

LOUISIANA BAR JOURNAL

April/May 2006

Volume 53, Number 6



Spoliation: Tort Liability for Missing Evidence

Res Judicata in Louisiana

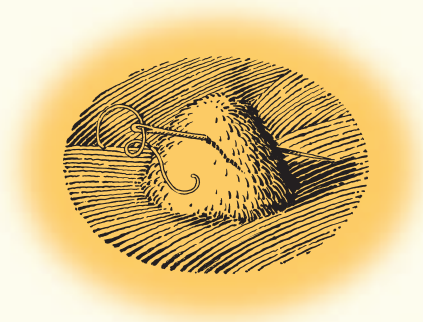
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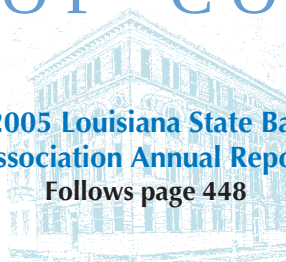
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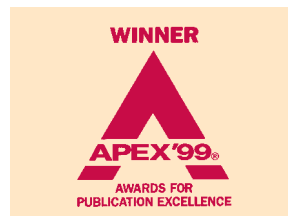
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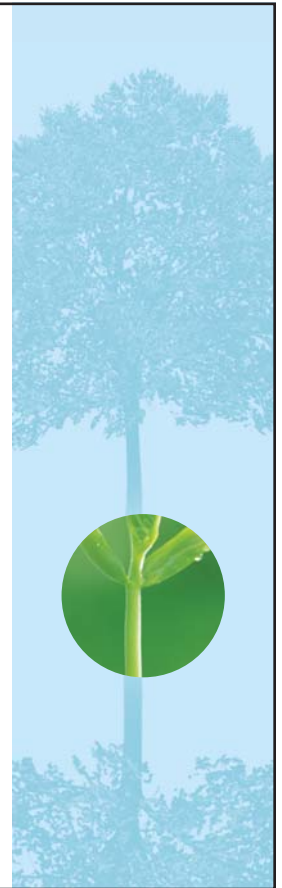
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President's MESSAGE

RECAP OF "KatRita" YEAR IN OFFICE



By Frank X. Neuner, Jr.

Are you like me and as you get older time passes more quickly, and you seem to have less time to accomplish the things you want to do? I believe this phenomenon is due to the fact that as we get older each year of our life becomes a smaller percentage of our life as a whole, resulting in each new year passing more quickly as we age.

If time passes more quickly as we age, the past year has been a real whirlwind (hurricane) for me due in large part to the two hurricanes that devastated Louisiana on Aug. 29, 2005 and Sept. 24, 2005. These hurricanes ("KatRita"), which undoubtedly changed Louisiana forever, also have had a major impact on my year as the Louisiana State Bar Association (LSBA) President. Since "KatRita," many people have remarked to me that they feel sorry for me since the hurricanes totally disrupted my year as President. To the contrary, my year has been very rewarding and fulfilling and, while I do wish "KatRita" would not have devastated south Louisiana, I do not feel sorry for myself but only for my many friends, colleagues and fellow citizens who suffered such destruction to their homes and businesses.

My hope for my year as LSBA President is that in some small way my efforts have provided a measure of relief to our colleagues who have had their personal and professional lives turned upside down. I am proud and thankful for the work of the LSBA and the Louisiana Bar Foundation (LBF) in providing services and relief efforts to our members. Donna Fraiche, LBF President, and the LBF staff have worked closely with the LSBA leadership and staff to raise and administer disaster relief funds for the benefit of our members and the public. This partnership for the good of the profession and the public is what founding President Dermot S. McGlinchey and his board



The Legal Assistance Call Center was established just days after Hurricane Katrina in the offices of the Baton Rouge Bar Association and is still operative today at Louisiana State University Paul M. Hebert Law Center.

envisioned when they had the foresight to create the LBF more than 20 years ago.

As I prepare to leave office, I look back on what I had hoped to accomplish, and I have to admit that we did not make much progress this year with many of my original plans and goals. The Professionalism Center, which I had hoped would become operational this year, is still in the planning stages and is likely to suffer from future funding squeezes as a result of anticipated budget deficits. I am happy to report, however, that, through the leadership of Barry Grodsky and Phelps Gay, a 3-L Professionalism Orientation was conducted at Louisiana State University Paul M. Hebert Law Center on April 7. I hope that eventually similar programs will be conducted at all Louisiana law schools.

Another initiative I had hoped we could undertake this year was a study of lawyer advertising and what Louisiana can do to rein in some of the misleading and egregious advertising by lawyers. Unfortunately, "KatRita" put us several months behind on this issue, but a special subcommittee of the Rules of Professional Conduct Committee is studying the issue and hopefully its work will carry over into next year.

Another issue which frankly was not on my personal radar screen before "KatRita" was competent indigent defense in Louisiana. The LSBA has been concerned with indigent defense, and it was a resolution by the House of Delegates in 2003 that encouraged the Legislature to create a Blue Ribbon Task Force in 2004, resulting in indigent de-

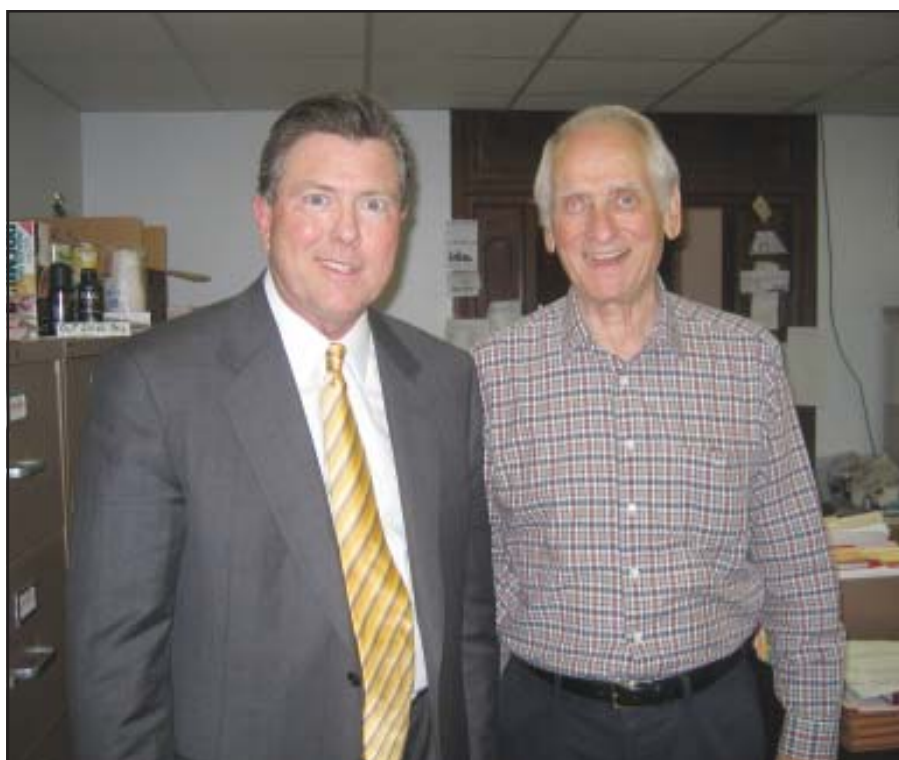
fense reform legislation in the 2005 legislative session which I referred to in my last President's Message. Unfortunately, funding for the indigent defense system was not the focus of these initial reform efforts and it is now more apparent than ever that proper funding for indigent defense must be made a priority in Louisiana, along with accurate reporting of caseloads and adherence to ethical caseload standards.

The New Orleans Bar Association, through the leadership of its President, Carmelite Bertaut, has become engaged in this issue in Orleans Parish, and it recently held a seminar at the Jones Walker law firm to educate civil lawyers on how to handle criminal defense cases. More than 60 lawyers attended and received free CLE, and many of the attending lawyers agreed to accept an appointment from the Orleans Indigent Defender's Office. While this will not cure the problem plaguing indigent defense in New Orleans, it will certainly enlighten many civil lawyers to the plight of those indigent defendants and hopefully create advocates for them with the Legislature and judiciary.

These are not easily solved issues and not issues that will go away soon. Although I will no longer have the honor and privilege of serving as the LSBA President, I intend to continue to work on problems plaguing indigent defense in New Orleans after my friend and very capable successor, Marta Schnabel, takes the helm on June 9, 2006. June seems like a long time away as I write this message but, as we all know, it will be here before we realize it!



In addition to being awarded as individual grants, Disaster Relief Funds were used to outfit a trailer in St. Bernard Parish for local lawyers to use as temporary office space.



LSBA President Frank X. Neuner, Jr., left, with District Attorney John F. (Jack) Rowley (34th Judicial District) in the St. Bernard Parish trailer set up as temporary office space for local lawyers.



SPOILIATION:

Tort Liability for Missing Evidence

By Linda C. Fowler

Courts have defined spoliation of evidence as the loss, destruction or material alteration of evidence, whether it is intentional or negligent.¹ This seems simple, but Louisiana circuit courts of appeal have reached divergent decisions on whether intentional conduct is required, if notice of a lawsuit is necessary, and the basis of the duty to preserve evidence.² In *Guillory v. Dillard's Department Store*, the 3rd Circuit stated that spoliation arises under Louisiana law through either the adverse evidentiary presumption or the tort of spoliation of evidence.³ As the court noted in *Quinn v. RISO Investments, Inc.*, the tort of spoliation actually stems from the adverse evidentiary presumption of evidence, so it is helpful to first examine the adverse presumption.⁴

Adverse Evidentiary Presumption for Spoliation of Evidence

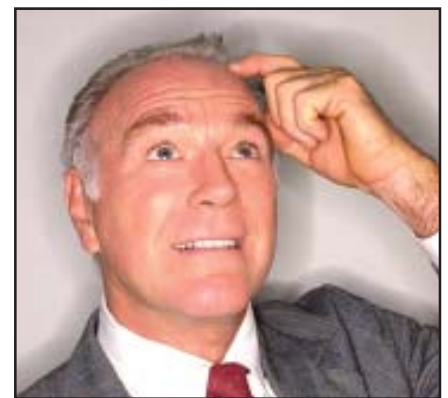
The court in *Salone v. Jefferson Parish Department of Water* held that if a litigant has spoliated evidence, or failed to produce evidence within his reach, a presumption is raised that the evidence would be detrimental to his case.⁵ The jury may receive a charge to that effect.⁶ So if there is no reasonable explanation for the missing evidence, the adverse presumption is proper.⁷ But no adverse evidentiary presumption is given if there is a reasonable or adequate explanation for the missing evidence.⁸

Miller v. Montgomery Ward & Co. and *Small v. Baloise Insurance Co. of America* held that there also must be a lawsuit filed or notice that one will be filed to receive the adverse evidentiary presumption instruction.⁹ Courts also have stated that, to apply the adverse evidentiary presumption, there must be intentional destruction of the evidence for the purpose of depriving the other party of its use.¹⁰

Word Briefs

What is spoliation?

- Winding wire or thread onto a cylinder.
- What happens to the contents of your freezer when the electricity is off for a week.
- The act of injuring, especially beyond reclaim.



The correct answer is (c).

Recognition of the Tort of Spoliation of Evidence

All five Louisiana circuit courts of appeal appear to recognize the tort of spoliation under Louisiana law.¹¹ The 3rd Circuit in *Guillory* regarded the tort of spoliation of evidence as a relatively new concept in Louisiana jurisprudence.¹² The *Guillory* court noted that Louisiana courts also had recognized a person's right to assert a similar cause of action for the tort of impairment of a civil claim.¹³

Bringing a Tort Suit for Spoliation Instead of Seeking the Adverse Presumption

Sometimes the adverse presumption is unavailable when spoliation of evidence has occurred, and the party's only recourse is the tort of spoliation. These cases arise when a third party has custody of and disposes of crucial evidence. As the U.S. District Court for the Western District of Louisiana noted in *Edwards v. Louisville Ladder Co.*, the remedies of sanctions and the adverse evidentiary presumption are useless when the spoliator is not a party to the lawsuit.¹⁴ For example, in *Desselle v. Jefferson Hospital District No. 2*, a patient was injured when he fell off a hospital gurney.¹⁵ In the suit against the hospital, plaintiffs alleged the hospital had impaired their cause of action against the manufacturer of the gurney by disposing of the evidence.¹⁶ In ruling for the hospital, the court cited *Pham v. Contico International, Inc.* in holding that the 5th Circuit did not recognize a tort of negligent spoliation of evidence; the conduct alleged must be intentional.¹⁷

Tort of spoliation cases also arise in the employer-employee context. Louisiana workers' compensation laws prohibit an employee's lawsuit in tort against his employer for personal injuries resulting from an accident at work.¹⁸ Thus, the evidentiary presumption against the employer is not available because the employee is unable to sue his employer in tort. The employee could, however, bring

an action against his employer for causing economic damage to his lawsuit against a third party due to the employer's spoliation of evidence.

Example: An employee is injured on the job at an auto repair shop when a defective battery explodes. The battery is manufactured by a third party. While the employee is recovering from his injuries, his employer allegedly loses or misplaces the battery. The employee cannot bring suit against his employer for his personal injuries because of workers' compensation laws. The employee brings suit against his employer for economic harm, alleging that the employer's actions have irretrievably impaired his lawsuit against the manufacturer of the battery.

These were the facts in *Carter v. Exide Corp.*¹⁹ There, the employee sought damages on the basis of the tort of spoliation of evidence. The 2nd Circuit gave the plaintiff 15 days to amend his petition, suggesting that workers' compensation immunity would not shield the employer from a lawsuit on the ground of the tort of spoliation of evidence because those laws do not shield an employer against a suit based on economic harm.²⁰ The 5th Circuit in *Pham* also held that workers' compensation laws do not provide a shield to the employer in a tort of spoliation case.²¹

Requirements for the Tort of Spoliation of Evidence

The circuits have differed on three issues. These include what is the legal basis or source of the tort of spoliation,²² whether intentional conduct is required²³ and, finally, is a lawsuit or notice of a lawsuit necessary.²⁴

Source of the Tort of Spoliation of Evidence

The majority of Louisiana circuit courts of appeal appear to find the basis for the tort of spoliation under the general tort duty in La. Civ.C. art. 2315, including the 3rd Circuit in *Bethea v. Modern Biomedical Services, Inc.*, the 4th Circuit in *Quinn*, and the 5th Circuit

in *Desselle*.²⁵ Only the 2nd Circuit has defined the source more narrowly. In *Carter*, the court found that the employer-defendant had a duty to preserve evidence only under a statute, contract, special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence.²⁶ The court reasoned that the courts have consistently held the plaintiff to a high standard of factual specificity regarding the source of the defendant's alleged duty to preserve evidence for the plaintiff's benefit, requiring more than the general tort duty to act reasonably under the circumstances.²⁷

In *Bethea*, the 3rd Circuit rejected the *Carter* court's holding that the duty to preserve evidence must stem from a specific source or circumstance.²⁸ The court held there is a duty to preserve the evidence under La. Civ.C. art. 2315, and the party could proceed with his tort of spoliation lawsuit. The court stated that art. 2315 is written in general terms to ensure that specific wrongs not foreseeable by the drafters would be included.²⁹ The court reasoned that the drafters viewed fault broadly and left it to the courts to determine fault in each case.³⁰ The court stated, "Although there is no statutory duty imposed on the defendants in this case to preserve the evidence and avoid hindering plaintiffs' claim, we find a duty exists under La. Civ. Code art. 2315. The absence of a statutory duty is not tantamount to no duty."³¹ The 5th Circuit in *Pham*³² and the U.S. District Court for the Eastern District of Louisiana in *Syracuse v. Valero Energy Corp.*, an unreported decision, both cited this reasoning.³³

Whether Intentional Conduct is Required for the Tort of Spoliation

The Louisiana circuit courts of appeal are split as to whether intentional conduct is required for the tort of spoliation, and the Louisiana Supreme Court has yet to rule on this issue. The 1st Circuit in *Randolph v. General Motors Corp.* and the 5th Circuit in *Pham* and *Desselle* appear to require intentional conduct by

the spoliator.³⁴ The 2nd Circuit, however, does not require an intentional act for the tort of spoliation of evidence. *Carter* held that an employer is liable for any post-accident conduct that impairs the plaintiff's ability to recover damages from a third party, whether intentional or negligent.³⁵

But *Carter* also held that the plaintiff-employee must first establish that the employer-defendant had a duty to preserve evidence under a statute, contract, special relationship between the parties, or an affirmative agreement or undertaking to preserve the evidence.³⁶ This is a much higher standard than the general tort duty under La. Civ.C. art. 2315, which is applied in the other Louisiana circuits.

