Court looked to the comments to ABA Model Rule 8.3(a) for assistance and held that reports of misconduct should generally be made to the bar disciplinary authority. The current Rule eliminates all confusion as to whom the misconduct should be reported by clearly stating that such violations shall be made known to the Office of Disciplinary Counsel.

What to Report?

What type of conduct must be reported is subject to some interpretation. The ABA Model Rule provides:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. [emphasis added]

It is noteworthy that the current Louisiana version of Rule 8.3(a) left out the word “substantial” that is utilized in the ABA Model Rule. The Riehlmann Court, discussing the differences between Louisiana’s Rule 8.3(a) and the ABA Model Rule, noted that Louisiana’s previous version of Rule 8.3(a):

. . . imposed a substantially more expansive reporting requirement than the ABA Model Rule, in that our Rule required a lawyer to report all unprivileged knowledge of any ethical violation by a lawyer, whether the violation was, in the reporting lawyer’s view, flagrant and substantial or minor and technical. . . .”

The 2004 version provides that a lawyer is now only required to report misconduct that raises a question as to a lawyer’s honesty, trustworthiness or fitness to practice law, and therefore seemingly lightens the burden on a lawyer to report misconduct to those particular instances. Yet, under the rationale of Riehlmann and because the revision specifically left out the word “substantial” with regard to the question of misconduct, a lawyer is still required to report any ethical violation that raises a question as to a lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, whether “. . . flagrant and substantial or minor and technical . . .”

Although the revised Rule appears to narrow the scope only of reporting ethical violations to those involving certain qualities, it does not necessarily prevent reports of minor and technical violations. Louisiana’s Rule 8.3(a) requires misconduct to be reported if it raises a question — as opposed to the ABA Model Rule, which requires the conduct to raise a substantial question — as to the lawyer’s fitness to practice law. This distinction leads to greater potential for reporting of misconduct under the Louisiana Rule when compared to the ABA Model Rule because all acts of unethical behavior pertaining to the designated qualities must be reported, not just those unethical acts deemed “substantial.” By excluding the word “substantial,” the Louisiana Rule continues to impose a more expansive reporting requirement than the ABA Model Rule, in that all misconduct pertaining to a lawyer’s “honesty, trustworthiness or fitness as a lawyer” must be reported, rather than only those acts having a “substantial” impact on the legal profession.

Conclusion

The rationale for Rule 8.3(a) is self-evident. Self-regulation of the legal profession assists in ensuring the integrity of the profession. At many times, a lawyer is in the best position to discover unethical behavior and is obligated to report this knowledge, despite the reluctance for policing one another. Until the Court further clarifies the substantiality issue, practitioners should note that a failure to report knowledge of unethical conduct that bears on honesty, trustworthiness or fitness by a fellow lawyer may be a violation of the Rules of Professional Conduct.

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.

2. In Re: Michael G. Riehlmann, 04-0680

3. Id., Riehlmann at p. 1247.

4. Id., Riehlmann at p. 1247.

5. Id., Riehlmann at p. 1247.

6. Id., Riehlmann, at p. 1247: “. . . The lawyer is not required to conduct an investigation and make a definitive decision that a violation has occurred before reporting; that responsibility belongs to the disciplinary system and this court. . . .”

7. Id., Riehlmann, at p. 1247: “. . . Once the lawyer decides that a reportable offense has likely occurred, reporting should be made promptly . . . .”

8. Id., Riehlmann, at p. 1247.


10. Id., Riehlmann, at p. 1247: “. . . Therefore, a report of misconduct by a lawyer admitted to practice in Louisiana must be made to the Office of Disciplinary Counsel. . . .”

11. Id., Riehlmann, at p.1246.

12. Id., Riehlmann, at p.1246.
What drove you to attend law school? Whatever your motivation, many of us have realized over the years that being an attorney is really a profession, not a business, and that we provide a valuable and necessary service to our clients. Much to our chagrin sometimes, it’s not always about the money. This is particularly true now when Hurricanes Katrina and Rita have highlighted longtime failures in our system of criminal justice. The question that we now must face is: Do we have what it takes as professionals to step up to the plate to correct the problems?

How many of us have done work over the years pro bono? There are many attorneys who provide free services every day to the lower-income persons in our area for little or no fee, believing it is part of their job and indeed their duty to the profession, and there are several other attorneys who do not perform work pro bono. Whatever your belief on this issue, you have undoubtedly heard that our criminal justice system in Louisiana, and especially in Orleans Parish, is in complete breakdown. Our best chance to reform the system permanently may be at hand.

One of the most used definitions of professionalism is this: Professionalism concerns the knowledge and skill of the law faithfully employed in the service of the client and the public good, and entails what is more broadly expected of attorneys. It includes duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency; and pro-bono obligations. We all hopefully provide a valuable service to our clients, and over the years, somehow that service has come to be valued as property. But it wasn’t always that way. Judges have been appointing attorneys to represent indigent defendants in Louisiana for more than 100 years; see State v. Simmons, 10 So. 382 (1891). Although the practice has occasioned some controversy, in general the bar has, in the past, willingly shouldered the burden. The Louisiana Supreme Court ruled in State v. Clifton, 172 So.2d 657 (La. 1965), that:

The argument is made that an attorney’s time and advice are “property” within the meaning of the constitutional article; that an attorney’s time, knowledge and skill are real assets and to compel him to give them without compensation violates the constitutional guarantee that there will be no taking of his property without due process of law and without the payment of adequate compensation. We do not agree with counsel in this case. The professional obligations assumed by attorneys in this State require that a reasonable amount of time and effort be devoted to promoting the cause of justice, including the defense of indigent accused without compensation. The high purpose and traditions of the legal profession require that this burden be shouldered by its members. So long as the burden is not oppressive and is fairly shared among the members of the bar to which they belong there is no cause for complaint.

The court went on to state that since the attorneys appointed had only been appointed once or twice before, it was no burden on them.

The Louisiana Supreme Court changed this opinion somewhat in 1993 in State v. Wigley, 624 So.2d 425 (La. 1993), when it held that assignment of counsel to represent an indigent defendant must provide at least for reimbursement of properly incurred and reasonable out-of-pocket expenses and overhead costs, and that if the judge determines no funds are available to reimburse appointed counsel, members of the private bar should not be appointed to represent indigents. This decision was in a death penalty case, and certainly could be construed to only apply to death penalty cases.

I certainly am in no way advocating anyone should be appointed in a death penalty case without compensation, and without serious consideration of their qualifications, but defending someone on a first-offense possession of marijuana charge or something similar is in many ways no different than trying an insurance defense or personal injury case. Involved in both types of cases is propounding of discovery, legal research, oral argument at hearings, and trial, all of which are similar in both cases. There is a statute little quoted, La. R.S. 15:145, which specifically states that each of the state’s indigent defender boards “shall maintain a current panel of volunteer attorneys licensed to practice law in this state and shall additionally maintain a current panel of nonvolunteer attorneys under the age of fifty-five licensed to practice law in this state and residing in the judicial district.” The statute goes on to read that attorneys are appointed from the nonvolunteer list only in the event of an inadequate number of volunteer attorneys.

The El Paso, Texas, indigent defender board came up with a solution to its problem of not having enough attorneys and money to represent indigent defendants. Since 1988, the task of representing indigent defendants in El Paso County has been shared by the Public Defender’s Office and private attorneys. Representation by private attorneys has been provided through the

Continued on page 270
STANLEY, FLANAGAN & REUTER, L.L.C.

IS PLEASED TO ANNOUNCE THAT

F. A. Little, Jr.,

FORMER CHIEF JUDGE OF THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA,

HAS JOINED THE FIRM AND WILL CONCENTRATE IN MEDIATION,
ESTATE PLANNING AND ADMINISTRATION,
TAX AND COMMERCIAL LITIGATION,
AND RESOLUTION OF ESTATE DISPUTES.

STANLEY, FLANAGAN & REUTER, L.L.C.
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Professionalism continued from page 268

El Paso Plan, under which all private attorneys under 55 years of age who practice law and live in El Paso County and cannot claim financial hardship must either accept appointments to represent indigent individuals or pay a fee to the county of $600 per year. This fee generates about $200,000 annually for the county’s use in indigent defense. El Paso’s legal community totals about 1,150 attorneys, of which 375 pay the fee, 375 are exempt from the plan and a remaining 400 attorneys are eligible to accept indigent appointments in rotation.¹

There are members of the legal community who have never practiced criminal law and who have no desire to do so and they are absolutely entitled to that right. To those members of the bar though, I would suggest that they become aware of the alternative: Criminal District Court judges can and are releasing incarcerated persons prior to trial because the defendants are not being represented in any type of timely manner. Although the persons released as of the writing of this article were in jail for first-offense possession and other similar nonviolent charges, the day certainly is coming where other defendants charged with more serious violations may be released. What will become of the criminal justice system then?

So which do you choose? Appointment to a case or two or other alternatives? I picked the volunteer choice, and my first client will be brought from Angola next month for a meeting, after which we will schedule his hearing. My father, who has been a police officer for more than 50 years, is none too happy but also told me this is a valuable service that must be performed until some permanent solution can be fashioned. The Supreme Court in State v. Peart, 621 So.2d 780 (La. 1993), stated some 10 years ago that:

[i]f legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided.

It’s our chance now to reform the system and step up to the plate as professionals to cure a longstanding problem that affects us all.

To volunteer, e-mail danielle.nelson@orleanspublicdefenders.org.

FOOTNOTE


Christy Howley Connois is a member of the firm Bowman & Howley in Gretna. She has a general civil, corporate and criminal litigation practice, handling successions, personal injury matters, insurance litigation, family law issues and criminal matters. She is a member of the Louisiana State Bar Association’s Professionalism and Quality of Life Committee. She resides on the Westbank with her husband. (922 Lafayette St., Gretna, LA 70053)

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**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_prog.html 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.
FREE to LSBA Members!

Requests from LSBA Members: Fastcase Launches New Features

In response to requests from Louisiana State Bar Association members, Fastcase has launched new features.

Fastcase, the online legal research service, is offered free to Louisiana lawyers as a benefit of LSBA membership.

Now when users log in to Fastcase, they access a customized home page rather than being directed to “Search Cases.” The home page includes a list of the different types of materials available on the member benefit (not just cases), as well as a customized search history and a customized “Quick Search” feature.

Also, many members have requested more prominent “Print/Save” buttons and the ability to personalize font sizes; both have been included in the updates. The ability to search newspapers also has been added, and the Authority Check feature has been made more prominent.

To take advantage of all that Fastcase has to offer, go to: www.lsba.org/Member_Services/fastcase.asp.

FASTCASE

To access all the FREE services, go to: www.lsba.org/Member_Services/fastcase.asp
Need Not Produce Public Records You Do Not Have

Lawrence Chapman, an inmate serving a sentence for a conviction which became final on Dec. 28, 1998, filed an application for writ of mandamus on Aug. 2, 2004, directing the East Baton Rouge district attorney to provide him with an estimate of the cost of copying the record of those criminal proceedings, basing his claim on the provisions of the Louisiana Public Records Act, La. R.S. 44:1, et seq. Because the three-year period for a defendant to seek post-conviction relief had run, the district attorney had destroyed the file material, except for an index card containing limited (not very useful) information. The trial court dismissed Chapman’s claim because there were no records to copy, and, therefore, no need to estimate the copying cost.

In Chapman v. District Attorney, East Baton Rouge, 05-0577 (La. App. 1 Cir. 3/29/06), 934 So.2d 128, the 1st Circuit held that the district attorney properly disposed of the Chapman record pursuant to the provisions of La. R.S. 44:36, which provides that prosecution records need only be retained until the statutory period — three years from the date the conviction is final — has run. The court said that had the records been retained, the mere fact that the record could not have been used in post-conviction proceedings would not have allowed the district attorney to refuse to produce them. Because the records were legally destroyed, there was nothing to produce, and the trial court’s decision was affirmed.

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Alternative Dispute Resolution

Louisiana Policyholders Get an Extra Year to File for Hurricane Mediation

As a result of the Louisiana Supreme Court’s ruling in State v. All Property & Casualty Insurance Carriers Authorized and Licensed to Do Business in the State of Louisiana, 06-2030 (La. 8/25/06), ____ So.2d ____, Louisiana policyholders now have an extra year to request mediation under the Louisiana Department of Insurance Hurricane Mediation Program. In that case, the court upheld
the constitutionality of Acts 2006, Nos. 739 and 802 of the Louisiana Legislature, state laws requiring insurers to give policyholders an extra year to file lawsuits over claims from Hurricanes Katrina and Rita. The mediation program was established to help resolve disputes between insurers and Louisiana policyholders arising from damages to residential property caused by Hurricanes Katrina and Rita. Under the program, insurance companies are required to notify policyholders having claims or disputes with their insurer about the mediation program regardless of whether a check has been issued. Mediation costs are paid by the insurance company.