The 3rd Circuit appears to have issued conflicting decisions on whether negligent conduct is permissible. For example, *Guillory* and *McCool v. Beauregard Memorial Hospital* both held that the tort

of spoliation may be based on negligent conduct.³⁷ But in *Bethea*, the 3rd Circuit seemed to require intentional conduct, speaking in terms of "intentionally hindering" a party's claim.³⁸

The 4th Circuit also appears to be split on whether intentional conduct is required. It held in *Williams I* that negligence may form the basis of a tort of spoliation case.³⁹ But in *Quinn*, it held that intentional conduct is required.⁴⁰

In sum, the majority of appellate decisions on this issue require intentional conduct. Intentional conduct is mentioned as a requirement in some adverse presumption cases.⁴¹ As the federal district court pointed out in the unreported decision of *Catoire v. Caprock Telecommunications Corp.*, it would seem inconsistent to require intentional conduct for the adverse evidentiary presumption, yet allow a separate cause of action for the tort of spoliation based on negligent conduct.⁴²

Whether a Lawsuit or Notice of a Lawsuit is Required

A few courts have required that a lawsuit must have been filed or notice of a lawsuit given in order to recover under the tort of spoliation.⁴³ The 4th Circuit in *Quinn* and the 5th Circuit in *Desselle* recently held that where suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded, the theory of spoliation of the evidence does not apply.⁴⁴

Policy Concerns

The remedy for the tort of spoliation is harsh; a party whose only fault is disposing of evidence crucial to the plaintiff may bear the burden of paying all of plaintiff's damages for his injuries. As the court in *Edwards* noted, one problem with a spoliation claim is that the evi-

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dence was spoliated by a third party who was not a party to the action in which the evidence would have been used.⁴⁵ The court further noted the speculative nature of the claim in tort of spoliation cases.⁴⁶ It is impossible to know what the destroyed evidence would have shown.⁴⁷

But remedies such as the adverse presumption and tort of spoliation promote the integrity of the judicial system. The court in *Edwards* stated that the preservation of items that might be relevant evidence is desirable.⁴⁸ It would presumably increase the likelihood of a just verdict.⁴⁹ And as the court stated in *Rapp*:

The reviewing court that implements the adverse inference must be guided toward the goal of a fair and equitable judicial process, by the likelihood that the verdict be based on the truth, and by the need to deter the wrongful intentional spoliation of evidence in the future.⁵⁰

Conclusion

With the splits among and within circuits and no ruling from the Louisiana Supreme Court, the doctrine of the tort of spoliation in Louisiana begins to more resemble the contents of a broken freezer than a clear body of law. However, themes emerge to give guidance to practitioners: Article 2315 appears to be the basis for a cause of action in the majority of the circuit courts of appeal. Intentional conduct by the spoliator is required by most courts, and notice of a lawsuit or potential lawsuit appears to be more often necessary. While the remedies of the adverse presumption for spoliation and the cause of action for the tort of spoliation are harsh, they promote the integrity of the judicial system.

FOOTNOTES

1. See, e.g., *Smith v. Jitney Jungle of Am.*, 35,100 (La. App. 2 Cir. 12/05/01), 802 So.2d 988; *Guillory v. Dillard's Dep't Store*, 00-0190 (La. App. 3 Cir. 10/11/00), 777 So.2d 1, 3; Karen Wells Roby and Pamela W. Carter, "Spoliation: The Case of the Missing Evidence," 47 La. B.J. 222, 222 (1999).

2. See, e.g., *id.*; *Miller v. Montgomery Ward & Co.*, 317 So.2d 278, 281 (La. App. 1 Cir.), writ denied, 320 So.2d 912 (La. 1975); *Bethea v. Modern Biomedical Servs., Inc.*, 97-0332 (La. App. 3 Cir. 11/19/97), 704 So.2d 1227, 1233, writs denied, 97-3169 (La. 2/13/98), 709 So.2d 760, 761.

3. 777 So.2d 1, 3-4.

4. 03-0903 (La. App. 4 Cir. 3/3/04), 869 So.2d 922, 927, writ denied, 04-0987 (La. 6/18/04), 876 So.2d 808.

5. 94-0212 (La. App. 5 Cir. 10/12/94), 645 So.2d 747, 750.

6. *McElroy v. Allstate Ins. Co.*, 420 So.2d 214, 216 (La. App. 4 Cir.), writ denied, 422 So.2d 165 (La. 1982).

7. See, e.g., *id.*; *Salone*, 645 So.2d 747, 750; *Rapp v. City of New Orleans*, 98-1714 (La. App. 4 Cir. 12/29/99), 750 So.2d 1130, 1138, writ denied, 00-0353 (La. 4/7/00), 759 So.2d 761.

8. See e.g., *Small v. Baloise Ins. Co. of America*, 96-2484 (La. App. 4 Cir. 3/18/98), 753 So.2d 234, 242, writ denied, 98-1345 (La. 7/2/98), 724 So.2d 733; *Babineaux v. Black*, 396 So.2d 584, 586 (La. App. 3 Cir. 1981); *Gladney v. Milam*, 39,982 (La. App. 2 Cir. 9/21/05), 911 So.2d 366, 369; *Hanks v. Entergy Corp.*, 40,486 (La. App. 2 Cir. 2/1/06), ____ So.2d ____.

9. 317 So.2d at 281; 753 So.2d at 242; *Hanks*, ____ So.2d ____.

10. *Smith*, 802 So.2d at 995; *Gordon v. State Farm Mut. Ins. Co.*, 97-0270 (La. App. 5 Cir. 9/30/97), 700 So.2d 1117, 1120; *Gladney*, 911 So.2d at 369; *Hanks*, ____ So.2d ____.

11. See, e.g., *Pham v. Contico Int'l, Inc.*, 99-0945 (La. App. 5 Cir. 3/22/00), 759 So.2d 880, 883; *Randolph v. Gen. Motors Corp.*, 93-1983 (La. App. 1 Cir. 11/10/94), 646 So.2d 1019, 1027, writ denied, 95-0194 (La. 3/17/95), 651 So.2d 276; *Carter v. Exide Corp.*, 27,358 (La. App. 2 Cir. 9/29/95), 661 So.2d 698, 704-05; *Bethea v. Modern Biomedical Servs., Inc.*, 704 So.2d at 1233; *Williams v. GM Corp. (Williams I)*, 607 So.2d 695, 697 (La. App. 4 Cir. 1992), writ denied, 644 So.2d 387 (La. 1994).

12. 777 So.2d at 3.

13. *Id.* at 4.

14. 796 F.Supp. 966, 971 (W.D. La. 1992).

15. 04-0455 (La. App. 5 Cir. 10/12/04), 887 So.2d 524, 534-535.

16. *Id.*

17. *Id.*

18. La. R.S. 23:1092.

19. 661 So.2d at 702-703.

20. *Id.* at 704.

21. 759 So.2d at 883.

22. See, e.g., *Bethea*, 704 So.2d at 1233.

23. See, e.g., *Pham*, 759 So.2d at 884.

24. See, e.g., *Desselle*, 887 So.2d at 534.

25. 704 So.2d at 1233; 869 So.2d at 927;

887 So.2d at 534.

26. 661 So.2d at 704.

27. *Id.* at 705.

28. 704 So.2d at 1233.

29. *Id.*

30. *Id.*

31. *Id.*

32. 759 So.2d at 883.

33. 2004 WL 1336403 at *5 (E.D.La. June 15, 2004).

34. 646 So.2d at 1027; 759 So.2d at 884; 887 So.2d at 534; see also *Jackson v. Home Depot, Inc.*, 04-1653 (La. App. 1 Cir. 6/10/05), 906 So.2d 721, 728 (citing *Randolph*, 646 So.2d at 1027).

35. 661 So.2d at 704.

36. *Id.*

37. 777 So.2d at 4; 814 So.2d at 119.

38. 704 So.2d at 1233.

39. 607 So.2d at 697.

40. 869 So.2d at 926-927.

41. See, e.g., *Smith*, 802 So.2d at 995; *Gordon*, 700 So.2d at 1120.

42. WL 21223258 (E.D. La. 5/22/03), p. 3.

43. 869 So.2d at 927; 887 So.2d at 535.

44. *Id.*

45. *Id.* at 969-970.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. 750 So.2d at 1138.

ABOUT THE AUTHOR

Linda C. Fowler received her JD degree from Louisiana State University Paul M. Hebert Law Center in 1985, where she was a member of the Moot Court Board and a Robert Lee Tullis Moot Court Competition semifinalist. She served as a law clerk to Judge John V. Parker of the United States District Court, Middle District of Louisiana, 1985-86. She then was an assistant attorney general for four years, prosecuting recusal cases throughout Louisiana with a focus on public integrity, forgery and vehicular homicide. After she left the Louisiana Department of Justice, she practiced law for six years in the areas of family and juvenile law, personal injury, insurance defense and administrative law. She also taught legal research and writing for more than eight years at the LSU Law Center as an assistant professor of professional practice. While at LSU, she also was the director of the appellate advocacy program for four years. She joined Southern University Law Center in July 2004. (P.O. Box 9294, Baton Rouge, LA 70803)





22nd Annual Summer School • June 4-7, 2006

65th Annual Meeting • June 7-9, 2006

Sandestin, Florida

Sandestin Golf & Beach Resort

Nestled between the white, sandy beaches of the Gulf of Mexico and the sheltered inlets of the Choctawhatchee Bay, Sandestin Golf and Beach Resort is a paradise unto itself. Sandestin has been one of the shining spots along the Emerald Coast for more than 25 years. In fact, it is the only resort on the Gulf Coast that is surrounded by water. Since 1985, Sandestin has been the home to meetings of the Louisiana State Bar Association.

Some of the appeal lies in 73 holes of championship golf, 15 tennis courts, 30 upscale shops open to anyone, a health club, a beachside pool with bar, good casual restaurants and a picturesque marina.

Golf

Sandestin is at the "top of its game" with four world-class courses. **Baytowne Golf Club** is a 3,300-yard, heavily bunkered course with views of the Gulf of Mexico and Choctawhatchee Bay. GolfWeek ranks the **Burnt Pine** course as #14 in Florida Top Public Access Courses. The **Links** meanders past numerous marshes, with more than a third of the play near the Bay. The most recent addition, the **Raven Golf Club**, has a 19-hole (the 16th alternates). Ranging 6,900-yard, and a par-71, the course is designed by Robert Trent Jones, Jr.

Its range of unique amenities includes member-for-a-day VIP treatment, players' assistants and numerous course upgrades that offer players a welcome experience and memorable atmosphere. The Junior Golf Program extends a half-price discount to golfers 17 years of age and younger. Tee times are available by calling (800)277-0800.

Tennis

Sandestin is a tennis-lover's dream, complete with your choice of Hydogrid clay, natural grass or hard courts. Enjoy a complimentary hour of tennis court time daily on any of Baytowne Tennis Center's 15 world-class courts simply by presenting your Sandestin Park Pass. For reservations, call (850)267-7060.

Fishing and Water Sports

Destin has been named the "luckiest fishing village in the world," which is not hard to understand when looking at the crystal water. Sandestin offers a variety of fishing options, featuring both deep-sea fishing and onshore fishing. The marina accommodates boats up to 100 feet, in addition to offering charter services. The resort also offers boogie boards, waverunners, snorkeling equipment, catamarans, kayaks and pontoon boats. Information on rentals and lessons is available by calling (850)267-7777.

Fitness Center and Day Spa

For anyone who prefers indoor fitness, Sandestin's Fitness Center and Day Spa are a perfect complement to a day at the resort. The Fitness Center features a cardio theater, air resistance weight training, aerobics, wellness classes, relaxing massage therapy and a full-service spa. The Salon and Day Spa offers services from head to toe. It specializes in facials, hair styling, manicures, pedicures, waxing and body treatments. Customized packages are available for guests. For more information, call (850)267-6466.

Dining

Dining at Sandestin is consistently ranked among Florida's Top 200. Enjoy a romantic evening in the upscale **Bistro Bijoux**, a quaint Provencal-style bistro serving authentic "nouvelle" New Orleans cuisine from soft-shell crabs to tourneys of beef. The **Bistro Bijoux** features a cozy bar with fireplace and

adjoining **Seagrapes Wine Cave** and outside terrace seating overlooking the lagoon. For reservations, call (850)622-0760. For a quiet dining experience, the **Finz Loft** features a la Carte upscale dining with fresh seafood and regional specialties.

Other restaurants located at Sandestin are **Sunset Bay Café** and **Linkside Pub**. **Sunset Bay Café** specializes in grilled fare with a Caribbean appeal for family dining and serves breakfast, lunch and dinner. **Linkside Pub**, overlooking the Links Golf Course, is a relaxed atmosphere serving pizzas and sandwiches where guests can watch one of the many televisions or play a game of darts. There is also al fresco dining at **Taylor's Tiki**, **Riptide Beach Bar** and **O'Reilly's Oasis**.

The Market Shops

The Market Shops at Sandestin, a unique collection of 27 boutiques and eateries, is the ultimate shopping adventure... a shopper's paradise with upscale, high-quality and unique choices. Lush tropical courtyards filled with café tables and umbrellas, fountains and a children's playground invite you to stay for the day. Shops include:

Angels Cosmetics
Azure
Barefoot Princess
Beef 'O' Brady's
Birkenstock Shoes
Black-N-White
Blue Marlin Trading Company
Chico's
Donna Burgess Gallery
FIRED! Up - Festival Cart
JCC/Jami's
Kitchenique & Cooking School
LaBonboniere Godiva & Ice Cream
Les Sassy Mermaids

M. Cline
McLean's Nature and Floral Co.
Murray's Beach Hut & Deli
My Favorite Things
Sandestin Clothing Company
Smooch
Soloman's Books & Gifts
Starbuck's Coffee
Teena Haven
Tis the Season
Tooley Street
Toys and Treasures
Zoo Gallery

Just for Children

Because Sandestin caters to families, children are provided with a fun, stimulating vacation experience.

• **Kidzone** — A fully supervised program of indoor and outdoor activities, including games, arts and crafts and more. Ages 3-5 can enjoy our half-day program from 9 a.m.-1 p.m. and ages 6-10 can enjoy our full-day program from 9 a.m. to 3 p.m.

• **Sailing Lessons** — Children from ages 8-12 may participate in this aquatic adventure, where they will learn the basics of rigging, knot tying, points of sail, safe operation and technique. Sailing also teaches the fine art of teamwork. Courses are offered Monday and Wednesday from 9-11 a.m. Call the Baytowne Marina at (850)267-7777 for more details or to book a course.

• **Jolee Island Nature Park** — This five-acre authentic island features a pirate ship-shaped adventure playground, picnic sites, a greenspace event lawn and a spacious hiking and running perimeter path.

• **Adventure Landing** — Swings that reach the clouds, winding paths and mazes that lead to unknown places, bridges and slides with water to splash in — all encompassed in one place at the Baytowne Wharf. With the imagination and support of locals and playground specialists, Adventure Landing is the fulfillment of drawings and dreams of kids.

Keeping abreast of new developments in the law through continuing education no longer is just a matter of satisfying CLE requirements. It is a necessity for maintaining a successful practice. The LSBA's renowned Summer School for Lawyers, now in its 22nd year, provides the opportunity for accomplishing these goals in the beautiful, relaxed and fun setting of the Sandestin Golf and Beach Resort.

Nationally acclaimed speaker Roger Dodd will present a session on "Cross-Examination: How to Dominate a Courtroom." Learn powerful techniques for cross-examination from a leader in the field. "The Greatest Trials Ever Held," which will include Socrates, Galileo and the Salem Witch Trials among others, will be recreated by acclaimed Utah trial attorney Todd Winegar who will show you advanced trial techniques, methods and strategies you can adapt to your own practice. Speakers from around the state will share useful information on a variety of topics. Other highlights include an intriguing discussion on "Employment Law Post-Katrina," "Practical E-Discovery," "Choosing and Charging the Jury," "Insurance Law: Post-Katrina Issues," "Professional Liability in the 21st Century" and an array of other topics for practitioners of all types. One of the Summer School's best features is the chance to interact with talented colleagues and judges from throughout Louisiana.

Summer School Exhibitors (as of May 3, 2006)

ADR inc.
Bourgeois Bennett, L.L.C., CPAs & Consultants
Gilsbar, Inc.
International Sureties, Ltd.
Kay E. Donnelly & Associates
Legal Directories Publishing Co.
Legier & Materne, apac
LexisNexis
Louisiana Organization for Judicial Excellence
Mediation Arbitration Professional Systems, Inc.
Mid South Bank
Rimkus Consulting Group, Inc.
Shuart & Associates, Legal Search & Staffing
Thomson Findlaw
Thomson West

Cancellations & Refunds

Cancellation of registration must be received in writing by the LSBA no later than Friday, May 19. Cancellations will receive a full refund, less a \$30 administrative charge. Absolutely no refunds will be made after Friday, May 19. Requests should be mailed to the Louisiana State Bar Association, 601 St. Charles Ave., New Orleans, LA 70130-3404; faxed to (504)598-6753; or e-mailed to aburas@lsba.org.

Summer School Registration

By May 24	On Site
\$550	\$575

- Includes seminar registration and admission to Lawyers' Expo;
- a seminar manual;
- daily continental breakfast/coffee/refreshment breaks; and
- an invitation to a joint cocktail party with the Louisiana Judicial College on Sunday, June 4.

Special Discounted Registration for Summer School & Annual Meeting

By May 24	On Site
\$950	\$1,025

Annual Meeting registration is for LSBA member and spouse/guest when indicated on Registration Form.

- Includes seminar registration, programs, business meetings and admission to Lawyers' Expo;
- a seminar manual;
- daily continental breakfast/coffee/refreshment breaks;
- an invitation to a joint cocktail party with the Louisiana Judicial College on Sunday, June 4;
- up to two adult tickets to the Annual Meeting President's Reception* on Wednesday, June 7;
- up to two adult tickets to the YLS Reception* on Thursday, June 8;
- up to two adult tickets to the Homecoming Dinner & Dance* on Friday, June 9; and
- up to two children's tickets to the Homecoming Carnival, Cookout & Dance* on Friday, June 9.

***Spouse/guest name and number and age of children must be indicated on the Registration Form to receive tickets included in registration.**

Additional tickets for children and guests are available for the social functions.

Total CLE Hours

Litigation

13.75 CLE hours, including 1 hour of ethics and 2.5 hours of professionalism.

Office

13.5 CLE hours, including 1 hour of ethics and 2.5 hours of professionalism.

Sunday, June 4

Joint Session with Louisiana Judicial College

3-5 p.m. **Advanced Cross-Examination:
How to Dominate a Courtroom**
Roger J. Dodd

5-5:15 p.m. **Break**

5:15-6 p.m. **Effective Jury Communication**
Phillip A. Wittmann

6-7:15 p.m. **Cocktail Party with Louisiana
Judicial College**

Monday, June 5 • Single Track

8-9:30 a.m. **The Federalization of Tort Law**
John M. Church

9:30-9:45 a.m. **Break**

9:45-10:45 a.m. **Employment Law Post-Katrina**
S. Price Barker
Terrel J. Broussard

10:45-11:45 a.m. **Complex Litigation Creates Complex
Ethical Issues: Identifying Problems and
Proposing Solutions**
Charles B. Plattsmier
Leslie J. Schiff
Richard C. Stanley

Tuesday, June 6 • Dual Track

Litigation

8-9:30 a.m. **Practical E-Discovery: Preserving It,
Asking for It and Paying for It**
Moderator: *Hon. Karen Wells Roby*
Panelists: *Larry E. Demmons*
Ernest E. Svenson

9:30-9:45 a.m. **Break**

9:45-11 a.m. **Choosing and Charging the Jury**
Moderator: *Hon. Michael G. Bagneris*
Panelists: *Judy Y. Barrasso*
Gladstone N. Jones III
Tony Clayton

11 a.m.-noon **Evidence Competition**
Scott H. Frugé
C. Frank Holthaus
Michael A. Patterson
Edward J. Walters, Jr.

Office

8-9:15 a.m. **What You Need to Know about the 2005
Bankruptcy Legislation**
Hon. Douglas D. Dodd
Louis M. Phillips

9:15-9:30 a.m. **Break**

9:30-10:30 a.m. **Post-Katrina Insurance Law Issues**
Adrianne L. Baumgartner

10:30-10:45 a.m. **Break**

10:45 a.m.-noon **Professional Liability in the 21st Century**
James A. Brown

Wednesday, June 7

Joint Session with Louisiana Judicial College

8-9:15 a.m. **Current Topics in Federal Diversity
Jurisdiction: Minimal Diversity Statutes,
The Current Meaning of Erie Railroad and
Related Issues**
H. Alston Johnson III

9:15-9:30 a.m. **Break**

9:30-10:45 a.m. **The Greatest Trials Ever Held**
Todd Winegar
(professionalism)

10:45-11 a.m. **Break**

11 a.m.-12:15 p.m. **The Greatest Trials Ever
Held (continued)**
Todd Winegar

Register online at
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Brief or Writ with the Touch of a Button.



OK, make that 10 buttons.

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65th Annual Meeting

INFO & FEES

Annual Meeting Registration

By May 24	On Site
\$450	\$495

- ▶ Includes programs, business meetings and admission to Lawyers' Expo;
- ▶ daily continental breakfast/coffee/refreshment breaks;
- ▶ up to two adult tickets to the Annual Meeting President's Reception* on Wednesday, June 7;
- ▶ up to two adult tickets to the YLS Reception* on Thursday, June 8;
- ▶ up to two adult tickets to the Homecoming Dinner & Dance* on Friday, June 9; and
- ▶ up to two children's tickets to the Homecoming Carnival, Cookout & Dance* on Friday, June 9.

Special Discounted Registration for Summer School & Annual Meeting

By May 24	On Site
\$950	\$1,025

Annual Meeting registration is for LSBA member and spouse/guest when indicated on Registration Form.

- ▶ Includes seminar registration, programs, business meetings and admission to Lawyers' Expo;
- ▶ a seminar manual;
- ▶ daily continental breakfast/coffee/refreshment breaks;
- ▶ an invitation to a joint cocktail party with the Louisiana Judicial College on Sunday, June 4;
- ▶ up to two adult tickets to the Annual Meeting President's Reception* on Wednesday, June 7;
- ▶ up to two adult tickets to the YLS Reception* on Thursday, June 8;
- ▶ up to two adult tickets to the Homecoming Dinner & Dance* on Friday, June 9; and
- ▶ up to two children's tickets to the Homecoming Carnival, Cookout & Dance* on Friday, June 9.

*Spouse/guest name and number and age of children must be indicated on the Registration Form to receive tickets included in registration.

Additional tickets for children and guests are available for the social functions.

For more information and to register online, go to: www.lsba.org

Cancellations & Refunds

Cancellation of registration must be received in writing by the LSBA no later than Friday, May 19. Cancellations will receive a full refund, less a \$30 administrative charge. Absolutely no refunds will be made after Friday, May 19. Requests should be mailed to the Louisiana State Bar Association, 601 St. Charles Ave., New Orleans, LA 70130-3404; or faxed to (504)598-6753; or emailed to aburas@lsba.org.

Annual Meeting Sponsors (as of May 3, 2006)

ABA Retirement Funds
The Capitol Group
Gilsbar, Inc.
Legal Directories Publishing Co., Inc.
LexisNexis
MBNA America Bank
Perry, Dampf, Watts & Associates

The Expo will be open:

Wednesday, June 7, 8 a.m.-5 p.m.
Thursday, June 8, 8 a.m.-1 p.m.
Friday, June 9, 8 a.m.-noon

Annual Meeting Exhibitors (as of May 3, 2006)

ABA Retirement Funds
ADR inc.
Baton Rouge Bar Association
Bourgeois Bennett, L.L.C., CPAs & Consultants
Gilsbar, Inc.
Kay E. Donnelly & Associates
Lafayette Parish Bar Association
Legal Directories Publishing Co., Inc.
Legier & Materne, apac
LexisNexis
Louisiana Bar Foundation
Louisiana Center for Law and Civic Education
Louisiana Organization for Judicial Excellence
Louisiana State Bar Association
Mediation Arbitration Professional Systems, Inc.
New Orleans Bar Association
Rimkus Consulting Group, Inc.
Shreveport Bar Association
Shuart & Associates, Legal Search & Staffing
Thomson Findlaw
Thomson West

To sponsor an event, contact Germaine A. Tarver at the LSBA office at (504)619-0117 or (800)421-5722, ext. 117.

To exhibit at the Annual Meeting, contact Christine A. Richard at the LSBA office at (504)619-0105 or (800)421-5722, ext 105.

2006 Summer School & Annual Meeting Registration Form

Bar Roll Number _____ ☐ Judge Name _____
 First Name for Badge _____
 Office Address _____ Ste./Floor _____
 City/State/Zip _____
 Office Phone _____ Fax _____ E-mail _____
☐ Please register my spouse/guest for the Annual Meeting at no additional charge. ☐ Law League Member
(Spouse/guest must be registered to receive tickets to the President's Reception, YLS Reception and the Homecoming Dinner and Dance.)
 Spouse/Guest Name _____ First Name for Badge _____
☐ Please include my Children's Homecoming Carnival, Cookout and Dance tickets: first child's age ____ second child's age ____
 My address while in Florida will be _____
☐ Please check here if you are disabled and require special services. Attach a written description of needs.

Summer School Only Registration

Includes seminar registration and manual, daily continental breakfast and breaks, and invitation to joint cocktail party with Judicial College.

☐ Received after April 26 and before May 24: \$550 ☐ Received after May 24 and On Site: \$575

Annual Meeting Only Registration

Includes admission to all open programs and business meetings, daily continental breakfasts and breaks, up to two tickets to President's Reception, up to two tickets to YLS Reception, up to two adult tickets to Homecoming Dinner (must be requested), up to two adult tickets to Homecoming Dance, and up to two children's tickets to Homecoming Carnival, Cookout and Dance.

☐ Received after April 26 and before May 24: \$450 ☐ Received after May 24 and On Site: \$495
☐ Please include Homecoming Dinner (including installation of officers) tickets for each registrant included in registration fee.

Summer School & Annual Meeting Discounted Registration

Includes all programs and events as set forth above.

☐ Received after April 26 and before May 24: \$950 ☐ Received after May 24 and On Site: \$1,025
☐ Please include Homecoming Dinner (including installation of officers) tickets for each registrant included in registration fee.

Additional Tickets

There is no charge for children under 4. Only members registered for the Annual Meeting may purchase additional tickets

	by May 24	On Site	Quantity	Total Amount
President's Reception	\$90	\$100	_____	_____
YLS Reception Adult	\$90	\$100	_____	_____
Teen (13-17)	\$30	\$35	_____	_____
Child (4-12)	\$20	\$25	_____	_____
Homecoming Dinner & Dance				
Adult	\$110	\$125	_____	_____
Teen (13-17)	\$45	\$50	_____	_____
Homecoming Dance				
Adult	\$60	\$75	_____	_____
Teen (13-17)	\$20	\$25	_____	_____
Homecoming Carnival, Cookout & Dance				
Child (4-12)	\$30	\$35	_____	_____

Payment Method

☐ Pay by Check: Make Checks Payable to the Louisiana State Bar Association.
☐ Pay by Credit Card: Please charge \$ _____ to my credit card: (check one) ☐ VISA ☐ MC (no American Express)
 Credit Card Account Number _____ Expiration _____
 Name as it Appears on Card _____ Signature _____
 Billing Address for Card _____ City/State/Zip _____

Total

Grand Total Enclosed _____ (Include all ticket fees with grand total.)

*Return checks to: Louisiana State Bar Association, 601 St. Charles Ave.,
 New Orleans, LA 70130-3404, Attn: Meeting Registration
 Fax credit card payment form to (504)598-6753*

For Office Use Only (ADVM)

Date Received

Check #

Auth. #

65th Annual Meeting

PROGRAM

Wednesday, June 7

- 7:15 a.m. **Golf Tournament Check-in & Registration**
(open to all tournament registrants and their families)
Baytowne Golf Club
- 7:45 a.m. **Annual Golf Tournament**
(open to all registrants for a fee)
Shotgun start with four-player scramble format
- 10 a.m.-5 p.m. **Exhibits Open**
- 10 a.m.-7 p.m. **Registration Desk Open**
- Noon-3 p.m. **Refreshment Break**
- Noon-1:30 p.m. **LSBA Executive Committee Meeting**
(open to all committee members)
Presiding: Frank X. Neuner, Jr., President
- 2-3 p.m. **Budget Committee Meeting**
Presiding: Kim M. Boyle, Treasurer
- 3-4 p.m. **Section Council Meeting**
(open to all section officers)
Presiding: Val P. Exnicios, Co-Chair
S. Guy deLaup, Co-Chair
- 4-6 p.m. **Legal Technology: Advanced Computer-Aided Investigation/Discovery**
Host: LexisNexis
Presiding: Michael Dorgan
Roy Turner
- 6-7:30 p.m. **President's Reception Honoring Louisiana Supreme Court and Members of the Judiciary**
(ticketed event)
Host: Frank X. Neuner, Jr., President
Sponsored by LexisNexis

Thursday, June 8

- 8 a.m.-1 p.m. **Exhibits Open**
- 8-10 a.m. **Continental Breakfast**
- 8-10 a.m. **Group Insurance Committee Meeting**
(open to all committee members)
Presiding: Albert J. Derbes III, Chair

- 8:30 a.m. **LSBA General Assembly**
Featuring Reports and Presentation of Awards
(open to all registrants)
Presiding: Frank X. Neuner, Jr., President
- House of Delegates Meeting**
Immediately following the General Assembly
Presiding: Frank X. Neuner, Jr., President
- 10:30 a.m. **Legal Malpractice Insurance Committee Meeting**
(open to committee members)
Presiding: Kevin C. O'Bryon, Chair
- 10:30-11:30 a.m. **Access to Justice Committee Meeting**
(open to all committee members)
Presiding: Sheral C. Keller, Co-Chair
Brian D. Lenard, Co-Chair
- 11 a.m.-noon **Committee on Alcohol & Drug Abuse Meeting**
(open to all committee members)
Presiding: Deborah L. Faust, Chair
- 11:30 a.m.-1 p.m. **Louisiana Bar Foundation Fellows Brunch**
(open to all Foundation Fellows)
Presiding: Donna D. Fraiche, LBF President
- Noon-1 p.m. **Light Lunch in Exhibit Hall**
- 12:30-2 p.m. **Bankruptcy Law Section Meeting**
(open to all section members)
Presiding: Kevin R. Molloy, Chair
- 1-3 p.m. **2006-07 Young Lawyers Section Council Meeting**
(open to all 2006-07 Council members)
Presiding: Mark E. Morice, Chair
- 1:30-2:30 p.m. **Right to Counsel Committee Meeting**
(open to all committee members)
Presiding: Cliffe E. Laborde III
- 1:30-3 p.m. **Alternative Dispute Resolution Section Meeting/Program**
"Explaining the Louisiana Department of Insurance Hurricane Mediation Program"
(open to all registrants)
Presiding: Elizabeth W. Middleton, Chair

Continued on page 440

Housing Request Form

The LSBA does not accept Housing Request Forms. Even though the published housing request form deadline has expired, rooms may still be available in the LSBA block. Hotel personnel will determine availability on booking.
Mail or fax the Housing Request Form directly to one of the resorts:

Sandestin Golf and Beach Resort
9300 Emerald Coast Pkwy. West
Sandestin, Fla. 32550
(800)320-8115; Fax (850)267-8221

Hilton Sandestin Beach Golf Resort & Spa
4000 Sandestin Blvd. South
Sandestin, Fla. 32550
(800)367-1271; Fax (850)267-3076

Name _____
Address _____
City/State/Zip _____
Phone _____ Fax _____

Please indicate the number of guests who will be staying in your unit: Adults _____ Children _____
O We will need a port-a-crib. (Cribs are limited and must be ordered in advance.)

Please list first, second and third choices only for accommodations:

Type of Accommodations	No. of Bedrooms
1. _____	_____
2. _____	_____
3. _____	_____
Date of arrival _____	Date of departure _____

Please confirm my reservation with my credit card: (check one)

O VISA O MC O AmEx O Discover O Carte Blanche O Diner's Club

Credit Card # _____ Exp. Date _____

Signature _____

No reservations will be accepted if not accompanied by an appropriate credit card guarantee.

- Check-in begins at 4 p.m.; check-out by 11 a.m.
- If arriving early, sleeping rooms may not be available.
- All rates are subject to 11 percent tax.
- Credit cards will be charged a deposit of one night's room and tax when reservations are made.
- Deposits are refundable if notice is received by Sandestin 14 days prior to the scheduled arrival date.