Arbitration Clause in Contract Not Adhesionary

Hoffman, Siegel, Seydel, Bienvenu & Centola, A.P.L.C. v. Lee, 05-1491 (La. App. 4 Cir. 7/12/06), 936 So.2d 853.

Plaintiff, a New Orleans law firm, sued Lee, its former chief financial officer, and Paychex, its former payroll support services company, to recover stolen funds, after it discovered that Lee had embezzled funds from the law firm. In response to Paychex’s motion to stay proceedings and enforce arbitration, plaintiff alleged, among other things, that the contract was unenforceable because it was adhesionary. The trial court denied the motion and the court of appeal affirmed. Citing Aguillard v. Auction Management Corp., 04-2804 (La. 6/29/05), 908 So.2d 1, the court of appeal found that the arbitration clause was not significantly smaller than other portions of the contract, that plaintiff was not in an inferior bargaining position, and that the fact that the contract allowed Paychex, in its own discretion, to litigate its claims for money under the contract did not make it a contract of adhesion.

PCF Oversight Board Dismisses Malpractice Claim

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

The Louisiana Patient’s Compensation Fund (PCF) Oversight Board dismissed a medical malpractice claim when the parties failed to appoint an attorney chair within one year as required by La. R.S. 40:1299.47 A(2)(c). The trial court granted the plaintiff’s request for a writ of mandamus directing the board to reinstate the request for the formation of the medical-review panel. The court of appeal reversed the trial court, finding that the word “shall” in La. R.S. 40:1299.47 A(2)(c) is mandatory and that if an attorney chair is not appointed within one year from the date the request for review of a claim is filed, the board is required to dismiss the claim.

Although the appellate court found that the board was correct in dismissing the claim, the court expressed no opinion as to the propriety of the dismissal with prejudice, as the issue of plaintiffs’ entitlement to re-file a second, identical claim was not before the court.

The court also expressed no opinion as to whether the plaintiffs and healthcare providers, by their failure to timely name and give notice of the attorney chair, are deemed to have waived the use of a medical-review panel. Two concurring judges on the court of appeal wrote separately to point out that the only effect of the dismissal of the claim for the failure to appoint an attorney within one year from the date the request for review was filed is that the parties are deemed to have waived the use of the medical-review panel.

Overnight Mail Accomplishes Certified or Registered Mail Requirement

In Re Med. Review Panel of Davis v. LSU Health Scis. Ctr.-Shreveport, 41,273 (La. App. 2 Cir. 8/25/06), ____ So.2d ____.

The plaintiffs timely filed their request for a medical-review panel when they sent the request to the Louisiana Division of Administration by certified mail exactly one year from the date of the alleged act of malpractice. La. R.S. 9:5628(A) states that all actions for damages for injury or death against a physician or hospital licensed under Louisiana law must be filed within one year from the date of the alleged act, omission or neglect, or within one year from the date of discovery of the alleged act, omission or neglect.

Moreover, La. R.S. 40:1299.391(A) states that a request for a medical-review panel, a prerequisite to filing a cause of action for medical malpractice in Louisiana, shall be deemed filed on the date of the alleged act, omission or neglect, or within one year from the date of discovery of the alleged act, omission or neglect.

The court also expressed no opinion as to whether the plaintiffs and healthcare providers, by their failure to timely name and give notice of the attorney chair, are deemed to have waived the use of a medical-review panel. Two concurring judges on the court of appeal wrote separately to point out that the only effect of the dismissal of the claim for the failure to appoint an attorney within one year from the date the request for review was filed is that the parties are deemed to have waived the use of the medical-review panel.
where the statute allows a filing by the use of registered or certified mail, the use of an overnight express mail delivery service clearly accomplishes that purpose. According to the court, express mail provides signed statements of the date mailed and the fact of next-day delivery. La. R.S. 40:1299.39.1(A)(1)(c) requires a claimant 45 days after the Division of Administration confirms receipt of the request for a medical-review panel to pay the $100 filing fee. Since the claimants paid the filing fee by overnight express mail within the 45-day period, the claimants timely filed the request for a medical-review panel.

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USAA argued that the Supreme Court did not have jurisdiction to review the trial-court ruling at the request of the prevailing party. The Supreme Court reminded USAA in a footnote that it never surrendered jurisdiction after it granted the attorney general’s first writ application. It had remanded to the trial court only for a hearing.

The Supreme Court can consider writ applications directly from the trial court, but only in extraordinary circumstances. Rule X Section 5(b)(b). This case was extraordinary.

Statutory Interpretation Rules


The best evidence of legislative intent is the law’s text. Secondly, there is:

► the occasion and necessity for the law;
► the circumstances under which it was enacted;
► concepts of reasonableness; and
► contemporaneous legislative history.

The Legislature also may express the intended meaning of a law in a concurrent resolution.

The Legislature is presumed to have enacted a new law in light of existing law involving the same subject matter and court decisions construing those articles or statutes. Where the new article or statute is worded differently from the preceding law, the Legislature is presumed to have intended to change the law.

A bill that does not become law is not competent evidence of legislative intent. Committee minutes are summary reports of committee proceedings and do not indicate legislative intent.

The keyword, one-liner, summary and adjoining information, abstract, digest, and other words and phrases contained outside the sections of a bill following the enacting clause are solely to provide legislators with general indicia of the bill’s content. Neither the Legislature nor any committee may amend them, and
they do not indicate legislative intent. The same is true for legislative staff documents that neither the Legislature nor any committee may amend. Conference committee reports are excepted from this rule.

**Effect on Appeal of Reasons for Judgment**

The Supreme Court recently noted in *Haynes v. United Parcel Service*, 05-2378 (La. 7/6/06), 933 So.2d 765, that the trial judge’s transcribed oral reasons for judgment are not part of the judgment. The court would not perform appellate review on statements made there. *Haynes* is just the latest entry in a long line of jurisprudence holding that the trial court’s reasons, written or oral, are not controlling and form no part of the judgment from which an appeal is taken. See, e.g., *Joseph v. Gray*, 05-0182 (La. App. 4 Cir. 8/3/05), 916 So.2d 1130 n.2. This jurisprudence is based on La. C.C.P. art. 1918, which requires that reasons for a final judgment be set out in a separate document.

**Amendments to URCA**

Several changes to the Uniform Rules – Courts of Appeal (URCA) became effective on Nov. 1, 2006. Writ applications must now be hole-punched and bound in two places along the top margin, preferably with 4¼-inch metal fasteners, and without obscuring text. A lengthy application must be divided into sections of no more than 250 pages. The writ application must include petitions in civil cases and the indictment or bill of information in criminal cases. The statement of the case in a writ application must include the status of the case at the time the application is filed, to reflect any pending trial or hearing dates. The applicant must notify the court of appeal of any setting, change or continuance of a hearing date.

**Writing Rant**

Superscripting the footnote number in the body text cues the reader that the number is not part of the text. Down in the footnote there is no need to superscript or indent the number. Most lawyers do both.

The reason may be that it is the default formatting in WordPerfect and Microsoft Word. This default is harder to override in Word. Professional typesetters do not superscript in the footnote. Open up a reporter or law-review volume to see a correctly formatted footnote.

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Criminal Law

State Violation of Grand Jury Secrecy

State v. Gutweiler, 06-0561 (La. App. 3 Cir. 9/27/06), ____ So.2d ____

Amanda Gutweiler was indicted by the Rapides Parish grand jury on April 30, 2002, with three counts of first-degree murder relating to the deaths of her three children due to a fire in the residence. Over the course of four years, various motions were filed and, early in 2006, the district attorney’s office disclosed that the assistant district attorney handling the indictment had shared grand jury testimony with the state’s key forensic witness, and then had the forensic witness testify before the grand jury. Further disclosures (after various motions to compel, issuance of subpoenas to assistant district attorneys, and the like) revealed that the state had disclosed grand jury testimony to its lead investigator for investigation of a possible perjury charge without seeking court approval, as specified in La. C.Cr.P. art. 434.

The defense filed a motion to quash the indictment, which was granted by the trial court. The trial court further found the assistant district attorney in constructive contempt of court and ordered that the detective and forensic expert be disqualified as witnesses before the grand jury in any future prosecution of the defendant. The state appealed the ruling, joined in an amicus brief by the Louisiana District Attorneys’ Association (LDAA).

The court of appeal reviewed the differences between the state and federal rules of grand jury secrecy, noting that the secrecy of Louisiana’s grand jury is written into the State Constitution (Art. V, § 34). Although the district attorneys argued that no particularized showing of harm had been made and, alternatively, that lesser sanctions would suffice, the court was unmoved. The presence of any non-authorized personnel in the grand jury chambers has been grounds to quash, and the secrecy of the proceedings and the testimony protected from all disclosure, whether by the state or the defense.

The motion to quash was affirmed, as the grand jury’s determination of probable cause, even if confirmed by conviction, would always be infected by the breach of secrecy in the indictment phase.

The disqualification of witnesses was also affirmed as an appropriate sanction under La. C.E. art. 615. The witnesses could not “unring the bell” of having received the tainted information, and would not be permitted to testify in any further proceedings regarding this defendant. The court likewise noted that the trial judge had not barred the witnesses delivering their files or reports to other investigators or experts for use in a subsequent trial.

The LDAA argued in short that the state’s experts and investigators are collectively “persons having confidential access to information concerning grand jury proceedings” under La. C.Cr.P. art. 434, and so any disclosure among law enforcement, prosecutors or their retained experts is acceptable. The LDAA further argued that as attorneys for the state, they should be entitled to discuss the testimony with their investigators and experts under a sort of “collective witness” doctrine similar to the right of a defendant to be represented by an attorney at the grand jury. The court determined that the LDAA was asking it to “waive grand jury secrecy for all prosecutors, allowing those prosecutors to reveal grand jury materials to anyone they feel can use the information to further the State’s case,” and found the arguments to be without merit.

Circuits Split on Unit of Prosecution in Pornography Cases

State v. Fussell, 06-0324 (La. App. 3 Cir. 9/27/06), ____ So.2d ____

Leon Fussell was convicted of the aggravated rape of a child under the age of 12 and 16 counts of possession of pornography involving juveniles. On appeal, he raised a variety of issues, including sufficiency of the evidence of rape, misjoinder of charges, and various complaints about the jury panel and his attorneys, all of which were easily resolved by the court of appeal. Of more interest is the court’s analysis of two issues regarding the child pornography charges — the appropriate unit of prosecution, and the classification of two photographs as child pornography.

For the classification issue, the court turned to federal jurisprudence, using the factors in U.S. v. Dost, 636 F.Supp. 828, 832 (S.D. Cal., 1986), aff’d, 813 F.2d
1231 (9 Cir. 1987), and the gloss of U.S. v. Amirault, 173 F.3d 28, 32 (1 Cir. 1999), clarifying that the factors are neither comprehensive nor necessarily applicable in every case, and that each determination will be case-specific. The factors used are:

- whether the focal point of the visual depiction is on the child’s genitalia or pubic area;
- whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- whether the child is fully or partially clothed, or nude;
- whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
- whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

The unit of prosecution issue focuses on whether the appropriate number of charges is the number of images or the course of conduct. The court first reviewed the 1st Circuit’s decision in State v. Kujawa, 05-0470 (La. App. 1 Cir. 2/22/06), 929 So.2d 99, in which the 1st Circuit declined to quash multiple counts of possession of pornography in favor of a single charge, finding that the legislative intent of La. R.S. 14:81.1 allowed a “charge per image” unit of prosecution. The 3rd Circuit largely incorporated the 1st Circuit’s analysis, but ultimately found Judge Downing’s dissent in Kujawa more persuasive, finding the statutory language ambiguous. The 3rd Circuit then applied the rule of lenity and effectively consolidated the 16 counts into a single count of conviction and remanded the case for resentencing as to that conviction.

The ruling appears to present a circuit split that may be ripe for further review. For another view on how to address the problem, see United States Sentencing Guideline 2G2.2, explicitly providing for enhancements to sentences based on the number of images possessed.

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Environmental Law

LDEQ Electronic Document Management System

The Louisiana Department of Environmental Quality (LDEQ) is conducting a six-month pilot test (initiated on Aug. 1, 2006) of its Electronic Document Management System (EDMS). The EDMS is an electronic repository of official records available on the LDEQ Web site (www.ldeq.org). All documents created or received by LDEQ since July 1, 2005, are available for search and retrieval, including e-mails. Documents are published in accordance with LDEQ regulations on confidentiality (LAC 33:I.501-511) and security sensitivity (LAC 33:1.601-609).