FOR HOST PROPERTY USE ONLY

Reservation Number _____

65th Annual Meeting

PROGRAM

Thursday, June 8 (continued)

- 2-4 p.m. **Professional Assessment Committee Meeting**
(open to all committee members)
Presiding: Donald R. Abaunza, Chair
- 5-6:30 p.m. **Friends of Bill W. Meeting**
- 5-6 p.m. **LCLCE Reception**
Host: E. Wade Shows, LCLCE President
- 6-8 p.m. **Young Lawyers Section Awards Reception**
(ticketed event)
Presiding: Dona Kay Renegar, Chair
Co-sponsored by MBNA
- 7-9 p.m. **Tulane Law School Alumni Party**
- 7-10 p.m. **LSU Law Center Alumni Party**
- 8-11 p.m. **Southern University Law Center Alumni Party**

Friday, June 9

- 7:30 a.m. **Guy Wootan Memorial 5K Run/Walk**
(open to all registrants and their families for a fee)
Beachside Green
Sponsored by Gilsbar, Inc.
- 8-9:30 a.m. **Continental Breakfast**
- 8 a.m.-noon **Exhibits Open**
- 8:30-10 a.m. **Insurance, Tort, Workers' Compensation and Admiralty Law Section**
"Torts & Admiralty: What's Been Happening in the Last Year While You've Been Practicing Law"
(open to all registrants)
Presiding: Richard J. Arsenault, Chair
- 9-10:30 a.m. **Labor & Employment Law Section Program**
(open to all section members)
Presiding: N. Eleanor Graham, Chair
- 9:30-10 a.m. **2005-06 Board of Governors Breakfast**
(open to 2005-06 Board members)
- 9:30-10:30 a.m. **Francophone Section Meeting**
(open to all section members)
Presiding: John A. Hernandez III, Chair

- 10:15-11:45 a.m. **Civil Law & Litigation & the Bench Bar Section Joint Program**
"Gold Stars & Black Marks: What Trial Appellate Judges Like and Dislike in Practice Before Them"
(open to all registrants)
Presiding:
J. Robert Ates,
Civil Law & Litigation Section
Val P. Exnicios, Bench & Bar Section Chair
- 10:30 a.m.-12:30 p.m. **2006-07 Board of Governors Meeting**
(open to 2006-07 Board members)
- 11 a.m.-1 p.m. **Diversity Committee Meeting**
Presiding: Louisiana Supreme Court
Justice Bernette J. Johnson, Chair
- 6-7 p.m. **Homecoming Reception**
(ticketed event)
- 7-9 p.m. **Homecoming Dinner and Installation of Officers**
(ticketed event)
- Children's Homecoming, Carnival & Cookout**
(ticketed event)
- 9 p.m.-midnight **Homecoming Dance**
Featuring Rockin' Dopsie, Jr.
and the Zydeco Twisters
(ticketed event)

**For more information and
to register online, go to:
www.lsba.org**

Recreation Entry Form

Golf Tournament Entry Form

Entry Form should be returned with your Annual Meeting Registration. Include entry fee with your total payment.
Entry fee: \$125 per single adult player and \$70 for players under 18. Request pairing of foursomes below:

Player 1 _____	Handicap _____	Player 3 _____	Handicap _____
Address _____		Address _____	
City/State/Zip _____		City/State/Zip _____	
Phone _____	Fax _____	Phone _____	Fax _____
E-mail _____		E-mail _____	

Player 2 _____	Handicap _____	Player 4 _____	Handicap _____
Address _____		Address _____	
City/State/Zip _____		City/State/Zip _____	
Phone _____	Fax _____	Phone _____	Fax _____
E-mail _____		E-mail _____	

5K Run/Walk Entry Form

Entry Form should be returned with your Annual Meeting Registration. Include entry fee with your total payment.
Entry fees: Adults, \$15 • Children, \$10 (*Photocopy this form for each participant.*)

Name _____	O Male O Female
Address _____	Age on Race Day _____
City/State/Zip _____	T-shirt Size: (Adult Sizes) O Small
Phone _____ Fax _____	O Medium O Large O X-Large
E-mail _____	

I certify that I am an LSBA member, spouse or child. In consideration of your accepting this entry, I, the undersigned, for myself, my heirs, executors and administrators, waive and release any and all rights and claims for damages I may have against the Louisiana State Bar Association, Gilsbar, Inc., and all other sponsors, officials and directors for any and all claims of damages, demands, or actions whatsoever in any manner, as a result of my participating in the 21st Annual LSBA 5K Run/Walk. I attest and verify that I am physically fit and have sufficiently trained for the completion of this event. I hereby grant full permission to the Louisiana State Bar Association to use any photographs, videotapes, recordings, or any other record of my participation in this event for any purpose whatsoever.

SIGNATURE _____ DATE _____
(Parent or Legal Guardian's signature if under 18 years of age is necessary for this entry to be processed.)

Total _____ Return Recreation Entry Forms with your Annual Meeting Registration Form.

For Office Use Only (ADVM)

Date Received _____ AM _____ SS _____
Check # _____ Auth. # _____ Golf _____ 5K _____

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- ▶ Alternative Dispute Resolution Program
- ▶ Client Assistance Fund
- ▶ Continuing Legal Education Program
- ▶ Ethics Advisory Service
- ▶ Lawyers' Substance Abuse Hotline • (800)354-9334 • (504)868-4826
- ▶ Legal Specialization Program
- ▶ Loss Prevention Counsel Judy Cannella Schott, Cynthia Oteri Butera, Johanna G. Averill, Lindsey M. Ladouceur or Linda A. Liljedahl (800)GILSBAR

Publications

- ▶ *Louisiana Bar Journal*
- ▶ "Bar Briefs"
- ▶ Louisiana Bar Today (online newsletter)

Online Services

- ▶ MCLE Transcripts
- ▶ Louisiana Bar Today Opinion Service
- ▶ Membership Directory

Young Lawyers Section

- ▶ Bridging the Gap
- ▶ Mentor Program
- ▶ Young Lawyers' Directory

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- ▶ Technology Resource Center
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The following hotels have agreed to corporate discount rates for LSBA members. Call the hotel for the current discounted rates. When making reservations, you must identify yourself as an LSBA member.

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- ▶ Hotel InterContinental (504)525-5566
- ▶ Wyndham Canal Place (504)566-7006
- ▶ Pontchartrain (800)777-6193
- ▶ Royal Sonesta Hotel (504)553-2345
- ▶ "W" Hotel (800)777-7372
French Quarter (504)581-1200
333 Poydras St. (504)525-9444
- ▶ Whitney Wyndham (504)581-4222

Baton Rouge

- ▶ Radisson Hotel (225)925-2244
Ask for the "Executive Advantage Rate" when making your reservations.
- ▶ Sheraton Hotel & Convention Center (225)242-2600
- ▶ Marriott (225)924-5000
- ▶ Richmond Suites Hotel (225)924-6500

Lafayette

- ▶ Hilton Lafayette and Towers (800)33CAJUN
- ▶ Hotel Acadiana (800)826-8386 (337)233-8120
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- ▶ La Quinta (866)725-1661
www.lq.com
Rate Code: LABAR

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- ▶ Avis
Discount No. A536100 (800)331-1212
- ▶ Hertz
Discount No. 277795 (800)654-3131

Other Vendors

The following vendors have agreed to discount rates for LSBA members.

- ▶ ABA Members Retirement Program (800)826-8901
- ▶ Airborne Express (800)443-5228
- ▶ Lexis/Mead Data Central (800)356-6548
- ▶ MBNA America® Bank • MBNA Platinum PlusSM Credit Card
• GoldSavers Money Market Account
• GoldCertificate CD Account
• GoldOption Loan
• GoldReserve Line of Credit (800)441-7048
- ▶ United Parcel Service (800)325-7000



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Res Judicata in Louisiana: A Synthesis of Competing Interests

By M. David Kurtz and Mark W. Frilot

In Louisiana, *res judicata* melds two conflicting policy concerns. As Judge Learned Hand has said, *res judicata*:

must be treated as a compromise between two conflicting interests: the convenience of avoiding a multiplicity of suits and the adequacy of the remedies afforded for conceded wrongs.¹

In a close case, these competing interests can drive a court's application of *res judicata*.

Res judicata's purpose is to promote judicial efficiency and final resolution of disputes by preventing needless litigation.² It thus serves the important public policy of conserving judicial resources by barring relitigation of matters already decided. Louisiana's *res judicata* framework further promotes judicial efficiency by requiring parties to assert in one proceeding all claims arising out of the same transaction or occurrence.³ Perhaps more importantly, *res judicata* preserves the finality of judgments by precluding cases that seek merely to overturn an adverse judgment.

However, *res judicata* can also

reinforce poor decisions or deny a litigant his day in court. Although courts have held that application of *res judicata* is not discretionary,⁴ they have often rationalized a narrow construct to avoid an inequitable result,⁵ reasoning that where there is doubt, *res judicata* should not bar a suit.⁶

Courts also have noted that though denial of a *res judicata* exception will diminish judicial efficiency and increase litigation, "[t]hose harms are sometimes preferable to the loss of plaintiff's substantive rights without the merits being decided."⁷ As the Louisiana Supreme Court has reasoned:

[w]hile *res judicata* is a useful tool, it should not be used as a scythe applied mechanically to mow down claims where the party asserting the claim is not at fault for the lack of adjudication of that claim in the first suit.⁸

Understanding the conflicting interests built into Louisiana's *res judicata* framework, as well as its statutory exceptions, is vital to a successful foray into the doctrine. Here,

we explore when and how *res judicata* has been applied to further those competing interests.

Louisiana's *Res Judicata* Framework

Res judicata in Louisiana is effected through code articles and statutes; effective Jan. 1, 1991, that framework was amended by the Legislature to be more akin to federal and common law.⁹

Before the amendment, Louisiana *res judicata* was narrower than under federal and common law.¹⁰ Common law *res judicata* focused on the extinguishment of the cause of action, whereas Louisiana precluded a second suit only if it involved the same parties, the same cause, and the same object of demand as the prior suit.¹¹

Current law is more in line with common law and bars relitigation of matters arising from the same "transaction or occurrence" as a previous suit.¹² When instituting a civil action, "[a] party shall assert all causes of action arising out of the transaction or occurrence that is the subject matter of the litigation."¹³ If a plaintiff asserts claims arising out of the same transaction

or occurrence in multiple concurrent suits, a defendant can have all but the first dismissed.¹⁴ Likewise:

[t]he defendant in the principal action, except in an action for divorce under Civil Code Article 102 or 103, shall assert in a reconventional demand all causes of action that he may have against the plaintiff that arise out of the transaction or occurrence that is the subject matter of the principal action.¹⁵

As a consequence:

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

- (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged into the judgment.
- (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
- (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.¹⁶

Further, if a defendant does not except to multiple concurrent lawsuits arising out of the same transaction or occurrence,



By bringing Louisiana res judicata in line with the federal system, the amendment embodies two related concepts — claim preclusion and issue preclusion.

“the first final judgment rendered shall be conclusive of all.”¹⁷

By bringing Louisiana *res judicata* in line with the federal system, the amendment embodies two related concepts — claim preclusion and issue preclusion. The former is what earlier Louisiana cases described as *res judicata*, while the latter, which was not previously recognized in Louisiana, is what earlier federal cases described as collateral estoppel. In distinguishing the two concepts, the United States Supreme Court noted:

Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing relitigation of an issue of fact or law actually litigated and

resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or different claim.¹⁸

Each type of preclusion applies in slightly different circumstances to bar relitigation without denying judicial recourse.

Claim Preclusion

For claim preclusion to apply, (1) the parties must be identical in both suits, or in privity; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must be a final judgment on the merits; and (4) the same claim or cause of action must be involved in both cases.¹⁹

Identity of the parties is required,²⁰ but the requirement is not literal. Some decisions interpret identity broadly: “Identity of the parties exists whenever the same parties, their successors, or others appear, so long as they share the same ‘quality’ as parties;”²¹ such nonparties are deemed “privies” of the parties.²² A nonparty is deemed a “privy” when: “(1) the nonparty is the successor in interest of a party; (2) the nonparty controlled the prior litigation; or (3) the nonparty’s interests were adequately represented by a party to the action who may be considered the ‘virtual representative’ of the nonparty because the interests of the party and the nonparty are so closely aligned.”²³ Courts have found identity of the parties where they were not actually identical,²⁴ including a husband and wife,²⁵ a corporation and its president,²⁶ a corporation and members of its board,²⁷ the Office of Family Support and the mother of a child in a previous paternity suit,²⁸ LIGA as successor of an insurance company,²⁹ and different representatives of the same class in a subsequent class action.³⁰

However, courts have also realized that:

[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Giving conclusive effect to a prior judgment against one who is neither

a party nor in privity with the party therein contravenes due process.³¹

Courts are more reluctant to find identity of the parties if it results in the imposition of liability against a nonparty.³²

Other decisions have narrowed the identity test, holding that if the parties are identical, there also must be “identity of capacity” for a second suit to be precluded.³³ For example, breach of fiduciary duty claims against a party in her individual capacity were not precluded based on a prior suit against the same party in her capacity as executrix.³⁴

A prior judgment must be valid; that is, among other things, it must have been rendered by a court of competent jurisdiction.³⁵ If the court did not have subject matter jurisdiction, such as a city court judgment involving ownership or title to immovable property,³⁶ or a court’s judgment on a matter over which an

administrative agency has exclusive statutory jurisdiction,³⁷ the judgment cannot have preclusive effect.³⁸

A judgment also must be final — dispose of the merits in whole or in part — to have preclusive effect.³⁹ The preclusive effect of a judgment attaches when it is signed, and any subsequent action is barred unless the judgment is reversed on appeal.⁴⁰ “A final judgment from which there can be no appeal acquires the authority of the thing adjudged.”⁴¹

Finally, claim preclusion requires that the same claim or cause of action be involved. This means that a plaintiff must assert all rights and claim all remedies arising out of the “transaction or occurrence.”⁴² Because of the extinguishment and merger of claims under La. R.S. 13:4231, a party must reserve any claim not addressed in a final judgment. Any claim not so reserved, such as a post-judgment claim for

attorneys’ fees, may be barred.⁴³

The legal effect of the silence of a judgment on any part of a demand that might have been allowed under the pleadings is a rejection of such part of the demand, which tacit rejection has the force and effect of res judicata against subsequent suit for such part of the demand.⁴⁴

Issue Preclusion

By its amendment to La. R.S. 13:4231, the Legislature also adopted the principle, new to Louisiana, of issue preclusion, which “serves the interest of judicial economy by preventing relitigation of the same issue between the same parties.”⁴⁵ Even where claim preclusion does not apply, issue preclusion may bar a subsequent suit.⁴⁶ For example, a criminal proceeding could preclude a subsequent civil action



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over the same issue.⁴⁷ However, unlike claim preclusion, Louisiana's *res judicata* statute does not merge all issues between the parties at final judgment; it is limited to dispositive issues actually litigated. In this respect, issue preclusion is narrower than claim preclusion.⁴⁸

Issue preclusion under Louisiana law requires that (1) the parties are identical; (2) the issues are identical; (3) the issue was actually litigated and determined in the prior litigation; and (4) the issue was essential to the disposition of the claim in the prior action.⁴⁹

Like claim preclusion, Louisiana issue preclusion requires identity of the parties.⁵⁰ This differs from many states and federal law, which allow non-mutual issue preclusion where the party to the first action had the same incentive to advance a position as the party against whom issue preclusion is being asserted. Louisiana law dictates that parties should not be held liable based on issue determinations in proceedings in which they did not participate. For example, defendants who were not parties to a prior criminal child support proceeding were not precluded from relitigating issues regarding the decedent's paternity in a later wrongful death and survival action.⁵¹

However, the identity requirement may be relaxed when asserted as a defense based upon an allocation of fault in delictual actions. For example, in *Williams v. City of Marksville*,⁵² the Louisiana 3rd Circuit acknowledged that, although Louisiana's *res judicata* statute still requires mutuality, or identity of the parties:

... even though not formally joined in the suit, for all intents and purposes, even a nonparty is treated as if s/he is a party for the purpose of allocating a percentage of fault to that "party" in order to reduce the percentage of fault allocated to the actual litigants and it stands to reason for purposes of *res judicata*. However, this does not mean that a nonparty is responsible if cast in



Res judicata in Louisiana synthesizes two competing interests — avoiding multiple suits and ensuring adequate remedies.

judgment since to do so would violate that person's due process rights by binding the nonparty without giving that person an opportunity to be heard. [Footnotes omitted.]⁵³

Thus, if a nonparty's fault is pleaded as an affirmative defense in the first suit, and zero fault is allocated to that nonparty, a plaintiff may be precluded from relitigating that issue against the nonparty in a subsequent suit.⁵⁴ However, if fault is allocated to the nonparty, a successful plaintiff cannot thereafter use *res judicata* to prevent the nonparty from arguing its percentage of fault.⁵⁵

The second and third criteria require that the issue be identical and actually litigated and determined in a prior litigation. These criteria require specific proof of the issues litigated and determined in the prior suit; without it a court might not apply issue preclusion because of the notion that *res judicata* is not invoked absent all essential elements.⁵⁶

Issue preclusion does not bar relitigation of what **might have been** litigated and determined, but only those matters in controversy upon which the prior judgment or verdict was actually based.⁵⁷

It is generally not sufficient to prove that a party argued numerous issues and lost; rather, the issue must have been dispositive.⁵⁸

Issue preclusion requires the issue to be precluded to have been a dispositive issue which the prior court **must have considered** in a contest between the same parties.⁵⁹

For example, credibility determinations are not subject to issue preclusion because they are not generally dispositive.⁶⁰ Further, "an issue presented by pleadings in a cause, but eliminated from the ultimate judgment, cannot, without more, be invoked in support of a plea of *res judicata*."⁶¹

Exceptions

As in federal law, there are several exceptions to *res judicata* application, but in Louisiana, they are statutory:

- A. A judgment does not bar another action by the plaintiff:
 - (1) When exceptional circumstances justify relief from the *res judicata* effect of the judgment;
 - (2) When the judgment dismissed the first action without prejudice; or,
 - (3) When the judgment reserved the right of the plaintiff to bring another action.
- B. In an action for divorce under Civil Code Article 102 or 103, in an action for determination of incidental matters under Civil Code Article 105, in an

Continued on page 449

action for contributions to a spouse's education or training under Civil Code Article 121, and in an action for partition of community property and settlement of claims between spouses under R.S. 9:2801, the judgment has the effect of *res judicata* only as to causes of action actually adjudicated.⁶²

While subparts (A)(2), (A)(3), and (B) are fairly straightforward, the breadth of subpart (A)(1) provides discretion to decline preclusion.⁶³ However, such relief should be granted only in truly exceptional circumstances.⁶⁴ The exception is not intended to apply where the plaintiff has simply failed to assert a claim through oversight or lack of preparation.⁶⁵ "It is designed to protect those drawn into error by an awkward factual or legal scenario, not those who can allude to no circumstance to justify their inaction below."⁶⁶ Still, this

exception lends authority to the notion of not using the *res judicata* "scythe" to deny a litigant his rights.

Convoluting factual or legal scenarios have qualified as exceptional circumstances to justify the exception.⁶⁷ Exceptional circumstances also have been found when the plaintiff's interests in the prior suit were poorly represented, whether by the party's attorney or otherwise.⁶⁸ A pro se litigant's lack of representation, however, is not an exceptional circumstance.⁶⁹

Conclusion

Res judicata in Louisiana synthesizes two competing interests — avoiding multiple suits and ensuring adequate remedies. These competing interests provide courts flexibility to allow parties their day in court while conserving judicial resources. Whether the battleground is claim preclusion, issue preclusion, or a statutory exception, the

underlying principles typically can guide a case to a predictable result. But in a close case, the competing interests also can allow the practitioner to frame an argument (or the court to frame a decision) in either direction. Thus, while the 1991 amendment has served the goal of providing legislative guidance, the body of law accumulated since 1991 (and federal decisions on the same issue) makes clear that the underlying tension in *res judicata* will spawn additional arguments and diverse decisions in the years to come.

FOOTNOTES

1. *Lyons v. Weatinghouse Elec. Corp.*, 222 F.2d 184, 189 (2 Cir. 1955), *cert. denied*, 350 U.S. 825 (1955).
2. *Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.*, 95-0654 (La. 1/16/96), 666 So.2d 624, 631.
3. See La. C.C.P. arts. 425, 531 and 1061; La. R.S. 13:4231.
4. *Avenue Plaza, L.L.C. v. Falgoust*, 96-

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0173 (La. 7/2/96), 676 So.2d 1077, 1080.

5. See *Skipper v. Berry*, 1999-1433 (La. App. 3 Cir. 3/15/00) 762 So.2d 56, 59; *Ortiz v. Ortiz*, 01-1252 (La. App. 5 Cir. 5/15/02), 821 So.2d 35, 37-38.

6. See *Domingue v. Allied Discount Tire and Brake, Inc.*, 2002-1338, p. 5 (La. App. 1 Cir.), 849 So.2d 690, 695, *writ denied*, 2003-1605 (La. 10/3/03), 855 So.2d 320; *Ortiz*, 821 So.2d at 38.

7. *Fine v. Regional Transit Auth.*, 95-2603 (La. App. 4 Cir. 6/26/96), 676 So.2d 1134, 1137.

8. *Terrebonne Fuel & Lube, Inc.*, 666 So.2d at 635.

9. See Section 5 of Acts 1990, No. 521.

10. *Terrebonne Fuel & Lube, Inc.*, 666 So.2d at 631.

11. *Burguières v. Pollingue*, 2002-1385, p. 7 (La. 2/25/03), 843 So.2d 1049, 1053; *Terrebonne Fuel & Lube, Inc.*, 666 So.2d at 631-32 (*citing* *Arbour*, "The Louisiana Concept of *Res Judicata*," 34 La.L.Rev. 763, 764 (1974)).

12. La. R.S. 13:4231, Comment (a) (1990); *Avenue Plaza*, 676 So.2d at 1080; *Atwell v. National Safety Consultants, Inc.*, 1997-1561, p. 4 (La. App. 3 Cir.), 713 So.2d 495, 497, *writ denied*, 1998-1866 (La. 10/30/98), 727 So.2d 1164.

13. La. C.C.P. art. 425(A).

14. La. C.C.P. art. 531.

15. La. C.C.P. art. 1061(B).

16. La. R.S. 13:4231.

17. La. C.C.P. art. 531.

18. *New Hampshire v. Maine*, 121 S.Ct. 1808, 1814 (2001).

19. *Ortiz*, 821 So.2d at 38.

20. *Mandalay Oil & Gas, L.L.C. v. Energy Dev. Corp.*, 2001-0993, p. 16 (La. App. 1 Cir. 8/4/04), 880 So.2d 129, 140, *writ denied*, 2004-2426 (La. 1/28/05), 893 So.2d 72; *Burguières*, 843 So.2d at 1053-54.

21. *Mandalay Oil & Gas*, 880 So.2d at 140.

22. *Hudson v. City of Bossier*, 33,620, p. 8 (La. App. 2 Cir.), 766 So.2d 738, 743, *writ denied*, 2000-2687 (La. 11/27/00), 775 So.2d 450.

23. *Id.*

24. *Mandalay Oil & Gas*, 880 So.2d at 140 n.9.

25. See *Rollins v. Allstate Ins. Co.*, 02-330 (La. App. 3 Cir. 10/2/02), 828 So.2d 677.

26. See *Middleton v. Parish of Jefferson*, 97-324 (La. App. 5 Cir.), 707 So.2d 454, *writ denied*, 1998-0403 (La. 3/27/98), 716 So.2d 896.

27. See *Paradise Village Children's Home, Inc. v. Liggins*, 38,926 (La. App. 2 Cir. 10/13/04), 886 So.2d 562, *writ denied*, 2005-0118 (La. 2/4/05), 893 So.2d 884.

28. See *State v. Coleman*, 616 So.2d 844 (La. App. 3 Cir. 1993).

29. See *Lastie v. Warden*, 611 So.2d 721 (La. App. 4 Cir. 1992), *writ denied*, 614 So.2d 64 (La. 1993).

30. See *Duffy v. Si-Sifh Corp.*, 1998-1400 (La. App. 4 Cir.), 726 So.2d 438, *writ denied*, 1999-0372 (La. 4/30/99), 741 So.2d 14.

31. *Hudson*, 766 So.2d at 743.

32. See *P. Charles Calahan, APLC v. Scottsdale Ins. Co.*, 2005-0098 (La. App. 3 Cir. 6/1/05), 903 So.2d 1251.

33. *Burguières*, 843 So.2d at 1054

34. *Id.*

35. La. R.S. 13:4231, Comment (d) (1990); see also *Kelty v. Brumfield*, 93-1142 (La.), 633 So.2d 1210, 1215, *reh'g denied*, 93-1142 (La. 3/25/94), 635 So.2d 247.

36. *King v. Young Properties*, 2004-680 (La. App. 3 Cir. 10/27/04), 893 So.2d 895, *writ denied*, 2005-0662 (La. 4/29/05), 901 So.2d 1076; see generally La. C.C.P. art. 4847(A)(1).

37. *Kelty*, 633 So.2d 1210.

38. La. R.S. 13:4231, Comment (d) (1990); see also *Kelty*, 633 So.2d at 1215.

39. La. R.S. 13:4231, Comment (d) (1990).

40. *Id.*

41. *Zenon v. Delchamps, Inc.*, 1998-0726, p. 5 (La. App. 4 Cir. 12/16/98), 727 So.2d 542, 544; see also *Avenue Plaza*, 676 So.2d at 1079.

42. La. R.S. 13:4231, Comment (e) (1990); see also La. C.C.P. art. 425.

43. See *Ken Lawler Builders, Inc. v. Delaney*, 36,885, p. 4 (La. App. 2 Cir. 3/5/03), 840 So.2d 672, 675; *Diamond B Constr. Co., Inc. v. Department of Trans. & Dev.*, 2002-0573, p. 11 (La. App. 1 Cir. 2/14/03), 845 So.2d 429, 437.

44. *Ken Lawler*, 840 So.2d at 675.

45. La. R.S. 13:4231, Comment (b) (1990); see also *Roland v. Owens*, 00-1846 (La. App. 5 Cir.), 786 So.2d 167, 169, *writ denied*, 2001-1500 (La. 8/31/01), 795 So.2d 1213.

46. *Goodman v. Spillers*, 28,933, p. 8 (La. App. 2 Cir. 12/23/96), 686 So.2d 160, 166, *writ denied*, 97-0225 (La.), 692 So.2d 393, *writ denied*, 97-0423 (La. 3/27/97), 692 So.2d 400.

47. *Gene R. Shreve and Peter Raven-Hansen, Understanding Civil Procedure*, Second Edition (Matthew Bender, New York 1994), p. 476 n. 2 (also noting that the differing burdens of proof for civil and criminal proceedings could limit the range of issues considered "identical," as required for issue preclusion).

48. See *Williams v. City of Marksville*, 2002-1130, p. 3 (La. App. 3 Cir. 3/5/03), 839 So.2d 1129, 1131.

49. *In re Whittaker*, 225 B.R. 131, 139 (E.D. La. 1998).

50. La. R.S. 13:4231(3).

51. See *Turner v. Busby*, 2003-3444, p. 6 (La. 9/9/04), 883 So.2d 412, 417.

52. 2002-1130 (La. App. 3 Cir. 3/5/03), 839 So.2d 1129.

53. *Id.* at 1132.

54. *Id.*

55. *Id.*

56. *Goodman*, 686 So.2d at 167.

57. *Id.* (emphasis in original).

58. *Id.*

59. *Id.* (emphasis in original).

60. See *Rao v. Rao*, 2005-0059, p. 8 (La. App. 1 Cir. 11/4/05), 2005 La. App. Lexis 2354, *11-*12.

61. *Ebey v. Harvill*, 26,373, p. 3 (La. App. 2 Cir. 12/7/94), 647 So.2d 461, 464.

62. La. R.S. 13:4232.

63. *Arwood v. J.P. & Sons, Inc.*, 99-1146 (La. App. 5 Cir. 2/29/00), 759 So.2d 848, 850.

64. *Id.*; *Spear v. Prudential Prop. & Cas. Ins. Co.*, 1998-1663, p. 4 (La. App. 4 Cir. 1/13/99), 727 So.2d 640, 642-43.

65. *Spear*, 727 So.2d at 643.

66. *Id.*

67. See, e.g., *Brouillard v. Aetna Cas. & Surety Co.*, 94-1559 (La. App. 5 Cir. 5/10/95), 657 So.2d 231, 233.

68. See, e.g., *Hudson v. City of Bossier*, 33, 620, pp. 9-10 (La. App. 2 Cir.), 766 So.2d 738, 744, *writ denied*, 2000-2687 (La. 11/27/00), 775 So.2d 450; *Fine v. Regional Transit Auth.*, 95-2603 (La. App. 4 Cir. 6/26/96), 676 So.2d 1134, 1137; *Skipper v. Berry*, 1999-1433, p. 4-5 (La. App. 3 Cir. 3/15/00), 762 So.2d 56, 60; *Jenkins v. State*, 615 So.2d 405, 406-07 (La. App. 4 Cir.), *writ denied*, 617 So.2d 932 (La. 1993).

69. *Dronet v. Dronet*, 96,982 (La. App. 5 Cir.), 694 So.2d 426, 428, *writ not considered*, 97-1263 (La. 9/5/97), 699 So.2d 82.

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Mark W. Frilot is an associate in the Mandeville office of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. He concentrates his practice on construction law, construction litigation and commercial litigation. He has particular experience in design professional liability as well as public and private works claims and bidding disputes. (Ste. 201, 3 Sanctuary Blvd., Mandeville, LA 70471-3345)





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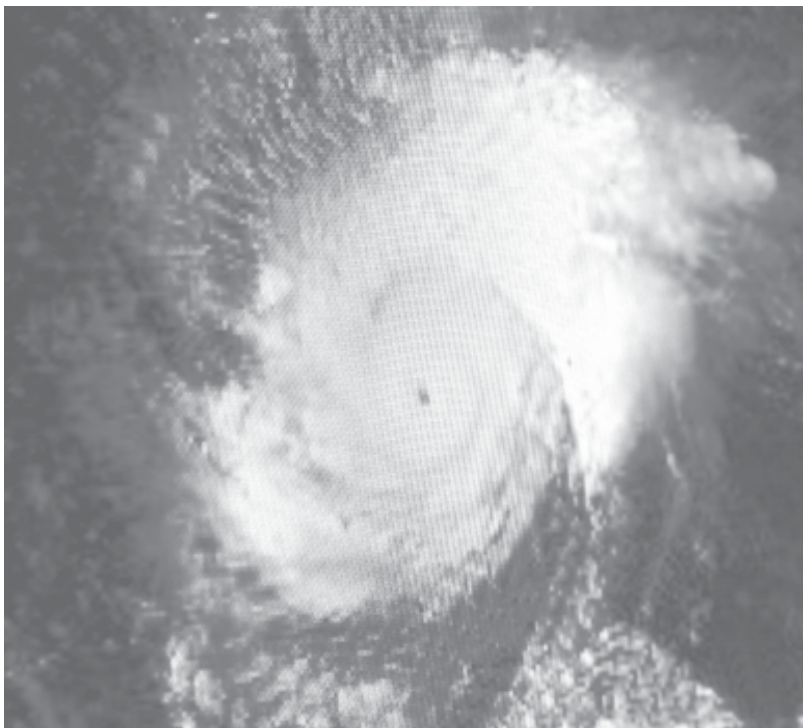
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Donations also have been received for the Call Center Fund and the Louisiana Legal Infrastructure Recovery and Rebuilding Fund.

The response from law firms, attorneys and law-related organizations nationwide has been overwhelming. As of March 17, more than \$440,000 has been received.

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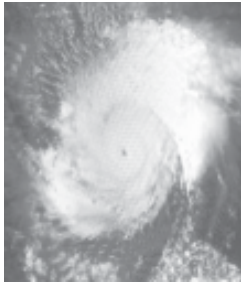
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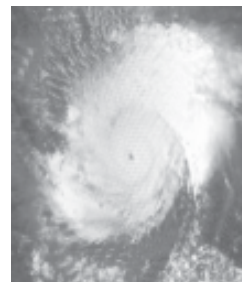
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MIDYEAR AWARDS. . . SPECIALIZATION

LSBA Recognizes 50-, 60-, 70-Year Members at Midyear Meeting Reception

More than 60 Louisiana State Bar Association (LSBA) members who have reached the half-century and beyond milestone in their professional careers were honored during the LSBA's Midyear Meeting in January.

The honorees received certificates from LSBA President Frank X. Neuner, Jr. and Louisiana Supreme Court Justice Jeffrey P. Victory during the awards reception.

50-Year Members

These honorees received their law degrees in 1956. They are listed with their hometowns and law schools.