Accordingly, unless a request for confidentiality is made, it should be expected that all communications will be published on the EDMS, including trade secrets, proprietary information, settlement negotiations, etc. Requests for confidentiality are governed by LAC 33:1.503.
LDEQ Expedited Permitting Program

Effective July 31, 2006, LDEQ adopted an emergency rule establishing an expedited permitting program. See LAC 33:1.18. The program provides for the expedited processing of permits, modifications, licenses, registrations or variances if the applicant is willing to pay the costs associated with having LDEQ personnel work overtime to accommodate the request. An applicant requesting expedited processing must submit a request documenting:

- the requested timeframe for a final permit decision;
- the basis and/or need for the request;
- a commitment to provide any additional information requested by LDEQ as quickly as practicable;
- after-hours contact information; and
- the maximum amount the applicant is willing to pay for expedited processing.

LDEQ will issue a final decision to grant or deny any request for expedited processing within 10 days of receipt. Applications for permit renewal and/or reconciliations are not eligible for the program, nor are applications needed to avoid or mitigate enforcement actions.

Hazardous Waste

Giauque v. Clean Harbors, L.L.C., 05-0799 (La. App. 1 Cir. 6/9/06), 926 So.2d 90.

Plaintiffs filed a suit to enjoin the operation of a hazardous-waste-injection well located in a low-lying wetland area that was within the boundaries of a historic body of water. The primary issue before the court was the interpretation and application of La. R.S. 30:2202(C):

Although the court readily determined that the statute does not permit hazardous-waste injection to be situated within a river, lake or stream, the question of whether the statute restricts disposal in swamps, marshes and other low-lying areas could not be answered as easily. The court resolved the matter on its facts. The site at issue was a low-lying wetland area that remains dry for most of the year and is subject to only occasional flood waters. Accordingly, the court ruled that the site was not precluded as a site for a hazardous-waste-injection well — provided that it was protected by an encompassing levee or berm.

Toxic Substance Control Act

Stewart v. Rheem Mfg. Co., 05-0726 (La. App. 3 Cir. 3/29/06), 926 So.2d 90.

A residential lessee filed a suit for damages under the Louisiana Products Liability Act (LPLA) against the homeowner and the manufacturers of an air conditioning unit after it malfunctioned and released PCBs into the home. Defendants asserted that plaintiff’s LPLA suit was pre-empted by the Toxic Substances Control Act (TSCA). The court held that TSCA did not pre-empt plaintiff’s LPLA suit was pre-empted by the Toxic Substances Control Act (TSCA). The court held that 15 USCA 2617 and 40 CFR 761.20 regulate only the permissible risks of exposure to PCBs and not the specific manner that such risk is to be minimized. As such, since TSCA does not mandate the design or use of certain materials, the court held that TSCA did not pre-empt plaintiff’s LPLA claim.

Oil and Gas

La. Crawfish Producers Ass’n-West v. Amerada Hess, 05-1156 (La. App. 3 Cir. 7/12/06), 935 So.2d 380.

Plaintiffs are commercial fishermen who filed suit against numerous defendants who engaged in oil and gas exploration that ultimately eliminated or significantly diminished the crawfish population. The court held that the fishermen could not recover on their state law claims (under La. Civ.C. arts. 656, 667 and 2315) because they did not have a proprietary interest in the land or in the wild crawfish that they sought to catch. An exception of no cause of action on the state law claims was sustained, but plaintiffs’ right to proceed under maritime law was reserved.

Toxic Torts

MSOF Corp. v. Exxon Corp., 04-0988 (La. App. 1 Cir. 12/22/05), 934 So.2d 708.

Plaintiff landowners asserted claims for damages, diminution of property and nuisance against hazardous-waste generators, a clean-up facility and a disposal facility. The court of appeal reversed a summary judgment granted to defendants, found the trial court abused its discretion when it disqualified plaintiffs’ experts, and remanded. The court addressed several Daubert issues and held that plaintiffs’ expert witnesses were not required to perform additional testing to confirm the findings of a government report identifying the presence of chemicals on plaintiffs’ property. The court held that the lack of independent testing was a factor that affected only the weight to be afforded the experts’ conclusions — not the admissibility thereof.

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Family Law

Custody

*Babin v. McDaniel*, 05-2455 (La. App. 1 Cir. 3/24/06), 934 So.2d 69.

The court of appeal reversed the trial court’s finding of contempt for not allowing visitation because it failed to state specific facts and reasons supporting the finding. The court also reaffirmed its prior finding that La. R.S. 9:344 regarding grandparents’ visitation was constitutional and explained the proper interpretation and application of the statute. Further, the trial court did not unconstitutionally apply the statute because its judgment was specifically drafted to require the grandparents to respect the father’s parental decisions and visitation guidelines.

*Gonzales v. Gonzales*, 06-290 (La. App. 5 Cir. 6/28/06), 934 So.2d 301.

Because of ongoing investigations of abuse and drug use pending in New Jersey where the parties evacuated from Hurricane Katrina, the court found that the best interest of the child was met by conferring temporary jurisdiction on New Jersey to make a custody order.

Child Support

*Myers v. Myers*, 04-2120 (La. App. 4 Cir. 4/26/06), 931 So.2d 1104.

The approach taken by the court-appointed special master and the CPA he retained to assist him to determine the parties’ incomes for child support purposes was reasonable and in accord with the methodology used by such professionals in making such determinations and did not violate the Daubert standards. The special master’s requests of Mr. Myers for additional documents were not inappropriate ex parte communications, and Ms. Myers provided no proof at trial of any impropriety or denial of due process or fundamental fairness.

*State v. L.T., Jr.*, 05-1965 (La. 7/6/06), 934 So.2d 687.

The Supreme Court determined this res nova issue, ruling that military allowances for housing and subsidies are included in gross income for child support purposes, even though they are not taxed by the IRS as taxable income. These benefits increase the total income of the recipient and allow him a higher standard of living, and the children are entitled to share in that increased standard.

*State v. Blankenship*, 41,107 (La. App. 2 Cir. 6/28/06), 935 So.2d 793.

Mr. Blankenship argued that the state could not order him to pay more child support than the VA was withholding from his benefits under a VA administrative decision, but the court held that there was no pre-emption issue and no conflict between state and federal laws, and that the state could order child support in accordance with state law, after credit for amounts being otherwise paid.

Spousal Support

*Ardoine v. Ardoine*, 06-245 (La. App. 3 Cir. 6/28/06), 934 So.2d 253.

Because Ms. Ardoine’s needs exceeded her income, and Mr. Ardoine’s income exceeded his expenses, the trial court did not err in awarding her final spousal support.

Divorce

*D’Angelo v. D’Angelo*, 05-0553 (La. App. 1 Cir. 3/29/06), 934 So.2d 119.

Mr. D’Angelo’s first filed suit in
Jefferson Parish was lis pendens to Ms. D’Angelo’s suit in St. Tammany Parish on all issues raised in his petition that could be res judicata to those raised in hers, except for an injunction against harassment because he had not raised that issue.

The St. Tammany Parish court’s order of transfer and consolidation with the Jefferson Parish suit was reversed because neither party requested it, and its parts subject to lis pendens were dismissed as a result thereof.

**Property**

*Spinosa v. Spinosa*, 05-1935 (La. 7/6/06), 934 So.2d 35.

Because Ms. Spinosa’s claims against Mr. Spinosa as to classification of assets and alleged breaches of fiduciary duties regarding corporate entities and a family trust arose from the matrimonial regime and were part of her petition for partition, the Family Court, not the 19th Judicial District Court, had subject matter jurisdiction over the actions. Further, her nullity action regarding a matrimonial agreement rendered by the 19th Judicial District Court before the Family Court was granted exclusive jurisdiction over partition issues was within the subject matter jurisdiction of the Family Court, because it now had jurisdiction over such actions, and the claim related to the marriage and could not be interpreted solely as a nullity action without consideration of its actual substance. Finally, the Family Court also had jurisdiction over the third-party trust because the action arose from the matrimonial regime and required an initial determination of whether assets in the trust were community; venue was also appropriate in East Baton Rouge Parish, rather than in the domicile of the trustee.

**Procedure**

*In re Kuntz*, 06-0487 (La. 5/26/06), 934 So.2d 34.

The Supreme Court reversed the trial court and court of appeal and remanded to the trial court to make specific findings that the trade secrets sought were relevant and necessary.

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**Insurance, Tort, Workers’ Compensation and Admiralty Law**

*Loss of Enjoyment of Life Is Recoverable as a Separate Element of General Damages*

*McGee v. A.C. & S, Inc.*, 05-1036 (La. 7/10/06), 933 So.2d 770.

Plaintiffs, the widow and children of a man who died as a result of asbestos exposure, filed a wrongful death and survival action naming a number of the decedent’s former employers and manufacturers of asbestos-containing products. In their petition, plaintiffs sought damages for, among other things, the decedent’s loss of enjoyment of life. The defendants filed a motion *in limine*, seeking to eliminate this element of damages. The district court denied the motion, and the defendants applied for supervisory writs. The 4th Circuit Court of Appeal granted the application, holding that a separate award for loss of enjoyment of life was erroneous, and that expert testimony pertaining to this element was inadmissible. Plaintiffs applied for supervisory writs to the Louisiana Supreme Court. The court granted the writ application to determine whether loss of enjoyment of life is recoverable as a separate element of general damages that may be reflected as a line item on a jury verdict form.

The court first considered whether loss of enjoyment of life was a compensable component of general damages under La. Civ.C. art. 2315 and the court’s existing definition of general damages. Resolving a conflict among the courts of appeal, the court held that it was, and went on to consider whether loss of enjoyment of life could be separated from other elements of general damages, specifically mental and physical pain and suffering, and whether that separation could be reflected by a separate line on a jury verdict form. The court held that loss of enjoyment of life is a component of general damages and, therefore, it is not

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separate and distinct from general damages. Nonetheless, the court explained that general damages awards are routinely dissected, and that allowing a separate award for loss of enjoyment of life would reflect the accepted method of listing elements of general damages separately.

The court went on to consider whether loss of enjoyment of life damages were recoverable by a tort victim’s family members. The specific issue was whether loss of enjoyment of life was duplicative of a loss of consortium claim. The court held that it was duplicative, and that recovery by the tort victim’s family was precluded.

Justice Victory dissented, stating that hedonic damages were duplicative of mental pain and suffering. Justice Weimer also took the position that a damage award for mental pain and suffering adequately compensated a tort victim for hedonic damages. Justice Weimer stated that the jury verdict form should have a line for loss of enjoyment of life or a line for mental pain and suffering, but not both. Alternatively, in Justice Weimer’s view, the jury verdict form could include a single line for loss of enjoyment of life and mental pain and suffering, which would serve the purpose of allowing a jury to consider both components of general damages without having to draw a fine line distinguishing between the two.

Justice Knoll concurred to address the dissent in Andrews v. Mosely Well Service, 514 So.2d 491 (La. App. 3 Cir. 1987).

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Apple Corps Limited (Corps), the publisher of the music, records, videos, movies and movie clips of The Beatles, sued Apple Computer, Inc. (Apple Computer) alleging a violation of the 1989 trademark agreement (TMA) between the two that detailed the arrangement for avoiding conflict of the parties’ respective marks and apportioning to each party its own area of exclusive use.

The TMA states that Corps has the exclusive worldwide right to use and authorize others to use its mark “on or in connection with” goods and services in conjunction with “any current or future creative work whose principal content is music and/or musical performances.” The TMA states that Apple Computer has the exclusive worldwide right to use and authorize others to use its mark “on or in connection with” goods and services in conjunction with “data transmission services.”

In 2003, Apple Computer launched the iTunes Music Store (iTunes). When iTunes is accessed, Apple Computer’s apple logo remains visible at all times, except when the user’s computer is communicating with the store or playing a track. In response to this use of Apple Computer’s mark with iTunes, Corps brought its suit against Apple Computer for breach of the TMA, contending that the appearance of Apple Computer’s apple logo while iTunes is on screen and being accessed is a use “on or in connection with” musical content, i.e., record-
ings. Corps argued that Apple Computer breached TMA’s granting to Corps the exclusive right to use its mark in connection with musical content. Corps also contended that Computer’s video, static and e-mail advertising for iTunes breached the TMA in the same manner.

The court had to resolve two questions: (1) What does it mean to use a mark “on or in connection with” goods or services? and (2) What impact does clause 4.3 of the TMA have on this litigation? Clause 4.3 of the TMA allowed Apple Computer to use its marks to reproduce, run, play or otherwise deliver content that fell within Corps’ exclusive rights for use of its marks.

With regard to the first question, the court held that under the TMA, in order to constitute the use of a mark “on or in connection with” a field of use, there must be a degree of trade connection or association between the mark and that field of use. The court first noted that the phrase “on or in connection with” is used in the context of the parties’ reserving their respective, exclusive fields in which to use their trademarks. The court limited the phrase “on or in connection with” to mean having a relationship to the proper use of trademarks. Further, since the TMA was a worldwide agreement, the court refused to restrict the construction of the TMA to the law of any one jurisdiction and instead held that the phrase must be limited in a manner that reflects generally the worldwide purpose of trademarks. The court held that, in accordance with the limitation supplied by the agreement’s context and the worldwide purpose of trademarks, in order to constitute use “on or in connection with” a field of use there must be a degree of trade connection or association with that field of use relating to its commercial origin.