Adelaide Wisdom Benjamin	New Orleans	Tulane
J. Joseph Blotner	Gretna	Tulane
Patrick T. Caffery	New Iberia	LSU
Thomas A. Casey, Sr.	Baton Rouge	Loyola

Jack C. Castrogiovanni, M.D.	New Orleans	Tulane
John Catlett Christian	Mandeville	Tulane
Bryant W. Conway	Baker	LSU
Joan A. Danner	Metairie	Loyola
Hon. Edward A. delaHoussaye III	Franklin	Tulane
James L. Dendy	Baton Rouge	LSU
James E. Diaz, Sr.	Lafayette	Tulane
John G. Discon	Mandeville	Loyola
James M. Dozier, Jr.	Farmersville	LSU
David M. Ellison, Jr.	Baton Rouge	LSU
James W. Finley	Houston, TX	LSU
Abraham P. Friedman	Houston, TX	Tulane
Hoffman Franklin Fuller	New Orleans	Tulane
Richard H. Gauthier	Chalmette	LSU
Gayle K. Hamilton	Shreveport	Legal study
Robert H. Hodges	Baton Rouge	LSU
W. Charles Hollier	Lafayette	LSU
Roger B. Jacobs	Metairie	Tulane

Continued next page



50-year honorees attending the reception were, seated from left, Hon. John D. Kopfler, J. Huntington Odom, Thomas A. Casey, Sr., Roger B. Jacobs, J. Joseph Blotner, Jack C. Castrogiovanni, M.D., John Catlett Christian, Alvin W. LaCoste and George Hefley Meadors.

Standing from left, W. Charles Hollier, W. Leonard Werner, Hon. Jack Crozier Watson, Hon. J. Bennett Johnston, Jr., Kent Satterlee, Jr., Daniel W. LeBlanc, Hon. James T. Trimble, Jr., John S. White, Jr., Patrick T. Caffery, David M. Ellison, Jr. and Sam Nelken.

Photo by Randy Bergeron

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60-year honorees attending the reception were Guyton H. Watkins, left, and Charles J. DeBaillon, Jr.

Photo by Randy Bergeron



Hon. J. Bennett Johnston, Jr.	McLean, Va.	LSU
S. Frank Jones	Tulsa, Okla.	Baylor
Hon. John D. Kopfler	Hammond	LSU
Alvin W. LaCoste	New Orleans	Loyola
Daniel W. LeBlanc	Baton Rouge	Loyola
Robert Liles, Jr.	New Orleans	Tulane
Huey K. McFatter	Lake Charles	LSU
Robert M. McHale	Lake Charles	Tulane
George Hefley Meadors	Homer	LSU
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George W. Woodard	Alamosa, Colo.	LSU

60-Year Members

These honorees received their law degrees in 1946. They are listed with their hometowns and law schools.

Mack E. Barham	Metairie	LSU
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Jordan Brown	New Orleans	Tulane
Edgar K. Corey	New Orleans	Tulane
Nestor Currault, Jr.	Gretna	Tulane
Charles J. DeBaillon, Jr.	Lafayette	Tulane
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A. Lester Sarpy	Metairie	Tulane
Guyton H. Watkins	New Iberia	Tulane
William E. Wright, Sr.	Metairie	Tulane

70-Year Members

These honorees received their law degrees in 1936. They are listed with their hometowns and law schools.

Ralph H. Agate, Jr.	Mobile, Ala.	LSU
Minos H. Armentor	New Iberia	LSU
George W. Bolton, Jr.	Rayville	LSU
Frederick Joseph Gisevius, Jr.	New Orleans	Loyola
R. Poinsett Johnson, Jr.	Lake Charles	LSU
H. Charles Korn	New Orleans	Loyola
Fontaine Martin, Jr.	New Orleans	Tulane



Teacher Paul Blankenship, right, is one of the two 2006 recipients of the President's Education Award for Excellence in Law and Civic Education. Presenting the award is Louisiana State Bar Association President Frank X. Neuner, Jr.

Photo by Randy Bergeron



Teacher Emmitt Glynn III, left, is one of the two 2006 recipients of the President's Education Award for Excellence in Law and Civic Education. Presenting the award is Louisiana State Bar Association President Frank X. Neuner, Jr.

Photo by Randy Bergeron

Two Social Studies Teachers Receive President's Education Awards

Two Louisiana social studies teachers were the recipients of the 2006 President's Education Award for Excellence in Law and Civic Education, presented by the Louisiana Center for Law and Civic Education (LCE) in January. The annual awards were presented to Paul Blankenship and Emmitt Glynn III by Louisiana State Bar Association (LSBA) President Frank X. Neuner, Jr. during the LSBA's Midyear Meeting in Baton Rouge.

Recipient Paul Blankenship is a social studies teacher at Caddo Middle Magnet School in Shreveport. He encourages students to think independently and to evaluate the reasons why and how living under the rule of law is a responsibility to be taken seriously. "Understanding the law helps prepare a young person for his or her role in society," Blankenship said. "The youthful struggle to find identity is in part the development of a sense of balance between the needs of the self and those of society, between rights and responsibilities," he said.

Recipient Emmitt Glynn III is a high school social studies advance placement educator at Episcopal High School in Baton Rouge. His fervor for teaching law-related education is acknowledged by his students who were supportive of his application. "Mr. Glynn is an excellent teacher for many reasons. First, he cares very deeply about government and the law and expanding his knowledge of them. . . He is devoted to his students and to passing on knowledge to them. Mr. Glynn often took time after class to discuss with us any concept we did not fully understand," his students said.

The LCE is a statewide educational nonprofit organization funded, in part, by the Louisiana Bar Foundation's IOLTA program and through various private and public grants and supporters.

For more information about the LCE, visit www.lsba.org/lce.

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AV RATED

LAP Offering Special Post-Hurricanes Program for Lawyers and Families

William R. Leary, director of the Lawyers Assistance Program, Inc. (LAP), is reminding Bar members of the availability of a special service established post-hurricanes to deal with mental trauma.

The Lawyers Assistance Program, Inc. (LAP) has contacted trauma and critical incident therapists who have volunteered to help lawyers and their families by telephone.

This process offers an informal opportunity for participants to discuss the impact of the event. It has proven to significantly diminish both acute and longer-term clinical consequences, especially when provided reasonably early. This is the opportunity to discuss the impact of this event on lives.

Leary and his wife, Kathleen (a licensed addiction counselor and employee assistant professional), will offer follow up beyond the crisis with appropriate referrals and the formation of mental health support groups across the state.

Use the numbers below to make the initial call, then call "866-354-9334" for LAP to follow up.

Listed below are the names and "800" numbers of these professionals:

Christine Long 800-343-8527
 Roy Scott 800-989-7406
 Bonnie Waters, Nancy Brown
 and Jeff Fortang 800-525-0210
 Steven Gordon, Chris Anderson
 and Robin Ryan 800-634-7710
 Scott Weinstein 800-282-8981
 Mike Long, Meloney
 Crawford-Chadwick and
 Shari Gregory 800-321-6227
 Barbara Harper and Service
 Center Staff 800-945-9722
 Richard LaMadeleine and
 Ashli Callaway 800-445-4232, x 3327
 Pan Adams 501-920-6891

Applications Being Accepted for Bankruptcy Law Certification

The Louisiana Board of Legal Specialization (LBLS) has announced that applications for 2007 certification in both Business Bankruptcy Law and Consumer Bankruptcy Law will be accepted through September 2006.

Both certifications may be simultaneously applied for with the LBLS and the American Board of Certification, the testing agency. Information concerning the American Board of Certification will be provided with the LBLS application form(s).

If you meet the minimum five-year, full-time practice requirement and are interested in applying, fax or mail the following information to:

Catherine S. Zulli, Executive Director
Louisiana Board of Legal Specialization
601 St. Charles Ave., New Orleans, La. 70130-3404
Fax (504)598-6753
E-mail czulli@lsba.org

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IT'S TIME TO BOOK A LISTING IN 'WHO'S WHO IN ADR 2006'

Arbitrators and Mediators: The October 2006 Louisiana Bar Journal is focusing on YOU!

The special Arbitrators and Mediators Directory will feature brief articles and photographs of arbitrators and mediators (**INDIVIDUALS ONLY**).

The articles should be **150 words MAXIMUM**. Please provide your address, phone, fax, e-mail address and Web site information at the end of the listing (not part of the word count).

Submit either original photos or digital photos. Digital photos should be submitted separately from the article, in either .tif, .eps or .jpg format (the order of preference). **DO NOT** submit digital photographs embedded in word processing programs; send the photograph as a separate file.

Fees are as follows:

	By June 30	By July 31
Directory/Web Combo	\$120*	\$150*

** Arbitrators/mediators with listings in the 2005 directory should call or e-mail Darlene M. LaBranche for additional pricing information.*

Articles and photographs must be for individuals only. No group articles or group photographs will be used. But, as an **ADDED BONUS**, firms which have three or more arbitrators/mediators purchasing individual listings will receive a free **firm** listing in the section. (Firms are responsible for submitting the additional information, 150 words maximum.)

If you would like to repeat a prior listing and photo, you may send us a photocopy of that listing along with your check; please provide the year the listing appeared. (Digital photos appearing in ADR directories are archived back to 2000.)

To reserve space in the directory, mail your article, disk, photo and check (*payable to Louisiana State Bar Association*) to: **Publications Coordinator Darlene M. LaBranche, 601 St. Charles Ave., New Orleans, La. 70130.**

Articles and photos may be e-mailed to dlabranche@lsba.org, and checks should be mailed or hand-delivered.

If you require more information, please contact: **Darlene M. LaBranche, (504)619-0112 or (800)421-5722, ext. 112.**

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adr_directory.asp](http://www.lsba.org/Consumer_Services/adr_directory.asp)

Sample of the Individual Listings

Jane Smith
XYZ Arbitration Services, Inc.

Jane Smith has been affiliated with XYZ Arbitration Services, Inc. for five years, handling dispute resolution mainly for the insurance industry. Smith received a BS degree in political science in 1982 from Tulane University and her JD degree in 1987 from Louisiana State University Paul M. Hebert Law Center. Prior to joining XYZ, she was in private practice. Smith believes her professional experience is well suited to the field of arbitration. "This growing trend, to arbitrate rather than litigate, will be beneficial to the legal profession and the burgeoning court system," Smith said.

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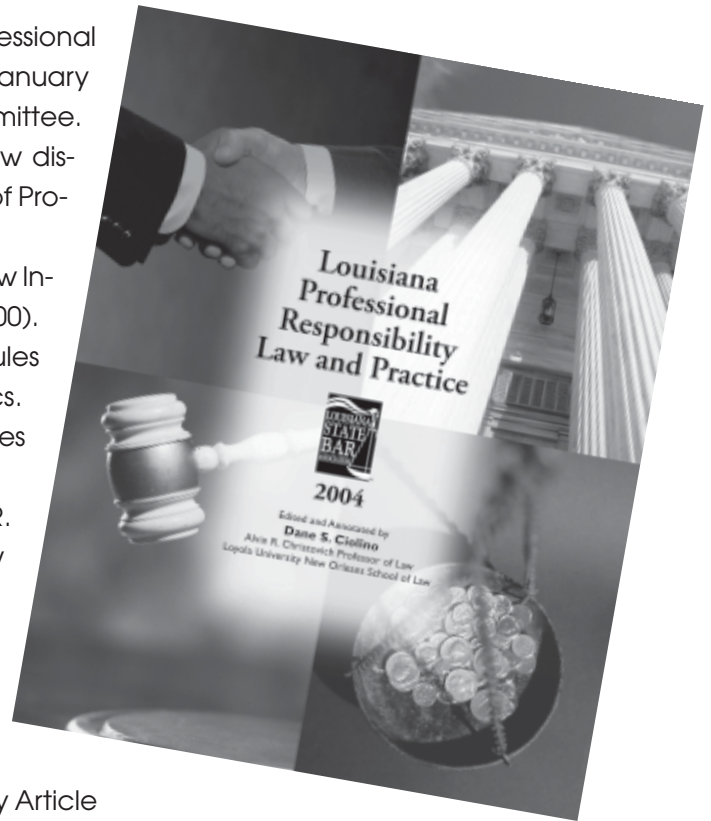
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PUBLIC Ethics Advisory Opinions

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

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

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

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

PUBLIC Opinion 05-RPCC-006¹

Client Confidentiality vs. Subpoena/Court Order to Testify

*A lawyer **may** disclose confidential information not otherwise permitted to be disclosed under Rule 1.6(b) of the Louisiana Rules of Professional Conduct, if the lawyer is subpoenaed, asserts the "attorney-client privilege," and is ordered to reveal the information after a contradictory hearing.*

What should a lawyer do when subpoenaed to testify about a client or former client's case? The Rules of Professional Conduct Committee considers the ethical concerns arising under Rule 1.6 of the Louisiana Rules of Professional Conduct, as revised and effective March 1, 2004, and which is identical to Rule 1.6 of the ABA Model Rules of Professional Conduct:

. . . (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) . . .

. . . (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . .

. . . (6) to comply with other law or a court order. . .

This opinion addresses only the question of what the lawyer should do if he is subpoenaed or ordered to testify regarding confidential information which the client or former client does not consent to disclose. It does not address the other exceptions under Rule 1.6.²

Underlying Principles

Before reviewing the situation governed by this Rule, the underlying policy considerations need to be discussed. Confidentiality is the key ingredient in an attorney-client relationship. This is the basis for the trust the client has in the lawyer, and the willingness of the client to make full disclosure to the lawyer to obtain the best legal advice and representation. Further, with full disclosure, the lawyer can advise the client of the legality of proposed conduct and to refrain from unlawful conduct.³ When the lawyer gives the client this advice, the lawyer is helping to preserve the integrity of the laws and legal process. Without the confidentiality rule, the client would not be forthcoming, the lawyer would not be able to give effective legal advice or representation,⁴ and the client may not know what is illegal. Both the client and the legal system would be undermined.

"Confidentiality" vs. "Attorney-Client Privilege"

A lawyer has an obligation to his own client to avoid revealing information relating to the representation unless the client has provided informed consent, the disclosure is impliedly authorized in order for the lawyer to carry out the representation, or one or more of the exceptions listed in Rule 1.6(b) of the Rules of Professional Conduct applies.⁵

There is a distinction between the “attorney-client privilege” and “confidentiality.” While often confused and interchanged, the “attorney-client privilege” is a rule of evidence⁶ — *i.e.*, a rule of substantive law — whereas “confidentiality” is an ethics concept and a much broader, all-encompassing principle. However, they are tied together when determining whether to reveal a client confidence in response to a subpoena or court order.

Subpoena and Court Orders

What does a lawyer do when he is subpoenaed to testify? First, the lawyer should discuss the subpoena and its ramifications with the client or former client involved. If the client has no objection, the lawyer may disclose the information.⁷

If the client objects, the lawyer’s next step is to review Louisiana Code of Evidence Articles 506-508. If the subpoena seeks information protected by the “attorney-client privilege,” the lawyer should assert that privilege. In both civil⁸ and criminal⁹ cases, there is a requirement for a contradictory hearing and there is a high standard which must be met before a court can order disclosure of information.¹⁰ The subpoena must state the information sought with particularity, and the issuing party must show that there is no practicable alternative means of obtaining the information.¹¹

After the contradictory hearing, if the court orders the lawyer to disclose the information, Rule 1.6(b)(6) allows the lawyer to testify.¹² The lawyer can still refuse without violating the ethics rules because Rule 1.6(b) says “. . . *may* reveal. . .,” but the lawyer will face contempt for disobeying the court’s order, since the disclosure is permitted pursuant to a court order.¹³ It is not unethical for the lawyer to testify, if ordered to do so by the court.

Conclusion

The Committee believes that, while

the general rule prohibits a lawyer from revealing confidential information, if the lawyer is ordered to do so by a court following a contradictory hearing pursuant to the Louisiana Code of Evidence,¹⁴ the lawyer may reveal the confidential information.

FOOTNOTES

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

2. See Rule 1.6(b)(1)-(5) of the Louisiana Rules of Professional Conduct (2004): “. . . to prevent reasonably certain death or substantial bodily harm . . .”; “. . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial bodily injury to the financial interests or property of another . . .”; “. . . to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud . . .”; “. . . to secure legal advice about the lawyer’s compliance with these Rules . . .”; “. . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . .”

3. See also Rule 1.2(d) and Rule 1.4 of the Louisiana Rules of Professional Conduct (2004).

4. See also Rule 1.1(a) of the Louisiana Rules of Professional Conduct (2004): “. . . A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation . . .”; and also Rule 2.1: “. . . In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other

considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation . . .”

5. Rule 1.6(a) of the Louisiana Rules of Professional Conduct (2004).

6. Article 506 of the Louisiana Code of Evidence defines the “Lawyer-client privilege.”

7. *Id.*, Rule 1.6(a): “. . . A lawyer shall not reveal information relating to the representation of a client **unless the client gives informed consent** . . .” [emphasis added].

8. Louisiana Code of Evidence Article 508(A).

9. Louisiana Code of Evidence Article 507(A).

10. *Id.*, LCE Article 507(A) and LCE Article 508(A). Aside from minor inherent differences between criminal practice and civil practice settings, these two Articles are nearly identical in listing the heavy burden that must be carried in order for a court to order a lawyer to appear or testify with respect to representation of a client or former client: “. . . (1) the information sought is essential to the successful completion of an ongoing investigation. . .” [507: “. . . prosecution or defense . . .”; 508: “. . . is essential to the case of the party seeking the information, and is not merely peripheral, cumulative, or speculative . . .”]; “. . . (2) the purpose of seeking the information is not to harass the attorney or his client . . .”; “. . . (3) with respect to a subpoena, the subpoena lists the information sought with particularity, is reasonably limited as to the subject matter and period of time, and gives timely notice. . .”; and “. . . (4) there is no practicable alternative means of obtaining the information . . .”

11. *Id.*, LCE Article 507(A) and LCE Article 508(A).

12. Comment [13] to ABA Model Rule 1.6, in part, indicates: “. . . Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court’s order . . .”

13. Rule 1.6(b)(6) of the Louisiana Rules of Professional Conduct (2004). See also Rule 3.4(c): “. . . a lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists . . .”

14. *Id.*, LCE Article 507(A) and LCE Article 508(A).

FOCUS ON Professionalism

By Bobby J. Delise

WHEN IS NOT TELLING THE TRUTH A LIE?

When is not telling the truth a lie? By training, experience and, some may argue, instinct, we attorneys are known for our craftiness, imagination and originality of thought. One of our most noted skills is our ability to *word craft*. Oftentimes, however, our zeal in representing our clients provides us with an opportunity to use our language in such a way to, should we say, “stretch the truth.” Taking this liberty is not reserved for members of the bar; esteemed members of the bench frequently exercise judicial privilege in disguising the truth “in the interests of justice.”

When is telling a “non-truth” simply employing the legal process to our client’s advantage? When are “white lies” acceptable? In simple terms, when is *not telling the truth a lie*?

The elder members of our bench and bar reminisce about the “good ole days” when agreements or settlements were perfected with a warm handshake, a kind pat on the back or lifted glasses in toast. Today covenants must be confirmed with reams of executed complex pleadings or documents, written correspondence and stifling language entered on the record. Where has the trust gone? And, is the loss of such trust the product of the commercialization of the practice, increased competition and a “win at all costs” approach to litigation?

Misrepresentation and untruths find their way into all aspects of our profession. Misleading attorney advertisements give false hope and expectations to a naïve and desperate public. Knowingly specious defenses to valid insurance claims are supported and encouraged by in-house counsel when a true assessment reveals that the claims are appropriate and meritorious. Litigation supported by exaggerated claims, though not rising to a level of fraud, weakens the judicial process and lends support to the ever

present and growing loss of confidence and respect for attorneys. Withholding exculpatory or condemning evidence, not specifically requested in formal discovery or formal rules of procedure, by private and public counsel, under the excuse of “you didn’t ask for the right documents!,” is often displayed by attorneys skilled in the art of “zealously advocating the interests” of their clients.

There are many examples of customary *word crafting* by members of our bench and bar:

Attorney to Attorney

I will get you the requested discovery by week’s end.

My expert will testify [fill in the blank].

I can have the witness appear without the need of a subpoena.

I sent you the pleading two weeks ago.

I have given you all of the documents.

There are no impeachment witnesses the State is withholding.

I am not going to jam you on a deadline.

I only have five more minutes of questioning.

My client did not [fill in the blank].

Attorney to Client (or Prospective Client)

I have never lost a case like this.

You have nothing to lose.

If you hire me in the case, I will get you a million dollars.

It’s not against the law for me to get you a new truck if you agree to hire me.

Fire your present attorneys. Our firm is much better than they are.

I always return my calls.

I’ll provide you my opinion letter with more than enough time to make a decision before trial.

Certainly these are the hours I spent on this file.

I, and not an associate, will be the

only attorney in our firm handling your case.

Your case is ready for trial.

It is in your best interests to [fill in the blank].

Judges to Attorneys

The hearing on this motion is set for 10 a.m. and you’ll be out of here soon thereafter.

You are first on the docket.

I will let you know with more than enough time whether we are going to trial to give you enough time to contact your witnesses and not incur unnecessary expenses.

The Court will get you a judgment as soon as we possibly can.

I have never had any ex parte discussions with opposing counsel on this case.

I have thoroughly read your memorandum.

I can find absolutely no reason or justification to recuse myself from this case.

Attorneys to Judges

I have fully explained all of your instructions to my client.

If called to testify, this witness will state [fill in the blank].

That is not what our agreement was.

I have done all possible to get opposing counsel my discovery responses.

My client ordered me to take this position.

That is not what my argument was.

I promise that I will act in good faith.

As members of the bench and bar, we are obligated to avoid misrepresentations. This obligation is based on our professional and ethical duties to the court, public and fellow bar members. These duties are clearly enunciated in the codes and rules that govern our conduct.

The Lawyer's Oath

... I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by an artifice or false statement of fact or law

Louisiana Code of Professionalism

My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue

Louisiana Rules of Professional Conduct

Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact

Rule 8.4 Misconduct (Identical to ABA Model Rules – Rule 8.4)

It is unprofessional misconduct for a lawyer to: . . .

- (c) *engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . .*

Rule 3.3 Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to

be directly adverse to the position of the client and not disclosed by opposing counsel; or

- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Louisiana Supreme Court Rules on Litigation Conduct

Lawyers' Duties to the Court

We will not knowingly misrepresent, mischaracterize, misquote, or miscite facts, authorities in any oral or written communication to the court.

Judges' Duties to the Court

We will be punctual in convening all hearings, meetings and conferences.

We will give the issues in controversy deliberate . . . analysis.

We will not adopt procedures that needlessly increase litigation expense.

As we all know, there are additional authorities imposing candor and truthfulness to the members of the bar such as Louisiana Code of Civil Procedure Articles 371 and 863, as well as Rule 11 of

the Federal Code of Civil Procedure.

How can it be that, in light of the overwhelming authorities on the issue of candor, honesty and truthfulness, our profession is so adept at "stretching the truth"? Are the submissions of "untruths" violations of our ethical and professional obligations? Or, are such statements simply accepted and recognized "tools of our trade"?

Perhaps a first step in discussing this matter is to investigate the real and indirect costs associated with our profession's tendency to take liberty with the truth. Does not misrepresentation spur the real costs of prolonged and unnecessary litigation expense? Is there not a great social cost associated with a lessened confidence in the integrity of the judicial system? And, perhaps most importantly, doesn't our profession suffer great personal strife, marked by depression, anxiety and stress, when the pursuit of truth becomes secondary to the goals of self gain, ambition and ego?

It is often suggested that the shortcomings of our profession are just a reflection of the greater ills of our culture. Examples of dishonesty, lies and distortions are epidemic in all arenas of our society: politics, government, business, medicine and the entertainment industry. Why should our profession be more vigilant or circumspect than others?

It is respectfully suggested that our profession take the lead role in our society in championing truth and honesty because it is our profession that historically drafts, enacts, administers and adjudicates the fabric that binds us together and keeps us civilized, namely the LAW. If our profession disrespects or ignores truth and trust in each other's word and integrity, we will lose the fundamental trust in each other, and perhaps ourselves. Take my word on it.

Bobby J. Delise is co-chair of the Louisiana State Bar Association's Professionalism and Quality of Life Committee. He is a partner in the Metairie firm of Delise, Amedee & Hall. He can be reached at (504)836-8000 or via e-mail at bdelise@dahlaw.com.



Criminal Law

Apprendi and *Blakely* Still Viable in Sentencing

State v. Washington, 05-0431 (La. App. 4 Cir. 12/7/05).

Abraham Washington was convicted by a jury of second-degree battery and attempted false imprisonment while armed with a dangerous weapon. He was then sentenced to five years at hard labor on each count, concurrent, with the sentence for second-degree battery to be served without benefit of parole. Wash-

ington appealed the sentence, claiming that the imposition of an enhanced sentence for use of a firearm during a crime of violence pursuant to La. Code of Criminal Procedure art. 893.3(B) and (G) violated *Blakely v. Washington*, 124 S.Ct. 2531 (2004), and *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). *Apprendi* holds that any fact other than a prior conviction that increases the penalty for a particular conviction beyond the statutory maximum must be found by a jury beyond a reasonable doubt. *Blakely*, in turn, defines a statutory maximum as the sentence to be applied based on facts found by a jury beyond a reasonable doubt under a state-sentencing-guideline scheme.

In Washington's case, the statutory maximum sentence for second-degree

battery is five years at hard labor with no limit on parole. The trial court relied on La. Code of Criminal Procedure art. 893.3 (B) in sentencing Washington, which provides:

If the court finds by clear and convincing evidence that the offender actually used a firearm in the commission of the felony or specifically enumerated misdemeanor for which he was convicted, the court shall impose a term of imprisonment of five years; however, if the maximum sentence for the underlying offense is less than five years, the court shall impose the maximum sentence.

Washington argued that (a) imposition of five years without benefit of parole was an increased penalty and (b) imposition of the sentence based on judicial fact finding rather than jury findings violated *Apprendi* and *Blakely*. The court of appeal, without much in the way of discussion, agreed that the penalty had in fact been increased by denial of parole benefits, and then turned to art. 893.3.

Art. 893.3 had previously been attacked on *Apprendi* grounds and had not been overturned. The court of appeal clarified that art. 893.3 provides for a mandatory-minimum sentence for offenders convicted for felonies using a firearm, rather than an alternative sentence. The factual key to Washington's case was that the mandatory-minimum sentence exceeded the maximum sentence for which Washington was convicted by the jury, while most crimes sentenced under 893.3 will have comparable statutory sentencing provisions. As a result, Washington's sentence was vacated as constitutionally infirm, and the case remanded for resentencing consistent with the constitutional principles announced.

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Double Jeopardy

State v. Joseph, 05-0186 (La. App. 3 Cir. 11/2/05), 916 So.2d 378.

John Joseph pled guilty to two counts of armed robbery and one count of aggravated burglary, based on his admission that he and a co-defendant kicked in the door of a home and took a gun from the resident while the co-defendant hit another resident with a bottle of bleach. After taking money from the residents, they fled the scene.

Joseph appealed his sentence and conviction, with a variety of bases. The two that were found important by the court of appeal were the issues of restitution and double jeopardy. In this case, the trial court did not specify an amount of restitution, but instead stated simply that the restitution should be paid "as required by law." The court found that this was an indeterminate sentence and thus illegal. The sentence was vacated and remanded

for a hearing on the amount of restitution. In what may be dicta, the court noted that when restitution is ordered, either as a condition of probation or as part of a sentence, the record should be sufficient to review the trial court's order, indicating a preference for hearings, or at least substantial evidence in the record.

While Joseph's guilt was established by plea, the factual basis at the hearing showed that he had taken a single item from the homeowner, namely a gun. While he did not contest the burglary charge, the state's theory as to the armed robbery was that the taking of the gun was itself armed robbery, even though nothing was taken after stealing the gun. The transcript excerpt in the reported case shows the tautological reasoning. Although the state argued that guilty pleas waive all nonjurisdictional defects not reserved, the court found that double jeopardy was, in fact, of constitutional magnitude.

Applying the "same evidence" test,

the court found that the "taking" of the gun to satisfy the armed robbery statute was the same evidence required to satisfy "after entering arms himself with a dangerous weapon" required for aggravated burglary. As the same evidence test was met, the armed robbery charge was dismissed by the court of appeal and the case remanded for resentencing and a hearing on restitution, if restitution was ordered as part of the new sentence.

— **Michael S. Walsh**

Chair, LSBA Criminal Law Section
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Joseph K. Scott III

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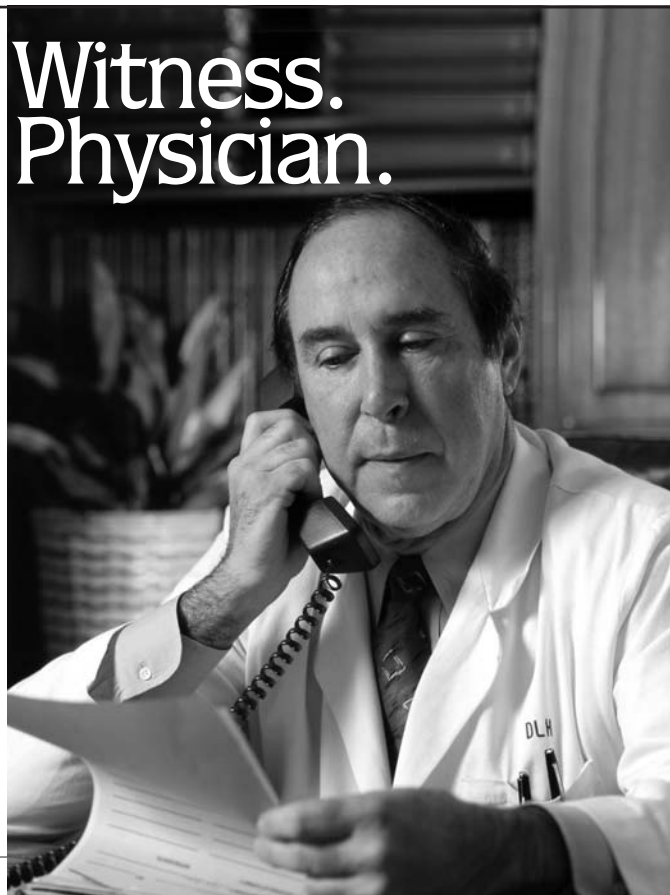
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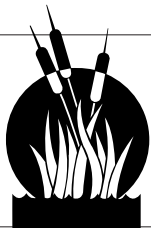
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Environmental Law

EPA Issues Final All-Appropriate-Inquiries Rule

On Nov. 1, 2005, the Environmental Protection Agency (EPA) issued a final rule establishing what constitutes "all appropriate inquiries" for purposes of relying on certain defenses to liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Amendments) was signed into law by President Bush on Jan. 11, 2002. The Brownfields Amendments to CERCLA clarified the requirements necessary to establish the innocent-landowner defense. The Brownfields Amendments also amended CERCLA to provide additional protection from liability for bona fide prospective purchasers and contiguous landowners. EPA's final rule sets forth minimum standards that must be met in order to rely on these three defenses to CERCLA liability.

The final all-appropriate-inquiries rule is generally consistent with the prior practice of conducting environmental site assessments under ASTM Standard

E1527-00. The final rule, however, establishes a more stringent definition of environmental professional and expands the scope of the environmental investigation. Some of the more significant changes adopted by the new rule are:

- ▶ environmental investigations must be carried out under the supervision of environmental professionals who meet specific certification, education and experience requirements;
- ▶ interviews with the current owner and occupant of the subject property are now mandatory;
- ▶ interviews with neighboring property owners are now mandatory for abandoned sites;
- ▶ the period of time covered by the environmental review is from the present and dates back to when the property first contained structures or was used for almost any purpose;
- ▶ the records review has been expanded to include tribal and local records in addition to federal and state records;
- ▶ a visual inspection of the subject property and adjoining properties is now required; and
- ▶ the environmental professional is required to comment on any data gaps and the significance of these data gaps.

The all-appropriate-inquiries rule applies to any public or private party who may seek protection from CERCLA liability based on the innocent-landowner, bona fide prospective purchaser, or contiguous-landowner defenses. The rule also applies to parties seeking grants under

EPA's Brownfields Grant program.

The final rule becomes effective one year from its date of promulgation, Nov. 1, 2006. Prior to that time, prospective purchasers may continue the current practice of relying on ASTM Standard E1527-00. Parties also may rely on the newly revised ASTM Standard E1527-05, which has been revised to reflect the new all-appropriate-inquiries requirements.

— **Thomas D. Gildersleeve III**
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Family Law

Custody

Stelluto v. Stelluto, 05-0074 (La. 6/29/05), 914 So.2d 34.

The Supreme Court reversed the court of appeal and reinstated the trial court's finding that Louisiana had jurisdiction in this UCCJA case. Even though California was the child's home state and the mother filed suit in Louisiana within six days of coming here from California, Louisiana had significant connections regarding the child via the mother's previous residence in Louisiana. Justices Victory and Traylor joined in Justice Weimer's vociferous dissent.

Schaeffer v. Schaeffer, 40,562 (La. App. 2 Cir. 10/26/05), 914 So.2d 631.