With regard to the second question of construction, the court held that clause 4.3 signifies that the mere running of a data transmission service that transmits musical content under a Computer apple mark is not of itself a breach. The court found that clause 4.3 was designed to address situations where a service or product within Apple Computer’s field of use, such as a transmission service or a piece of hardware, was used to deliver content within Corps’ field of use. However, the court held clause 4.3 was intended to protect only a “fair and reasonable” use of the mark in connection with content within Corps’ field of use and found that the “fair and reasonable” standard was implied in order for clause 4.3 to achieve the parties’ intent.

Having resolved the issues of the TMA’s construction, the court considered whether Apple Computer’s use of its marks in relation to iTunes is a use “on or in connection with” musical content, within the meaning of the TMA. It held that a reasonable user of iTunes would not take the mere presence of Apple Computer’s logo in connection with iTunes to suggest that there was a trade connection with the musical content beyond that of being a retailer. The court found Apple Computer’s use of the mark was not a use “on or in connection with” content within the meaning of the TMA. Accordingly, Apple Computer had not breached the TMA.

Further, the court held that clause 4.3 permits Apple Computer’s use of its own mark in connection with iTunes. Apple Computer was using its mark in connection with its data transmission service, and that data transmission service delivered content within Corps’ field of use. Apple Computer’s use did not go beyond identifying the mark with the retail service. There was no suggestion of a trade connection between Apple Computer and the content itself. The court found the use to be “fair and reasonable.”

The court next considered whether the video, static and e-mail advertisements for iTunes, in which Apple Computer’s logo appears, violated the TMA. The court found that a reasonable person would understand the use of Apple Computer’s mark in these advertisements to signify a connection only to iTunes as a retailer, not to signify a trade connection to the musical content. Thus, under the TMA, this use is not a use “on or in connection with” musical content. Additionally, the court held that the advertisements fall within the protection of 4.3. Like the use of Apple Computer’s mark with iTunes itself, the advertisements signify a connection between Apple Computer’s mark and a service that transmits content within Corp’s field of use. Thus, the court ruled that Apple Computer’s advertisements for iTunes are not a breach of the TMA.

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Kentucky River Cases Give Long-Awaited Clarity to Definition of “Supervisor”

The National Labor Relations Board recently issued important guidance intended to provide predictable standards on the definition of “supervisor” under the National Labor Relations Act. Under the Act, supervisors are excluded from the right to participate in union elections and be part of a bargaining unit. The long-standing ambiguities associated with determining supervisor status have increased in many industries as workforce hierarchies have flattened and more employees have taken on supervisor-like functions.

The Act defines “supervisor” as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing
the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.


In \textit{NLRB v. Kentucky River Community Care, Inc.}, 121 S.Ct. 1861 (2001), the U.S. Supreme Court rejected the board’s interpretation of “independent judgment” in determining supervisory status. The board responded in 2003 by inviting briefs from interested parties on the issue in \textit{Oakwood Healthcare, Inc.}, 348 NLRB No. 37. In that case, the board reviewed a regional director’s denial of supervisory status to all charge nurses at an acute-care hospital. The board also invited briefing in two other cases addressing the issue: \textit{Croft Metals, Inc.}, 348 NLRB No. 38 (lead maintenance and assembly line workers and load supervisors in shipping), and \textit{Golden Crest Healthcare Center}, 348 NLRB No. 39 (nursing home charge nurses). These board decisions, issued Oct. 3, 2006, are now referred to as the “Kentucky River” cases because they respond to the Supreme Court’s criticism in \textit{Kentucky River} of the standard then applied by the board.

The board set its revised standard in \textit{Oakwood} and applied it in all three cases. Most of the workers in question were deemed non-supervisory under the new guidelines. The narrow questions addressed were the meanings of “assign,” “responsibly to direct” and “independent judgment.”

Under \textit{Oakwood}, “assign” means designating to a place (in health care this can include appointing an employee to a patient), setting a time (e.g., shift, overtime), or giving significant overall duties. “Assign” does not mean selecting the order in which discrete tasks within a shift must be performed or ordering a single short-term task.

“Responsibly to direct” means having such accountability for the performance of a task that the one directing it is subject to adverse consequences if the task is not properly done. Thus the putative supervisor must have the authority to take necessary corrective action and be subject to discipline if that action is not taken.

The board rejected its previous interpretation of “independent judgment” in favor of the Supreme Court’s directive (in \textit{Kentucky River}) by applying the term without reference “to whether the judgment is exercised using professional or technical expertise.” Independent judgment means developing an evaluation or opinion “by discerning and comparing data,” free from the control of others (including through non-discretionary standards, such as in policies or a collective bargaining agreement), and which is not routine or clerical.

Lastly, the board confirmed that engaging in part-time supervisory functions confers supervisor status if it is regular (a pattern or schedule) and substantial (at least 10-15 percent of the employee’s work).

Under these standards, the Oakwood nurses did not “responsibly direct” work, where they did not risk discipline or lower evaluations if the tasks they delegated were not properly performed. However, they did “assign” nurses to patients at the beginning of the shift, giving them significant overall duties. Once the board found that the nurses performed a supervisory function, it then determined that the regular-charge nurses exercised “independent judgment” in applying their discretion to match nurses to patients, and were supervisors under the Act. Rotating-charge nurses did not meet the definition, as they did not exercise supervisory authority for a “substantial” part of their work time.

In applying the same standards to the lead persons in \textit{Croft Metals}, the board...
concluded that they did not “assign” employees, but they did “responsible direct.” The lead persons, who were held accountable for their crews’ performance, managed teams, shifted employees, corrected performance inadequacies and ordered work sequence to meet performance goals. However, because the lead persons’ decisions were controlled by pre-set guidelines (e.g., delivery schedules) or were routine, they were not supervisors under the Act.

In *Golden Crest*, the board found charge nurses not to be supervisors. Where the charge nurses could not require employees to stay later, come in when off-duty or alter shift section assignments, they did not “assign” employees. Nor did they “responsible direct” employees where they were not accountable for the performance of others. This standard was not met through a rating on their evaluations regarding their ability to direct others.

These decisions pave the way for greater clarity in understanding workers’ and employers’ rights and duties in this often contested area of the law. The decisions can be accessed at [www.nlrb.com](http://www.nlrb.com).

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**Professional Liability**

**Shoulder Dystochia/Erbs Palsy**

*Salvant v. State*, 05-2126 (La. 7/06/06), 935 So.2d 646.

Shoulder dystocia was encountered during the delivery of a child. The complication ultimately led to a severe brachial plexus injury.

A medical-review panel found no breach of any standard of care and concluded that the injury resulted from a “yet unknown intrauterine mechanism.” Part of the panel’s reasoning was that the child’s presentation during the delivery should have injured his left arm, whereas the child suffered a brachial plexus injury on the right side, and therefore the injury probably occurred prior to his birth; ergo the delivery team’s actions probably had nothing to do with the injury. The panel also commented that Erb’s palsy “can occur” absent negligence and is sometimes found when delivery is by caesarean section.

The trial court ruled in favor of the defendants, concluding that it was unable to determine what had happened in this particular case and was therefore bound to dismiss the claim.

The court of appeal reversed the trial court’s judgment because it found that the brachial plexus injury was more likely than not caused by improper management of the shoulder dystocia. Furthermore, the court of appeal applied the doctrine of *res ipsa loquitur* in reaching this conclusion. The Supreme Court reversed because it found that a “reasonable factual basis exist[ed] in the record” for the dismissal of the plaintiff’s case.

One key exhibit was the delivery summary prepared by a nurse, which was entered into evidence jointly by all parties. The information in that summary was supported by the testimony of the defendants, and there was no conflicting evidence. The Supreme Court said that a key issue in its reversal of the court of appeal’s opinion was that this uncontradicted evidence was not accepted by that court; that is, the uncontradicted evidence was that during the delivery, the baby’s presentation was ROA (right occiput anterior), whereas the court of appeal found this evidence “unreliable” and dismissed it. The fact that the baby’s position was ROA was the primary reason the medical-review panel found that the defendants were not negligent, i.e., an ROA presentation would lead to an injury to the left arm, which did not occur. One physician said that it was impossible to injure the right arm during delivery with an ROA presentation.

Another major issue in the case involved the court of appeal’s ruling that because the medical-review panel found, and the defense witnesses confirmed, that the injury was caused by a “yet unknown intrauterine mechanism,” their evidence was of little or no value, and the plaintiff’s expert testimony was sufficient to cause a reversal of the trial court’s decision. The Supreme Court, in this 5-2 opinion, held that this finding by the court of appeal was wrong, as there was ample evidence in the record to prove that a brachial plexus injury can occur for unknown reasons. Despite the testimony of the plaintiff’s expert witness that there was negligence in the management of the delivery, the Supreme Court concluded that the evidence clearly provided a “reasonable factual basis” for the trial court’s judgment. Furthermore, in light of the conflicting evidence, the Supreme Court found clear error in the court of appeal’s reversing the trial court’s judgment based on its conclusion that its review of the record indicated “the plaintiff’s testimony and expert witnesses are more credible than the defendant[’]s.” The court held that the case was “a text book example of an impermissible finding under the manifest error standard of review . . . .”

The court also held that the court of appeal erred in applying the doctrine of *res ipsa loquitur* because the evidence in the record provided a reasonable factual basis for concluding that this injury may have occurred in the absence of negligence.

**Cap Ruled Unconstitutional**

*Arrington v. ER Physicians Group*, 04-1235 (La. App. 3 Cir. 9/27/06), __ So.2d ___.

A five-judge panel of the 3rd Circuit Court of Appeal reversed a trial court’s decision and found that the $500,000 cap on medical malpractice damages is unconstitutional because it fails to provide injured plaintiffs with an adequate remedy as guaranteed under the Louisiana Constitution, Article 1, 22. The case was remanded to the trial court for the assessment of damages.
One judge concurred with written reasons, and two judges dissented. The dissenters agreed with the majority opinion that the devaluation of the dollar over the passage of time makes the current $500,000 cap “wantonly inadequate as a remedy for all damages sustained by catastrophically or severely injured malpractice victims, which damages include loss of wages, and diminished earning capacity,” but they stated that this finding alone does not support the “sweeping conclusion that the MMA’s cap . . . is per se unconstitutional because it fails to provide an adequate remedy to plaintiffs.”

The dissenters also mentioned that:

the State opted, perhaps at its peril, to rely on prior jurisprudence despite the current evidence in the instant case, thereby leaving the plaintiff’s evidence unrefuted, and substantially (lessening) the weight of the evidence (the state) apparently relied on in Butler to satisfy Art. I, § 3’s heightened burden.

The dissenters rejected the state’s excuse for not meeting its burden, but they would nevertheless remand the case:

for a full and fair hearing in the interest of justice on all issues bearing on whether a reasonable basis still exists for maintaining the discriminatory classification affecting Plaintiff’s right to full recovery in this case, and whether the $500,000 limitation as it affects the right of catastrophically or severely injured malpractice victims continues to further aid legitimate public purpose.

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Trusts, Estate, Probate and Immovable Property Law

“Auntie”

Succession of Caillouet, 05-0957 (La. App. 4 Cir. 6/14/06), 935 So.2d 713.

Anna Rita Babin King Caillouet made her final testament in 2001 — a handwritten document entitled “My Last Will” that she signed “Auntie.” The will made several particular legacies, including ones to her surviving niece and two nephews, but left the majority of the estate to Children’s Hospital, as universal legatee.

When Ms. Caillouet died childless in 2003, her niece and nephews filed a petition to declare the document invalid. They argued, inter alia, that a will signed “Auntie” ran afoul of the rule that an olographic will be signed. The trial court rejected this argument and upheld the will.

Refusing to say uncle, the petitioners appealed whether “Auntie” was a signature under article 1575 of the Louisiana Civil Code.

The 4th Circuit’s analysis centered upon two cases broadly interpreting the signature requirement in an olographic will. In Succession of Bacot, 502 So.2d 1118 (La. App. 4 Cir. 1987), the court interpreted a testament signed by a man who used only his middle and last names. In Bacot, the 4th Circuit held that the testator’s failure to use his entire legal name was not fatal to the will, so long as the actual identity of the testator could be ascertained. The testament at issue in Succession of Cordaro, 126 So.2d 809 (La. App. 2 Cir. 1961), was a letter addressed to the decedent’s sister and signed using only the decedent’s first name. The Cordaro court also upheld the signature on the grounds that it satisfied the principal aim of the signature requirement — identifying the testator.

In finding the testament valid, the 4th Circuit reaffirmed the jurisprudential rule that the intention of the testator is given paramount importance when a testament is written in olographic form without the aid of counsel. Because the record contained credible evidence that Ms. Caillouet commonly referred to herself as “Auntie” in dealings with her niece and nephews, the 4th Circuit agreed with the trial court that the signature on the testament was sufficient to identify Ms. Caillouet as the testator.

Court Upholds French Quarter Lease — Code Violations and All

Karno v. Bourbon Burlesque Club, Inc., 05-0241 (La. App. 4 Cir. 5/10/06), 931 So.2d 1111.
Plaintiffs Billie Karno and Rosemary Caraci rented retail space in the French Quarter to the Bourbon Burlesque Club, Inc. The lease required that Bourbon Burlesque comply with “all ordinances and laws, now existing or to be enacted” and gave the landlord the right to cancel the lease in the event the tenant failed to do so within 10 days of being notified.

On May 12, 2004, a New Orleans fire inspector cited the tenant for a number of safety violations. Five days later, as the tenant was in the process of seeking administrative remedies for the alleged violation, the landlord sent the tenant a notice of default, demanding immediate compliance. On June 5, the landlord brought an action to evict.

At trial, the tenant characterized its landlord’s actions as an attempt to squeeze it for more rent, based on a hyper-technical reading of a lease provision. The trial court agreed and upheld the lease despite the provision requiring compliance. The court found that the tenant had already spent $1.2 million improving the premises and that the landlord would not have filed to evict had the tenant agreed to pay more rent. The court was also sensitive to Bourbon Burlesque’s regulatory dilemma: On one hand, its lease and the fire department demanded immediate compliance with safety codes. On the other, compliance could take years due to the development restrictions and procedures imposed by the Vieux Carre Commission. The trial court found that immediate compliance with the fire code was “impossible.”

The landlord appealed, arguing that when compliance with the lease was impossible, the proper remedy is dissolution of the lease — not reformation. The 4th Circuit affirmed the trial court.

The 4th Circuit noted that a court has discretion to decline dissolution of a lease where it finds that the breach of the lease was not major, where the breach was not the fault of the lessee or where the lessee was in good faith. The court also cited the new La. Civ.C. art. 2014, which prevents dissolution in spite of a breach when there is substantial performance by the obligor and no substantial impairment of the interest of the obligee. The appellate court found that these criteria were satisfied by the evidence adduced at trial.

Given the unique circumstances of the French Quarter, the 4th Circuit found that:

had the parties intended that the lease be dissolved based merely on the basis of the type of citations issued to the defendant, the parties would have included lease language that would have been more explicit on that issue.

The court defined a substantial or material violation of a law or ordinance in light of what a reasonable person would consider substantial when weighed against such factors as the magnitude of the lease, the extent of the lessee’s performance to date, how the breach might impact the lessor, and whether the lessee was taking reasonable steps to deal with both the problems and the regulatory process.

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YOUNG LAWYER SPOTLIGHT

Karelia R. Stewart
Shreveport

The Louisiana State Bar Association’s Young Lawyers Section Council is spotlighting its newest council member, Karelia R. Stewart, who was recently appointed to fill a vacancy on the council for District 8.

Stewart is an associate in the Law Offices of Ronald F. Lattier and practices in the areas of insurance defense, products liability and workers’ compensation. She is a 2001 graduate of Dillard University, where she received a BS degree in political science, and a 2004 graduate of Loyola University Law School.

She is an associate status member of the Harry V. Booth and Henry A. Politz Inn of Court, a member of the Young Lawyers and Women’s Sections of the Shreveport Bar Association, and the Young Lawyers Section of the Black Lawyers Association of Shreveport-Bossier.

She is a member of Delta Sigma Theta Sorority, Inc. She is also active in her local community and serves as a board member of the River City Repertory Theater, as well as the Shreveport-Bossier Master Planning Committee.

Stewart has started her career with a great deal of emphasis on active bar and community involvement. As the District 8 representative, Stewart is available for questions and concerns. E-mail krstewart@bellsouth.net.

LOCAL AFFILIATES

Simar to Lead Lafayette Young Lawyers Association in 2006-07

Maggie Simar with the 16th Judicial District Court will serve as 2006-07 president of the Lafayette Young Lawyers Association (LYLA), a section of the Lafayette Parish Bar Association. Simar and other 2006-07 officers were installed in August.

Frank Slavich III is president-elect; Greg Koury, treasurer; Bobby Odinet, secretary; and Tiffany Thornton, immediate past president.

New Orleans Bar Association’s YLS Sponsors Golf Tournament

Twenty-five teams participated in the New Orleans Bar Association’s annual Young Lawyers Section (YLS) golf tournament this past September to benefit the New Orleans Legal Assistance Corp. (NOLAC). NOLAC offers free legal assistance to those who cannot afford to pay for such services.

This year’s winning team was Dow Edwards, Brad Belsome and Mike Sepcich. Placing second was the team of Alan Herbert, Brock Degeyter, Clay Cambre and Steven Serio.

Best gross score winners were Judge Guy Holdridge, James Lapeze, Scott Seiler and Charles Wilmore.

Top honors for the putting contest went to Mark Van Horn. Van Horn also won the closest-to-the-hole contest. Jason Alley won a driver for hitting the longest drive.

Golf tournament chairs were Rick Stedman and David (Beau) Haynes.

Abramson Named to Lawyers USA List

Beth E. Abramson, an associate in the New Orleans office of McGlinchey Stafford, P.L.L.C., is one of seven up-and-coming attorneys from around the nation named to the Lawyers USA 2006 list. The seven were chosen to illustrate the positive impact lawyers can have, even early in their careers.

Abramson is currently serving as the Louisiana State Bar Association Young Lawyers Section’s representative to the American Bar Association Young Lawyers Division.

Immediately after fleeing New Orleans in the midst of Hurricane Katrina in 2005, Abramson helped establish a Legal Assistance Hotline that has helped thousands of hurricane victims and is still operating today.

A 1998 graduate of Carnegie Mellon University, Abramson received her JD degree from Tulane Law School in 2001.

The 2006-07 Lafayette Young Lawyers Association officers are, front row from left, President Maggie Simar and Immediate Past President Tiffany Thornton. Back row from left, Secretary Bobby Odinet, President-Elect Frank Slavich and Treasurer Greg Koury.

Co-chairs of the New Orleans Bar Association’s Young Lawyers Section Golf Tournament Committee were Rick Stedman and Beau Haynes.

The 2006-07 Lafayette Young Lawyers Association officers and committee chairs are, front row from left, Olita Magee, April Citron, Danielle DeKeerlegand, Maggie Simar, Tiffany Thornton, Laura Kraemer, Steven Ramos, Greg Koury and Scott Higgins. Back row from left, Donnie O’Pry, Will Montz, Cynthia Simon, Jeremy Morrow, Nicole Breaux, Matthew Fontenot, Pat Magee, Frank Slavich and Bobby Odinet.

Members of the winning team in the New Orleans Bar Association’s Young Lawyers Section golf tournament were, from left, Dow Edwards, Brad Belsome and Mike Sepcich.

The Young Lawyers Section is accepting nominations for the following awards:

- **Michaelle Pitard Wynne Professionalism Award**
  This award is given to a young lawyer for commitment and dedication to upholding the quality and integrity of the legal profession and consideration towards peers and the general public.

- **Outstanding Young Lawyer Award**
  This award is given to a young lawyer who has made outstanding contributions to the legal profession and his/her community.

- **Service to the Public Award**
  This award is given to a local affiliate organization that has implemented a program or provided a service to that local community by which the non-attorney public has been helped.

- **Service to the Bar Award**
  This award is given to a local affiliate organization that has implemented a program or provided a service that has benefited and/or enhanced the attorney community in that area.

- **YLS Pro Bono Award**
  This award is given to a young lawyer for commitment and dedication to providing pro bono services in his/her community.

All entries must include a nomination form, which may not exceed 10 pages. In addition, entries should include a current photo and résumé of the nominee, newspaper clippings, letters of support, and other materials pertinent to the nomination. Nomination packets must be submitted to Mimi Plauché, Chair, LSBA Young Lawyers Section Awards Committee, P.O. Box 4412, Baton Rouge, LA 70821-4412. Any nomination packet that is incomplete or is not received or postmarked on or before March 2, 2007, will not be considered. Please submit detailed and thorough entries, as nominees are evaluated based on the information provided in the nomination packets. All winners will be announced at the Louisiana State Bar Association Annual Meeting in Destin, Fla. in June 2007.

1. Award nominee is being nominated for: (Individuals/local affiliate organizations may be nominated for more than one award. Please check all that apply.)
   - Michaelle Pitard Wynne Professionalism
   - Outstanding Young Lawyer
   - Service to the Public
   - Service to the Bar
   - Pro Bono Award

2. Nominator Information:
   - Name ________________________________
   - Address/City/State/Zip ________________________________
   - Telephone/Fax ________________________________
   - E-mail ________________________________

3. Nominee Information:
   - Name ________________________________
   - Address/City/State/Zip ________________________________
   - Telephone/Fax ________________________________
   - E-mail ________________________________
   - Birth Date ________________________________
   - Marital Status/Family Information ________________________________

4. Describe the nominee’s service to the public for the past five years (or longer, if applicable). Include details as to the nature of the service, value to the public, amount of time required, whether nominee’s activities are a part of his/her job duties, and other pertinent information.

5. Describe the nominee’s service to the Louisiana State Bar Association Young Lawyers Section for the past five years.

6. Describe the nominee’s service to the legal profession for the past five years.

7. Describe the nominee’s particular awards and achievements during his/her career.

8. Provide a general description of the nominee’s law practice.

9. Describe what has made the nominee outstanding (answer for Outstanding Young Lawyer Award only).

10. Has the nominee overcome challenges (handicaps, limited resources, etc.)?

11. Why do you believe your nominee deserves this award?

12. Provide other significant information concerning the nominee.

For more information, contact Mimi Plauché at (225)376-0279 or e-mail mimi.plauche@phelps.com.
Judge Elected

24th Judicial District Court Judge Greg Gerard Guidry was elected to the 5th Circuit Court of Appeal, First District, to fill the vacancy created by the retirement of Judge James Canella. He was first elected to Division E, 24th Judicial District Court, Jefferson Parish, in 2000 after he was in private practice of law from 1985-89, assistant attorney general for the Louisiana Department of Justice from 1989-90 and assistant United States attorney for the Eastern District of Louisiana from 1990-2000. He earned his JD degree from Louisiana State University Paul M. Hebert Law Center, where he was selected for the Louisiana Law Review and inducted into the Order of the Coif. He is an advisory board member for the New Orleans Federalist Society, the counselor for the Judge John C. Boutall American Inn of Court and a member of the Louisiana Bar Foundation.

Appointments

- Attorney Ernest L. Jones has been appointed, by order of the Louisiana Supreme Court, as judge pro tempore of Division A, Orleans Parish Civil District Court, to fill the vacancy created by the retirement of Judge Carolyn Gill-Jefferson. He will serve Oct. 1, 2006, through March 31, 2007, or until the vacancy is filled, whichever occurs sooner. Jones received both his undergraduate and JD degrees from Howard University in Washington, D.C. After a year as a staff attorney for the New Orleans Legal Assistance Corp. (1969-70), he entered the private practice of law as a partner in the law firm of Cotton, Jones & Dennis. From 1979-84, he served as a general attorney for Louisiana Offshore Oil Port, Inc. (LOOP) before returning to the private practice of law until the present appointment as manager of Elie, Jones and Associates, L.L.C. Additionally, from 1993-2000, he was on the adjunct faculty of Tulane Law School, teaching trial advocacy. Throughout his 37-year legal career, he has been the recipient of numerous professional honors and awards, as well as having served as judge pro tempore of Orleans Parish Juvenile Court at various times from 1988-90.
- Judges Alvin Batiste, Jr. and David N. Matlock were reappointed, by order of the Louisiana Supreme Court, to the Louisiana Judicial College Board of Governors for terms of office that began Oct. 1 and will end on Sept. 30, 2009.
- Judge Benedict J. Willard was appointed, by order of the Louisiana Supreme Court, to the Louisiana Judicial College Board of Governors for a term of office that began Oct. 1 and will end on Sept. 30, 2009.
- Professor Bobby M. Harges was appointed, by order of the Louisiana Supreme Court, to the Louisiana Judicial Campaign Oversight Committee for a term of office ending on April 21, 2010.
- Peter A. Landry was appointed, by order of the Louisiana Supreme Court, to the Louisiana Board of Legal Specialization for a term of office ending on June 30, 2009.

Retirement

Orleans Parish Civil District Court Judge Carolyn Gill-Jefferson retired effective Sept. 1. She served as judge at Orleans Parish Civil District Court from 1994 until her retirement. A graduate of Tougaloo College, Tougaloo, Miss., she earned her JD degree from Loyola University Law School. She is a former member of the Advisory Board of the YWCA Battered Women’s Program and is a member of the Louis Martinet Legal Society and the Association of Black Women Attorneys.
Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., announces that Alton E. (Biff) Bayard III has joined the Baton Rouge office as a shareholder.

Baldwin Haspel, L.L.C., announces that Richard L. Houghton III and Robin D. Pittman have become associated with the firm and that Robert John Skinner has become of counsel with the firm.

Burke & Mayer, A.P.L.C., announces that Paul N. Vance has become a shareholder with the firm.

Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, L.L.C., announces that J. Patrick Gaffney has joined the firm as a partner.

Coats Rose, A.P.C., announces the opening of its New Orleans office at Ste. 1440, 400 Poydras St., New Orleans, LA 70130, phone (504)299-3070. Clyde H. Jacob III and Christopher E. Moore are directors in the New Orleans office.

The Conroy Law Firm, A.P.L.C., announces that Tom D. Snyder, Jr. has joined the firm as an associate.

DeLaup & Schexnayder, L.L.C., announces that Albert C. Miranda has joined the firm as a partner and that the name of the firm has changed to deLaup Schexnayder & Miranda, L.L.C. Miranda joins partners Mickey S. deLaup, Valerie T. Schexnayder and Stephen D. Enright, Jr., along with associates Stephanie L. Cook and Lauren E. Brisbi and of counsel Alexandra L. Kelly.

E. Eric Guirard Injury Lawyers announces that Ruben Hernandez, Jr. has joined the firm as an associate in the New Orleans office, W. Paul Wilkins has joined the litigation department in the Baton Rouge office, and Chris P. Keyser has joined the firm as an associate in the Baton Rouge office.

Liskow & Lewis, A.P.L.C., announces that Clare M. Bienvenu, Sean P. Brady and Collette N. Ross have joined the firm as associates in the New Orleans office, and April Rolen-Ogden and Vanessa W. Servat have joined the firm as associates in the Lafayette office.
McGlinchey Stafford, P.L.L.C., announces that Michael J. Cerniglia, Marc R. Michaud, Lester W. Johnson, Jr. and George A. Mueller III have joined the firm as associates in the New Orleans office.

Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P., announces that H. Philip Radecker, Jr. and J. Scott Loeb were made partners; Jonathan C. Augustine and Stephen L. Williamson have joined the firm as partners; and Christopher S. Bowman, William M. Davis, Ronald J. Kitto, Nina A. Rabito, Jacqueline A. Romero and Shelley Luke Thompson have joined the firm as associates.

Phelps Dunbar, L.L.P., announces the merger with the law firm of Terriberry, Carroll & Yancey, L.L.P. Joining the admiralty practice group are Robert J. Barbier, Michael M. Butterworth, Gary A. Hemphill, Kevin J. LaVie, David B. Lawton and Hugh Ramsay Straub as partners; Charles F. Lozes and Cynthia A. Wegmann as counsel; and John A. Bolles and G. Edward Merritt as of counsel.

Scofield, Gerard, Singletary & Pohorelsky in Lake Charles announces that Peter J. Pohorelsky and Kevin P. Fontenot have joined the firm as associates.

Sessions, Fishman & Nathan, L.L.P., announces that the following attorneys have become associated with the firm: Allison L. Cannizaro, Mayas D. Erickson and E. Lilian Wise in the Metairie office; and Drue E. Banta and April L. Watson in the New Orleans office.

The Law Offices of Risley C. Triche, L.L.C., announces that Richard G. Perque has joined the firm as an associate in Napoleonville.

Adams and Reese attorneys Lee C. Reid and Christopher J. Kane were two of about 20 young professionals from Louisiana selected to participate in the inaugural U.S. Senate Leadership Summit in Washington, D.C., in September. Reid was nominated by U.S. Sen. David Vitter. Kane was nominated by U.S. Rep. Bobby Jindal.

Christine L. Crow, clerk of court for the Louisiana 1st Circuit Court of Appeal, has been elected to the Executive Committee of the National Conference of Appellate Court Clerks (NCACC) for a two-year term. She will serve as a co-host with other Louisiana appellate court clerks for the NCACC Annual Meeting and Conference in New Orleans in August 2007.

McGlinchey Stafford attorney Emily T. Grey is the recipient of the Foundation for Improvement of Justice’s award for her work as founding member and vice president of Community Partners for Forensic Science, a nonprofit organization working to clear the backlog of unprocessed rape test kits around the state.
Albert Mintz, partner in the New Orleans office of Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P., received the Young Family Award for professional excellence, presented by the Professional Advisory Committee of the Jewish Endowment Foundation. The award recognizes legal, financial and estate-planning professionals from the New Orleans Jewish community.

IN MEMORIAM

George L.J. Dalferes, 83, a member of the Louisiana State Bar Association since 1949, an Air Force colonel and vice president of government affairs for Martin Marietta Corp., died Sept. 8 in Sterling, Va. He represented the aerospace corporation in Washington for 17 years until his retirement in 1990. He then consulted for the industry and NASA and served as legislative counsel for President George H.W. Bush’s 1990 Stafford Commission. Born in Warsaw, he lived in Poland, Germany and France through his father’s work as vice consul with the U.S. State Department. At the outset of World War II, his family came to the United States. He graduated from Louisiana State University, then was commissioned into the Army and served as an intelligence and reconnaissance platoon leader in the 84th Infantry Division. He returned to LSU, where he received a bachelor of laws degree in 1949 and began to practice law. Recalled to the military in 1952, he served in the Air Force as an aide to the commander of the Alaskan Command. He received a master of laws degree from Georgetown University in 1965 and graduated from the War College at Maxwell Air Force Base in Montgomery, Ala., in 1967. His final assignment in Washington was as deputy assistant to the Secretary of Defense for legislative affairs. He was a Century Club member (1978-87) of the LSU Alumni Federation. He was a past president and board member of the Nyumbani USA programs that care for abandoned and orphaned HIV-positive children in Nairobi, Kenya. He is survived by two children and a grandson. He is interred in Arlington National Cemetery.

PUBLICATIONS

Florida Legal Elite 2006
Robert W. Barron, of Berger Singerman, P.A., in Fort Lauderdale, Fla., was named as one of Florida’s Legal Elite, as chosen by his legal peers. He also is a member of the Louisiana Bar.

The Best Lawyers in America® 2007

Gainsburgh, Benjamin, David, Meunier & Warshauer, L.L.C.: Robert J. David, Gerald E. Meunier and Irving J. Warshauer.
### Client Assistance Fund Payments / Sept. 28, 2006

<table>
<thead>
<tr>
<th>Attorney</th>
<th>Amount Paid .... Gist</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phillip Lucius Alleman</td>
<td>$734.00............ #768 - Unearned fee in a bankruptcy matter</td>
</tr>
<tr>
<td>Phillip Lucius Alleman</td>
<td>$704.00............ #769 - Unearned fee in a bankruptcy matter</td>
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<tr>
<td>Wendell Armant</td>
<td>$3,122.00........ #629 - Conversion of client funds</td>
</tr>
<tr>
<td>Pamela Van Buren</td>
<td>$2,200.00........ #793 - Unearned fee in a tort matter</td>
</tr>
<tr>
<td>Mel L. Credeur</td>
<td>$3,421.66........ #829 - Conversion of client funds</td>
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<tr>
<td>Mel L. Credeur</td>
<td>$666.66........... #837 - Conversion of client funds</td>
</tr>
<tr>
<td>Mel L. Credeur</td>
<td>$666.66........... #838 - Conversion of client funds</td>
</tr>
<tr>
<td>Mel L. Credeur</td>
<td>$5,504.27........ #827 - Conversion of client funds</td>
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<tr>
<td>Mel L. Credeur</td>
<td>$3,655.00........ #828 - Conversion of client funds</td>
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<tr>
<td>Mel L. Credeur</td>
<td>$2,539.00........ #830 - Conversion of client funds</td>
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<tr>
<td>Andrew Charles Engolio</td>
<td>$4,000.00........ #804 - Conversion of client funds</td>
</tr>
<tr>
<td>Alex O. Lewis III</td>
<td>$700.00........... #697 - Unearned fee in a bankruptcy matter</td>
</tr>
</tbody>
</table>

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**Need some help managing your law office?**

The Louisiana State Bar Association is coming to the rescue!

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.*
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.
The following is a verbatim report of the matters acted upon by the United States District Court for the Eastern District of Louisiana, pursuant to its Disciplinary Rules. This information is published at the request of that court, which is solely responsible for the accuracy of its content. This report is as of Oct. 1, 2006.

### Respondent Disposition Date Filed Docket No.

<table>
<thead>
<tr>
<th>Respondent</th>
<th>Disposition</th>
<th>Date Filed</th>
<th>Docket No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Robert L. Barrios</td>
<td>Suspended two years retroactive to 5/1/06.</td>
<td>8/1/06</td>
<td>06-2965 A</td>
</tr>
<tr>
<td>Brian P. Brancato</td>
<td>Disbarred.</td>
<td>8/24/06</td>
<td>06-3292 F</td>
</tr>
<tr>
<td>George Downing</td>
<td>Suspended three months deferred, probation three months retroactive 5/31/06.</td>
<td>7/28/06</td>
<td>06-3032 N</td>
</tr>
<tr>
<td>Katherine M. Guste</td>
<td>Suspended six months retroactive to 5/26/06.</td>
<td>8/24/06</td>
<td>06-3033 K</td>
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<tr>
<td>Isaac F. Hawkins III</td>
<td>Interim suspension retroactive to 6/14/06.</td>
<td>8/17/06</td>
<td>06-3417 B</td>
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<tr>
<td>Joel G. Porter</td>
<td>Suspended one year retroactive to 6/23/06.</td>
<td>8/25/06</td>
<td>06-3468 J</td>
</tr>
<tr>
<td>Johnny Wellons</td>
<td>Disability inactive status.</td>
<td>8/2/06</td>
<td>06-2964 R</td>
</tr>
<tr>
<td>Samuel M. Yontor</td>
<td>Suspended one year and one day retroactive to 6/16/06.</td>
<td>8/14/06</td>
<td>06-3293 L</td>
</tr>
</tbody>
</table>

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


**Randal Lee Menard,** Lafayette, (2006-B-1927) **Consent public reprimand** ordered by the court on Sept. 15, 2006. JUDGMENT FINAL and EFFECTIVE on Sept. 15, 2006. **Gist:** Failure to timely notify a third party of his receipt of funds; and failure to properly remit funds which the third party was entitled to receive.

**Lester J. Waldmann,** Gretna, Permanent resignation from the practice of law in lieu of discipline by order of the Louisiana Supreme Court on Sept. 19, 2006. JUDGMENT FINAL and EF-
Discipline Report
Continued from page 296


<table>
<thead>
<tr>
<th>Area</th>
<th>Violation</th>
<th>No. of Violations</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Lack of communication</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Filing frivolous pleadings</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Conflict of interest</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Failure to properly supervise a non-lawyer employee</td>
<td>1</td>
</tr>
<tr>
<td><strong>TOTAL INDIVIDUALS ADMONISHED</strong></td>
<td></td>
<td><strong>3</strong></td>
</tr>
</tbody>
</table>

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

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.

Alcohol and Drug Abuse Hotline
Director William R. Leary 1(866)354-9334
Ste. 4-A, 5789 Hwy. 311, Houma, LA 70360
CLASSIFIED NOTICES

Standard classified advertising in our regular typeface and format may now be placed in the Louisiana Bar Journal and on the LSBA Web site, LSBA.org/classifieds. All requests for classified notices must be submitted in writing and are subject to approval. Copy must be typewritten and payment must accompany request. Our low rates for placement in both are as follows:

RATES

CLASSIFIED ADS
Contact Brooke Monaco at (504)836-7595 or (800)421-LSBA, ext. 118.

Non-members of LSBA
$85 per insertion of 50 words or less
$1 per each additional word
$20 for Classy-Box number

Members of the LSBA
$60 per insertion for 50 words or less
$1 per each additional word
No additional charge for Classy-Box number

Screens: $25
Headings: $15 initial headings/large type

BOXED ADS
Boxed ads must be submitted camera ready by the advertiser. The ads should be boxed and 2 ¼” by 2” high. The boxed ads are $70 per insertion and must be paid at the time of placement. No discounts apply.

DEADLINE
For the April issue of the Journal, all classified notices must be received with payment by Feb. 16, 2007. Check and ad copy should be sent to:

LOUISIANA BAR JOURNAL
Classified Notices
601 St. Charles Avenue
New Orleans, LA 70130

RESPONSES
To respond to a box number, please address your envelope to:
Journal Classy Box No. ______
c/o Louisiana State Bar Association
601 St. Charles Avenue
New Orleans, LA 70130

POSITIONS OFFERED

Shuart & Associates, Legal Search and Staffing, is the leader in legal search and strategic placement of attorneys at all levels throughout Louisiana and the Southeast. With 20 years invested in developing relationships with legal community leaders, and knowing firm cultures and current hot practice areas, Shuart has gained trust and respect as “Louisiana’s Leader in Legal.” Last year, our accomplishments included 33 lateral attorney placements, the successful negotiation of two practice groups into other firms, and three in-house searches on behalf of local corporations resulting in three placements. We also provide top caliber legal support staff candidates for both direct hire and contract/temporary placement. All inquiries are held in the strictest of confidence. Shuart & Associates, Legal Search & Staffing, Ste. 1910, 650 Poydras, New Orleans, LA 70130; (504)836-7595; www.shuart.com; info@shuart.com.

Attorney Positions
Confidentiality Guaranteed
Immediate openings for attorneys with two-plus years of experience in Lafayette, New Orleans, Baton Rouge and Houston. Practice areas include: commercial real estate, commercial leasing, maritime, insurance coverage, medical malpractice, commercial litigation, products liability, labor and employment, bankruptcy, and oil and gas. All inquiries will be handled with the utmost of confidentiality. All résumés should be e-mailed to contact@lalawrecruit.com. You may also contact Michelle Voorhies Bech, Esq., or Jenny P. Chunn with Legal & Professional Search Group, L.L.C., Ste. 304, 757 St. Charles Ave., New Orleans, LA 70130, telephone (504)525-9003, fax (504)522-6226.

Law Offices of Harry W. Ezim, Jr. and Associates seeks associate attorney with at least five years of experience in family law practice in Louisiana. Excellent written communication and drafting skills required. Qualified candidates should submit résumé and writing sample to P.O. Box 1543, Baton Rouge, LA 70821, or fax to (225)929-7717.

New Orleans AV-rated litigation firm seeks an attorney with at least two years’ experience in insurance coverage, top third of law school class. Send résumé to: Hiring Partner, Degan, Blanchard & Nash, Ste. 2600, 400 Poydras, New Orleans, LA 70130.

TRAFFIC ACCIDENT RECONSTRUCTION & EVALUATION OF HIGHWAY DESIGN, HIGHWAY MAINTENANCE & HIGHWAY CONSTRUCTION

BATES ENGINEERING, INC.
(800) 299-5950

JOHN T. BATES, P.E.
50 years engineering experience. Board-certified by ACTAR.

EXAMINER OF QUESTIONED DOCUMENTS

Wills • Checks
Altered Records
Disputed Signatures
Mary Ann Sherry, M.B.A., C.D.E.
Board Certified; Court Qualified
Diplomate
NATL ASSOCIATION OF DOCUMENT EXAMINERS
Greater N.O. Area (504) 889-0775
Outside Greater N.O. (888) FORGERY
New Orleans AV-rated law firm seeks an attorney with at least two years’ experience in insurance defense and casualty litigation, top third of law school class. Send résumé to: Hiring Partner, Degan, Blanchard & Nash, Ste. 2600, 400 Poydras, New Orleans, LA 70130.

New Orleans AV-rated law firm seeks an attorney for associate or of counsel position in workers’ compensation defense, top third of law school class. Send résumé to: Hiring Partner, Degan, Blanchard & Nash, Ste. 2600, 400 Poydras, New Orleans, LA 70130.

Small Lake Charles AV-rated firm engaged primarily in estate planning and administration, tax planning and general business practice has available office and seeks attorney for associate or of counsel position in such or complementary practice areas, such as real estate, commercial practice or general civil litigation. David L. Sigler & Associates, Attorneys at Law (A.P.L.L.C.), P.O. Box 1550, Lake Charles, LA 70605.

Immediate opening for goal-oriented attorney with two-three years’ experience and for a recent law school graduate for employment in Baton Rouge. Practice areas are in general civil litigation, including insurance defense, banking bankruptcy, subrogation and collection matters. Competitive salary and benefits. Please respond to C-Box 211, c/o Louisiana State Bar Association, 601 St. Charles Ave., New Orleans, LA 70130.

Growing Lafayette AV-rated litigation defense firm seeking attorney with three to six years of experience. Busy practice and pleasant work environment. The position requires strong academic credentials and excellent writing skills. Competitive compensation and benefits. Email résumé and writing sample in confidence to trj@juneaulaw.com.

Taylor, Wellons, Politz & Duhe, A.P.L.C., is seeking an attorney with three-plus years of experience in defending workers’ compensation claims to practice in its Baton Rouge, La., office. Experience in litigating longshore and maritime claims is a plus, but not a prerequisite to apply. The position offers a competitive salary with benefits, including health benefits, 401(k) and profit sharing. Please visit www.twpdlaw.com for further information about the firm. Send résumé to Charles J. Duhe, Jr., Ste. C, 7924 Wrenwood Blvd., Baton Rouge, LA 70809. All inquiries will be kept confidential.

The LSU Law Center invites applications and nominations for the position of Chancellor. The Chancellor will be selected by the LSU Board of Supervisors.

The LSU Law Center is accredited by the American Bar Association and is a member of the Association of American Law Schools. It offers the J.D. degree, a LL.M. and a Master of Civil Law degree to U.S. and foreign law graduates, and joint degree programs in law and business administration and law and public administration. Since 2002, graduating J.D. students are also awarded a B.C.L. (Bachelor of Civil Law) degree upon the successful completion of the Law Center’s rigorous ninety-seven hour course of study.

The LSU System is composed of ten institutions and ten public hospitals spread across Louisiana. Louisiana State University, Baton Rouge, is a Research I University, with an enrollment of almost 30,000 students. The campus is located on 2,000 acres in the southern part of Baton Rouge, and it is bordered on the west by the Mississippi River. Baton Rouge, with a metropolitan area population of more than 730,000, is the capital of Louisiana and is approximately one hour northwest of New Orleans.

The LSU System, with a full-time faculty of 39, a student population of 575, and over 10,000 alumni, is a member of the Association of American Law Schools. It offers the J.D. degree, a LL.M. and a Master of Civil Law degree to U.S. and foreign law graduates, and joint degree programs in law and business administration and law and public administration. Since 2002, graduating J.D. students are also awarded a B.C.L. (Bachelor of Civil Law) degree upon the successful completion of the Law Center’s rigorous ninety-seven hour course of study.

APPLICATION AND NOMINATION PROCEDURE
The Chancellor will be selected by the LSU Board of Supervisors. Consideration of candidates will begin in January 2007 and will continue until the Chancellor is appointed. Applications should include a curriculum vitae and should be submitted to:

Judge Tom Stagg, Chair
Paul M. Hebert Law Center Chancellor Search Committee
LSU System Office of Academic Affairs
3810 W. Lakeshore Drive, Baton Rouge, LA 70808

Formal nominations should be submitted to Judge Stagg at the address listed above. Applications and formal nominations received by the committee are matters of public record under Louisiana law.

Informal inquiries and informal suggestions of potential applicants are encouraged and should be directed to Judge Stagg at (318) 676-3260.

Given Louisiana’s civil law tradition, the Law Center is in a unique position to educate students in both the civil law and the common law. The dual nature of the curriculum, and the training and interests of the faculty, have enabled the Law Center to build significant relationships with scholars and institutions around the globe.

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APPLICATION AND NOMINATION PROCEDURE
The Chancellor will be selected by the LSU Board of Supervisors. Consideration of candidates will begin in January 2007 and will continue until the Chancellor is appointed. Applications should include a curriculum vitae and should be submitted to:

Judge Tom Stagg, Chair
Paul M. Hebert Law Center Chancellor Search Committee
LSU System Office of Academic Affairs
3810 W. Lakeshore Drive, Baton Rouge, LA 70808

Formal nominations should be submitted to Judge Stagg at the address listed above. Applications and formal nominations received by the committee are matters of public record under Louisiana law.

Informal inquiries and informal suggestions of potential applicants are encouraged and should be directed to Judge Stagg at (318) 676-3260.

The Paul M. Hebert Law Center of the Louisiana State University System is an Equal Opportunity Employer, and it actively seeks diversity in its faculty, administration, staff, and student populations. Applications by, and nominations of, women, persons of color, and others with diverse backgrounds are particularly encouraged.
Assessors/toxic tort/workers’ comp/longshore/maritime. AV-rated New Orleans law firm seeks two attorneys. One for toxic tort/workers’ comp/longshore and one for maritime practice licensed to practice in the state of Louisiana. We are seeking dedicated lawyers with good academic credentials. The firm offers a good work environment, interesting practice, competitive salary, benefits and opportunity for advancement. Please submit résumés to Administrator, Ste. 1200, 400 Poydras St., New Orleans, LA 70130, or fax to (504)524-9003. All inquiries will be kept strictly confidential.

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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.

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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.

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NOTICE

Notice of application for readmission. Richard R. Nevitte, Jr. is seeking readmission to the Louisiana State Bar Association. Please file any opposition or concurrence to his readmission with the Louisiana Attorney Disciplinary Board, Ste. 310, 2800 Veterans Memorial Blvd., Metairie, LA 70002, within the next 30 days.

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Send announcements, photos and photo payments (checks payable to Louisiana State Bar Association) to:
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Darlene M. LaBranche
Louisiana Bar Journal
601 St. Charles Ave.
New Orleans, LA 70130-3404

Or e-mail
dlabranche@lsba.org
Rubin Elected President of American College of Real Estate Lawyers

Michael H. Rubin, a senior partner in the McGlinchey Stafford law firm, was recently elected president of the American College of Real Estate Lawyers at its annual meeting. He is the first Louisiana attorney to be elected to this position.

Rubin, who served as 2001-02 president of the Louisiana State Bar Association, is nationally recognized for his law review articles and writings about real estate and finance. Trained in Louisiana’s unique civil law tradition, Rubin now leads this national group in its efforts to further develop and enhance real estate law for the benefit of all involved, including homeowners, commercial developers, businesses and lenders from coast-to-coast.

Rubin has taught as an adjunct professor at Louisiana State University Paul M. Hebert Law Center, and both federal and state courts have cited his publications as authoritative. He is a past president of the Bar Association of the U.S. 5th Circuit Court of Appeals, the Southern Conference of Bar Presidents and the Baton Rouge Bar Association.

He also has served on the Executive Council of the National Conference of Bar Presidents. He currently is chair of the Ethics Committee of the Real Property Section of the American Bar Association.

Juneau Named 2006 LSU Law Center Distinguished Alumnus of the Year

Patrick A. Juneau, Jr. of Lafayette was recently honored as the Louisiana State University Paul M. Hebert Law Center’s 2006 Distinguished Alumnus of the Year. The award recognizes personal and professional achievements and loyalty to one’s alma mater.

Juneau obtained his JD degree from LSU Paul M. Hebert Law Center in 1965. He is in private practice at the Juneau Law Firm in Lafayette.

He is a past president of the Louisiana Association of Defense Counsel and served as a member of the Louisiana Constitutional Convention, the body that drafted the new Constitution for Louisiana in 1973. He has served as the mediator in more than 2,000 cases, involving both state and federal court actions. He has been appointed a designated mediator by federal and state courts and also has served as the court-appointed special master in numerous federal and state cases, including many complex and multi-party matters.

Juneau has been a frequent guest lecturer at LSU Law Center and Tulane Law School. In 1996, he was awarded the Curtis R. Boisfontaine Trial Advocacy Award by the Louisiana Bar Foundation.

He served as president of the LSU Law Alumni Association in 1982. He is

Legal Services Grants from ABA

The American Bar Association’s Section of Litigation and Section of Antitrust have provided grants totaling $195,000 to Acadiana Legal Services and Southeast Louisiana Legal Services to assist in providing legal services to victims of Hurricanes Katrina and Rita. Joseph R. Oelkers III, right, representing Acadiana Legal Services, thanked ABA Section of Litigation Chair Brad D. Brian for the section’s assistance during the section’s Annual Meeting.

Joseph R. Oelkers III

Patrick A. Juneau, Jr.
Fraiche Receives Loyola’s 2006 Integritas Vitae Award

Donna D. Fraiche, a shareholder in the New Orleans office of the law firm Baker, Donelson, Bearman, Caldwell & Berkowitz, is the 2006 recipient of the Integritas Vitae award, Loyola University’s highest honor presented to an individual demonstrating courage of conviction and adherence to the principles of honesty, integrity, justice and preservation of human dignity.

Fraiche received her JD degree from Loyola University Law School in 1975 and served as president of the Alumni Association in 1991. She chaired Loyola’s Board of Trustees from 2000-05.

She currently chairs the Louisiana Health Care Commission and is president of the Louisiana Bar Foundation. She served as president and chair of the board of the World Trade Center, founded the New Orleans Regional Medical Center, and is a diplomate of the American College of Health Care Executives. She is on the adjunct faculty of Tulane University’s School of Public Health and Administration and served as a preceptor for the residency program in health systems management. She is the first female president of the American Health Lawyers Association and is a current fellow of the association.

Fraiche is a member of the Louisiana Recovery Authority Board of Directors, assisting the governor in providing the vision, creativity and leadership to identify, prioritize and address the short- and long-term issues of recovery. She chairs the Long-Term Community Planning Task Force of the Louisiana Recovery Authority and serves on the Louisiana Health Care Redesign Collaborative to reform health care in the state post-hurricanes.

She received the Gillis Long Public Service Award from Loyola University Law School in 2003. In 2003, the World Trade Center in New Orleans conferred upon her the Order of the Mark. In 2004, she received the Presidents’ Award from the New Orleans Bar Association.

New Orleans Attorney, Wife Receive 2005-06 Adjutor Hominum Award

New Orleans attorney George R. Simno III and his wife Claire are the recipients of the 2005-06 Adjutor Hominum award, the highest award presented by the Loyola Alumni Association to an outstanding alumnus whose life exemplifies moral character, service to humanity and integrity. The award was presented this year because of hurricane-forced delays in 2005.

George and Claire Simno are both graduates of Loyola University. George received his bachelor of business administration degree in 1969 and his JD degree in 1972. Claire graduated, cum laude, earning a bachelor of arts degree in 1971. George pursued his master of laws degree in energy and environmental law and is currently a doctoral candidate at the University of New Orleans in urban and public affairs. Claire earned a master of science degree in urban studies from the University of New Orleans and also is a doctoral candidate in urban and public affairs.

George is general counsel for the Sewerage & Water Board of New Orleans. He has served as a panel attorney for the Federal Public Defenders’ Office since 1977. He has judicial experience as judge ad hoc in First City Court. He served as an assistant and deputy city attorney for the city of New Orleans, as both a prosecutor and defense attorney. He served as assistant United States attorney for the United States Department of Justice.

Claire has owned a convention planning business and a local gift basket business, and established the Urban and Public Affairs Research Group. She and George operate a small real estate sales, rental and management company.

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Former Counsel for LOUISIANA ATTORNEY DISCIPLINARY BOARD: Former Judicial Law Clerk, LOUISIANA SUPREME COURT.
Ford Receives Alexandria Bar’s Causidicus Award

Alexandria lawyer William M. Ford received the Alexandria Bar Association’s Causidicus Award for lifetime achievement at the Opening of Court ceremonies on Sept. 6.

A former member of the Louisiana State Bar Association’s Board of Governors and a current member of the LSBA’s Medical/Legal Interprofessional Committee, Ford has practiced law in Alexandria for the past 45 years.

He is a past president, vice president and secretary of the Alexandria Bar Association. He currently serves as secretary of the board of trustees of the Methodist Church of Louisiana and chairs the Alexandria Civil Service Commission. He has served as president of the Kiwanis Club and as the city attorney for Pineville, Ball and Pollock, La. He is the current city attorney for Creola, La.

Presenting the award to Ford was his daughter, Susan Ford Fiser, who practices law with her father at the Ford Law Office.

The Causidicus Award is presented annually to one member of the Alexandria Bar Association who has more than 20 years of law practice, is active in local and/or state bar associations, promotes professional courtesy, ethics and civility by personal example, consistently demonstrates an interest in the welfare of his or her clients, professes a willingness to assist fellow members of the bar to improve the standards of the practice of law, and is active in community endeavors.

Baton Rouge Bar Association

The Baton Rouge Bar Foundation (BRBF) sponsored its Ball Maul Golf Tournament on Oct. 9. Tournament proceeds benefit the Pro Bono Project and the BRBF’s Youth Education programs. More than 100 golfers participated. Rebecca Myhand, Ball Maul Committee staff liaison, is with committee Co-Chairs Kyle Ferachi and Chris Jones.

The Ball Maul Golf Tournament team of Matt Bailey, Aline Colson, Kay E. Donnelly, Judge Tim Kelley, Stephen Babcock and Scott Brady won first place gross. They are at the golf hole sponsored by Kay E. Donnelly & Associates.
The Lafayette Parish Bar Association (LPBA) held a general membership meeting on Aug. 30. U.S. Congressman Charles W. Boustany (Louisiana’s 7th District) updated attendees on Louisiana’s current issues. From left, Richard Becker, LPBA president-elect; Gary McGoffin; Congressman Boustany; Kenny Oliver, LPBA president; and Susan Holliday, LPBA executive director.

The Lafayette Parish Bar Association (LPBA) hosted ceremonies for the opening of the 15th Judicial District Court on Sept. 8. The tradition of opening court each fall dates back to the days when all courts closed during the summer. From left, Hon. John Trahan; Kenny Oliver, LPBA president; Joseph R. Oelkers III, LPBA immediate past president; Susan Holliday, LPBA executive director; Frank X. Neuner, Jr., Louisiana State Bar Association immediate past president; Lamont Domingue; and Ric Mere.

Vavrick is Recipient of NOBA’s Presidents’ Award

Attorney Evangeline M. Vavrick is the recipient of the 2006 New Orleans Bar Association’s (NOBA) Presidents’ Award. NOBA President Carmelite M. Bertaut presented the award at a reception on Aug. 31. The association’s highest honor recognizes attorneys who have dedicated themselves to community service in the exercise of the highest ideals of citizenship.

Vavrick has been active in the Louisiana State Bar Association as a member of the House of Delegates. She is a member of the NOBA, the Louisiana Trial Lawyers Association and the American Bar Association. She has served as president, vice president and secretary of both the Academy of New Orleans Trial Lawyers and the New Orleans Chapter of the Federal Bar Association. Under the leadership of Plauche Villere, she worked to establish the continuing legal education program for new lawyers and to conduct admissions to the Eastern, Middle and Western District of the U.S. District Courts, all on the same day.

She has served for many years on the Archbishop’s Community Appeal and on the board of Catholic Charities. She has served as president of Catholic Charities and as chair of the Catholic Charities Ball.

She has served as president of the Loyola University Alumni Association and, in 1996, was the recipient of the Loyola Law School St. Ives Award.

Attorney Evangeline M. Vavrick, left, is the recipient of the 2006 New Orleans Bar Association’s (NOBA) Presidents’ Award. NOBA President Carmelite M. Bertaut presented the award.
LBF Institutes Two New Grant Programs

The Louisiana Bar Foundation (LBF) has instituted two new grant programs as a means to provide support to grantees by assisting in their long-term stability and viability in providing services and by helping secure the employment of attorneys in public interest law positions.

The Building Capital Development Grants Program awards grants up to $25,000, on a matching basis, to current grantees to assist in the acquisition of an office building and/or property. Building/property and/or new construction projects are eligible for consideration including planning and architectural expenses. Recipients of this funding may reapply annually for grants on the same project until receiving five years of funding.

The Public Interest Attorney Loan Repayment Assistance Program provides one-year loans up to $5,000 to new or current public interest attorneys with law school debt employed by LBF grantees. The loans will be disbursed to the recipients on a quarterly basis and will be forgiven after completion of 12 months of employment with the grantee. Recipients of this funding may reapply annually for loans until receiving three years of funding.

Guidelines, criteria and applications for these two programs are available on the LBF Web site, www.raisingthebar.org. Deadline to submit applications is Dec. 31, 2006.

Direct questions to Donna Cuneo at the LBF office at (504)561-1046 or donna@raisingthebar.org.

LBF Develops Community Partnership Panels

The Louisiana Bar Foundation (LBF) established a Community Partnership Panel (CPP) for each major region of Louisiana. Led by board members and volunteers representing their respective areas of the state, these regional panels create local-level representation.

The CPPs will focus on serving as liaison to community grantees; ensuring networking with local constituents; observing grantee performance; identifying arising community needs; and submitting names of Fellows for consideration for annual board vacancies.

LBF Welcomes New Fellows

The Louisiana Bar Foundation welcomes the following new Fellows:

Valerie Briggs Bargas ...... Baton Rouge
Dean P. Cazenave ............ Baton Rouge
Linda Law Clark ............. Baton Rouge
Joseph A. Donchess ....... Baton Rouge
Megan S. Nash ............... New Orleans
William Allen Schafer ..... Belle Chasse
Zebulon M. Winstead ....... Alexandria

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The June/July 2007 deadline is April 4, 2007.
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- American Bank of Welsh
- Bank of Abbeville & Trust Co.
- Bank of Commerce & Trust Company
- Bank of Erath
- Bank of Erath/Delcambre
- Bank of Greensburg
- Bank of Gueydan
- Bank of Louisiana
- Bank of Maringouin
- Bank of Montgomery
- Bank of St. Francisville
- Bank of Sunset & Trust Co.
- Bank of Winnfield
- Bank of Zachary
- Basile State Bank
- Britton & Koontz Bank, N.A.
- Caldwell Bank & Trust
- Cameron State Bank
- Church Point Bank & Trust Company
- Citizens Bank & Trust of Mandeville
- Citizens Bank & Trust of Plaquemine
- Citizens Bank & Trust of Springhill
- Citizens Bank & Trust of Ville Platte
- Citizens Bank & Trust of Vivian
- Citizens National Bank of Bossier City
- Citizens Progressive Bank
- City Bank & Trust/Natchitoches
- City Savings Bank & Trust Co.
- Community Bank of Lafourche
- Community First Bank
- Community Trust Bank
- Cottonport Bank
- Cross Keys Bank/Tallulah
- Delta Bank
- Exchange Bank & Trust Company
- Farmers-Merchants Bank
- Farmers State Bank & Trust
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- First Bank & Trust
- First Community Bank
- First Federal Savings & Loan
- First Financial Bank & Trust Co.
- First Louisiana Bank
- First Louisiana National Bank
- First National Bank
- First National Bank of Louisiana
- First National Bank Jeanerette
- First National Bank of DeRidder
- First NBC Bank
- Florida Parishes Bank
- Gibsland Bank & Trust Company
- Guaranty Bank of Mamou
- Guaranty Savings and Homestead
- Gulf Coast Bank & Trust of New Orleans
- Gulf Coast Bank of Abbeville
- Hibernia Homestead
- Hodge Bank & Trust Company
- Home Federal Savings & Loan
- Homeland Federal Savings Bank
- Investar Bank
- Jackson Parish Bank
- Jeff Davis Bank & Trust Company
- Jonesboro State Bank
- Kaplan State Bank
- Landmark Bank
- Liberty Bank & Trust Company
- Marion State Bank
- Merchants & Farmers Bank
- Metairie Bank & Trust Company
- Mississippi River Bank
- Morgan City Bank & Trust
- Omni Bank
- Ouachita Independent Bank
- Patterson State Bank
- Peoples State Bank
- Progressive Bank & Trust
- Rayne State Bank & Trust Company
- Resource Bank
- Sabine State Bank & Trust Company
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- South Lafourche Bank & Trust
- South Louisiana Bank
- St. Landry Homestead FSB
- St. Martin Bank & Trust Co.
- State Bank & Trust
- State Bank & Trust Company of Golden Meadow
- Synergy Bank
- Teche Federal Savings Bank
- Tensas State Bank
- The Bank
- The Highlands Bank
- Tri Parish Bank & Trust Company
- Tri State Bank & Trust
- United Community Bank
- Vermilion Bank & Trust Company
- Vernon Bank
- West Carroll Community Bank
- Winn Parish State Bank & Trust Co.
- Your Bank

The IOLTA program is the result of a unique partnership between the banking and legal communities. The interest earned on these trust accounts is disbursed by the Louisiana Bar Foundation to Louisiana’s largest civil legal service programs, pro bono programs, battered women’s shelters and numerous other community organizations that provide civil legal assistance to Louisiana’s low-income citizens.
I was killing time, perusing one of those “lawyer effectiveness” articles espousing the benefits of essentially “dumbing down” your legal mumbojumbo to more directly connect with your average juror. And while the article had many helpful tips for not saying with dollar words what you can say with two bits, you can always cross the line with this “everyman” style. In fact, not only in the courtroom but in most legal endeavors, it all boils down to 10 easy-to-remember commandments of communication.

I. Do not use “doohickey” and/or “thingamajig” in any document headed to the U.S. Patent Office.

II. In appellate oral argument, when posed a pointed question by the panel, it is unwise to use the phrase “beats the bejoomies outta me, Judge.”

III. Should your evidentiary objection be sustained, do not retort with, “Yeah, you right!”

IV. “Your Honor” is synonymous with neither “Blood” nor “Your Cupcakeness.”

V. At loan closings, do not refer to escrow accounts as “hush money.”

VI. Resist the use of less-than-optimal analogies in your briefs. In almost every instance, “the evil empire” is not analogous to a liability insurer.

VII. Thou shalt not cite in closing argument lyrics from any song popular in The Seventies.

VIII. In succession pleadings, “decedent” and even “de cujus” are preferable to “stiff” and “worm twinkie.”

IX. In the opening joint session, you will make your mediator’s task infinitely harder if you use the words “pond scum,” “nimrod” or any word followed by “bag.”

X. “No further questions” almost always beats the heck out of “In yo’ face, suckah!”
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