Given the mother's drug history and other issues regarding her fitness and lifestyle, physical custody of every other weekend, alternating holidays, and three two-week periods during the summer, totaling 109 per year, was sufficient to meet the frequent-and-continuing contact standard. Because both parties did

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not have jobs and were living with and being supported by their families, there was no abuse of the trial court's discretion in denying Ms. Schaeffer interim spousal support.

In re of J.B.A., 40,567 (La. App. 2 Cir. 10/26/05), 914 So.2d 654, 05-2390 (La. 2/5/06), So.2d 1037.

Although the court of appeal agreed with the trial court that the paternal and maternal grandparents should be granted joint custody, it reversed the designation of the paternal grandparents as domiciliary custodians and, instead, named the maternal grandparents as domiciliary custodians. The court found that the trial court ignored the overwhelming evidence, including the testimony of two mental-health professionals and the clear preference of the children, that the maternal grandparents provided a more stable and healthy environment.

Colvin v. Colvin, 40,518 (La. App. 2 Cir. 10/26/05), 914 So.2d 662.

The court of appeal reversed the trial court's award of alternating custody of an 8-year-old child on a yearly rotating basis between the parents, who lived in different states. The court found, initially, that there had been no material change of circumstances affecting the child's welfare, and that, in any event, an annual rotation of custody was not in the child's best interest. The court of appeal stated that an interstate move not of a significant distance is not, per se, sufficient to establish a change of circumstances.

Child Support

State v. Neathery, 39,796 (La. App. 2 Cir. 7/29/05), 909 So.2d 40.

Child support was made retroactive to the date Mr. Neathery was actually served with the state's petition, rather than to the

date of the judicial demand, because the state failed to produce evidence supporting its claims of numerous attempts to serve Mr. Neathery, and because the court found that an award of back due support over a five-year period would not be fair since the state's inaction contributed to the delay. However, the trial court abused its discretion in not awarding child support for the period when the child participated in a boot camp where he attended classes and obtained a GED, and where the mother paid certain personal expenses for the child. The trial court also erred in not awarding child support during the period the child was employed. While the court can consider the child's earnings in setting child support, the child's employment does not excuse the parent's support obligation.

Moffett v. Moffett, 40,161 (La. App. 2 Cir. 9/21/05), 911 So.2d 928.



E. JOSEPH BLEICH



JOHN E. CAULKING



J. GREGG COLLINS



THOMAS K. FOUTZ



JOEL W. FRIEDMAN



RICHARD J. GANUCHEAU



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The trial court did not err in appointing an attorney to be served and to represent Mr. Moffett, who was a nonresident who had previously submitted to the jurisdiction of the court. The attorney had diligently sought to locate Mr. Moffett, so the child-support judgment against him was affirmed.

Property

McDonald v. McDonald, 40,035 (La. App. 2 Cir. 8/17/05), 909 So.2d 694.

The parties agreed that Mr. McDonald would "maintain the status quo," which included his paying the mortgage payments on the former matrimonial domicile until the home was partitioned. The trial court held, and the court of appeal affirmed, that Ms. McDonald was not entitled to reimbursement for mortgage payments during the interim spousal support period because, as the court found, "she did not make any mortgage payments." Mr. McDonald, however, was entitled to reimbursement for payments made after the interim-spousal-support period terminated. Regarding the valuation of two businesses, Ms. McDonald's financial expert valued the two businesses using "generally accepted appraisal methods," while Mr. McDonald's expert valued them based on his business experience. The court affirmed the trial court's valuation of the companies at Ms. McDonald's expert's value, but deducted 25 percent as an adjustment in accordance with Mr. McDonald's expert's tes-

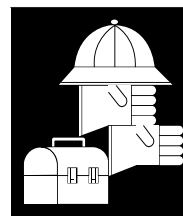
timony regarding "the 'real world' elements of the finance company business."

Craft v. Craft, 40,344 (La. App. 2 Cir. 10/26/05), 914 So.2d 648.

Ms. Craft was entitled to reimbursement for the increase in the value of Mr. Craft's separate property business due to the reduction of business indebtedness and the increase in its cash assets, which led, along with other factors, to a gain in the retained earnings and total equity of the business during the marriage. The court found that Mr. Craft paid himself a small salary and that the unpaid retained earnings were used to increase his equity. She also was entitled to reimbursement for business earnings Mr. Craft used to pay his brother's debt. She also was entitled to reimbursement for funds received from the sale of her separate property vehicle, which were then used to purchase a community property vehicle. Mr. Craft was not entitled to one-half of the value of that vehicle because he provided no proof of its value. He also was not entitled to expert witness fees for his CPA's testimony since the CPA was not qualified as an expert and he did not present to the court any evidence of her fees.

— **David M. Prados**

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Labor and Employment Law

FLSA Covers Donning But Not Waiting to Don

IBP, Inc. v. Alvarez, 126 S.Ct. 514 (2005), involved consolidated cases that addressed questions concerning coverage of the Fair Labor Standards Act of 1938 (FLSA) as amended by the Portal-to-Portal Act of 1947. A principal question presented in both consolidated cases was whether the time that employees spent walking between a changing area and the production area was compensable under the FLSA. The second question was whether the time employees spent waiting to put on protective gear was compensable.

The court held that any activity that was integral and indispensable to a principal activity was itself a principal activity under Section 4(a) of the Portal-to-Portal Act, and that any walking time that occurred after the beginning of the employee's first principal activity and before the end of the last principal activity was covered by the FLSA. Similarly, the court found that donning and doffing gear that was integral and dispensable to the employee's work was a principal activity under the statute. However, the time that employees had to spend waiting to don the first piece of gear was a preliminary activity, two steps removed from the productive activity on the assembly line, and not covered by the FLSA.

Pilots Not Employees of Pilot Association

In **Coleman v. New Orleans & Baton Rouge S.S. Pilots' Ass'n**, 97 Fair Empl. Prac. Cas. (BNA) 369, ____ F.3d ____ (5 Cir. 2006), the 5th Circuit rejected the plaintiff/job-applicant's ADEA claim against two pilots' associations and one

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association's board of commissioners because it found that the defendants were not employers, employment agencies or labor organizations under the statute. Although the associations elected individuals to apprenticeships and certified their completion of the apprenticeship program to the governor who would appoint a certified apprentice to a pilot job when one became available, there was an absence of any traditional employer relationship between the associations and the pilots.

The 5th Circuit weighed the factors set forth in *Clackamas Gastroenterology Associates v. Wells*, 123 S.Ct. 1673 (2003). The associations did not hire or fire the pilots; they did not supervise their work; the pilots retained personal liability for their own negligence; and they had ultimate control over the associations' rules and regulations. Therefore, the court concluded that because the pilots were not employees of the associations, the associations were not employers covered by the statute.

Informal Misrepresentations Can't Modify Plan Terms

In *Mello v. Sara Lee Corp.*, 431 F.3d 440 (5 Cir. 2005), the 5th Circuit ruled that a participant could not detrimentally rely on inaccurate pension benefit statements that contradicted the terms of the pension plan itself. The appellate court agreed with the district court that its *de novo* review was proper since it was not reviewing interpretation of plan terms but rather was applying the legal theory of estoppel. The court rejected the plan's argument that a misrepresentation could not be material if it was in an informal communication.

Rather, the court found that Mello had

established the first element of ERISA estoppel: a reasonable person could have been misled by the undisputed misrepresentation of his monthly benefits in the benefit statements sent by the company. However, the court also found that it was unreasonable for Mello to rely on the misrepresentations because the written terms of the plan were unambiguous and did not entitle him to greater benefits. ERISA estoppel is not permitted if it is based on an oral modification of clear plan terms. Therefore, Mello's ERISA estoppel claim failed.

City Owes State Supplemental Pay

The Louisiana Supreme Court denied writs in a 3rd Circuit decision affirming summary judgment for the plaintiffs. *Bailey v. City of Lafayette*, 05-0029 (La.

App. 3 Cir. 6/1/05), *writ denied*, 05-1690 (La. 1/9/06). The city had violated state wage statutes benefiting its police officers and firefighters by reducing the portion that the city contributed to each by the amount that each received in state supplemental pay. The trial court ordered the city to restore to each plaintiff an amount equal to all sums designated as state supplemental pay from three years before the original suit was filed, together with all retirement, fringe benefits and legal interest until paid.

— **Nancy Picard**
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Professional Liability

ACOG Bulletin Called into Question

Salvant v. State, 04-0805 (La. App. 4 Cir. 6/1/05), 904 So.2d 946.

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

The medical-review panel found no breach of a standard of care and concluded that the injury resulted from a "yet unknown mechanism." The case was tried to a judge, who rendered judgment in favor of the defendants.

One issue raised on appeal by the plaintiffs involved ACOG Practice Bulletin No. 40, which concluded that many brachial plexus injuries occur without shoulder dystocia. The results of the author's survey were based on a computerized review of hospital discharge summaries during a four-year period and concluded that "34 to 47 percent of all brachial plexus injuries occur routinely

without a shoulder dystocia diagnosis by the medical staff."

Plaintiffs' expert witness testified that the findings of the author of the ACOG Bulletin were misleading because of the fact that if a child has a shoulder dystocia complication during delivery and the diagnosis is not documented, but the child nevertheless suffers a brachial plexus injury that is documented in the chart, the conclusion may be incorrectly drawn that the dystocia had nothing to do with the injury. The author admitted in the study that it had "an inherent ascertainment bias" because the absence of a shoulder dystocia designation in the medical records may actually represent nonrecognition of the complication or incomplete documentation by the medical staff who prepared the chart.

The court ultimately concluded that the medical-review panel's and the trial court's opinions were incorrect, and it rendered judgment in favor of the plaintiffs for the statutory maximum, finding that the panel opinion:

[wa]s not credible because it merely offers conclusions, and does not explain the obvious question: If the doctor's negligence was not the sole and proximate cause of the injury,

then what identifiable and known intrauterine mechanism or force caused the injury? The medical review panel did not venture to offer any rational explanation to this question, but instead concluded that it was not their purpose to attribute causation.

The five-judge panel of the 4th Circuit was divided 3-2, with two judges issuing dissenting opinions.

HIPAA Supersedes Contrary Provisions in State Laws

State v. Downs, 04-2402 (La. App. 1 Cir. 9/23/05), ____ So.2d ____.

The defendant was charged with DWI and other moving violations. She filed a motion to suppress the results of blood-alcohol tests and to exclude her other medical records from evidence because the state failed to comply with the Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. § 160.300 *et. seq.*, and the Louisiana statute pertaining to obtaining medical records, La. R.S. 13:3715.1(B)(1). The trial court denied the defendant's motion, and the appellate court granted a writ to review that ruling.

During the trial court's hearing, no

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evidence was introduced and no witnesses testified. The state argued that it had issued a "D.A. subpoena" to obtain the defendant's medical records, but it did not give notice of the proposed subpoena to the defendant/patient, and no court order accompanied the subpoena served on the hospital.

The defendant argued that the D.A. subpoena violates the privacy rule under HIPAA and that the HIPAA pre-emption rule applies to Louisiana healthcare providers; to support this argument, the defendant relied on *United States ex rel. Stewart v. Louisiana Clinic*, (E.D. La. 12/12/02)(unpublished). The state countered that *Stewart* was a civil case, not criminal, and therefore the doctor-patient "privilege" does not exist for persons under arrest.

The court of appeal pointed out that a healthcare provider covered by HIPAA may disclose health information in response to a subpoena that is not accompanied by a court order only under the HIPAA guidelines. The HIPAA guidelines had not been followed. Likewise, the state had not complied with Louisiana law (R.S. 13:3715.1), although it later attempted to correct the error. The court ruled that:

any requirement under HIPAA that is contrary to a provision of state law supercedes that provision of

State law. "Contrary," as defined under the regulations, means that "[a] covered entity would find it impossible to comply with both the state and federal requirements" 45 C.F.R. § 160.202(1).

The court held that it did not appear to be impossible to comply with both the federal and state requirements in this case, as both HIPAA and 13:3715.1 allow objections from the patient; hence 13:3715.1 is not pre-empted by HIPAA. Nevertheless, in this case, the state did not comply with 13:3715, and the trial court's ruling denying defendant's motion in limine was reversed and the matter remanded.

Summary Judgment on Damages After Settlement for \$100,000

Jordan v. Willis-Knighton Med. Ctr., 39,944 (La. App. 2 Cir. 9/21/05), 911 So.2d 351.

The plaintiff filed a medical review panel complaint against several physicians and ultimately settled with one for \$100,000. The settlement was approved by the trial court prior to the 2003 amendments to the MMA, which allow the PCF to assess the third-party fault of a quali-

fied healthcare provider under certain circumstances. The trial court then granted summary judgment on the issue of causation of damages and awarded damages for the statutory maximum.

One of the PCF's arguments on appeal involved the third-party fault of a healthcare provider, but the pre-2003 amended version of MMA applied to this case, and the PCF was not allowed to assert the third-party fault of a *qualified* healthcare provider. However, the court said that even if this were a post-2003 case, the PCF would still be prohibited from asserting third-party fault, as it did not prove the existence of any of the six criteria enumerated in the amendments.

The final issue addressed by the court of appeal was the amount of damages the plaintiff could recover. The plaintiff supported the motion for summary judgment with affidavits establishing causation and the extent of injuries, whereas the PCF did not introduce any countervailing affidavits. Likewise, there was no evidentiary opposition to the quantum; summary judgment was affirmed.

— **Robert J. David**

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JUDICIAL Notes

By Robert Gunn, Louisiana Supreme Court

NEW JUDGES . . . APPOINTMENTS

New Judges

Ruben J. Bailey was named Domestic Commissioner, 24th Judicial District Court, Jefferson Parish. He earned his undergraduate degree from Southern University in 1974 and his JD degree from Texas Southern University Thurgood Marshall School of Law in 1981. He is a recipient of the Louisiana State Bar Association's Career Public Interest Award. Prior to his appointment to the bench, he served as managing attorney for an office of the New Orleans Legal Assistance Corp. and Southeast Louisiana Legal Services. He is married to Sheila Riley Bailey and they are the parents of two children.



Ruben J. Bailey

Michael M. Distefano was elected to Plaquemine City Court, Iberville Parish.

He earned his undergraduate degree from Louisiana State University in 1986 and his JD degree from Southern University Law Center in 1990. He is a member of the 18th Judicial District Bar Association. He is married to Julie B. Distefano and they are the parents of two children.



**Michael M.
Distefano**

Patricia Evans Koch was elected to the 9th Judicial District Court, Rapides Parish. She earned her undergraduate degree from the University of Louisiana at Monroe in 1985 and her JD degree from Loyola University Law School in 1991. From 1991-92, she held a clerkship with Judges Alfred Mansour and Lewis Lauve before joining Central Louisiana Legal Services Corp. from 1992-94. From 1994-99, she served as a Department of Labor mediator and adminis-

trative law judge. In 1999, she began presiding over child support, domestic violence and selected juvenile cases of the 9th JDC as a hearing officer for Rapides Parish. In 2002, she began working in Grant Parish as a hearing officer to preside over child support cases. A member of the Louisiana Supreme Court's Steering Committee for the Louisiana Protective Order Registry and the Louisiana State Bar Association's Access to Justice Committee, she also has served as president of the statewide Hearing Officers' Association and has been involved in a number of other civic and professional organizations. She is married to Michael Koch and they are the parents of three children.



**Patricia Evans
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Appointments

William D. Aaron, Jr. was appointed, by order of the Louisiana Supreme Court, to the Louisiana Attorney Disciplinary Board for a term of office which began on Jan. 1, 2006, and will end on Dec. 31, 2008.

Glenn B. Adams was appointed, by order of the Louisiana Supreme Court, to the Louisiana Attorney Disciplinary Board for a term of office which began on Jan. 1, 2006, and will end on Dec. 31, 2006.

Dr. Constance C. Dolese, Billy R. Pesnell and Christopher H. Riviere were reappointed, by order of the Louisiana Supreme Court, to the Louisiana Attorney Disciplinary Board for terms of office which began on Jan. 1, 2006, and will end on Dec. 31, 2008.

Ninth Judicial District Court Judge Harry F. Randow was appointed, by order of the Louisiana Supreme Court, to the Louisiana Judicial College Board of Governors for a term of office which ends on Sept. 30, 2008.

Fifth Circuit Court of Appeal Judge Thomas F. Daley and Orleans Civil District Court Judge Rosemary Ledet were reappointed, by order of the Louisiana Supreme Court, to the Louisiana Judicial College Board of Governors for a term of office which ends on Sept. 30, 2008.

Carey J. Messina was reappointed, by order of the Louisiana Supreme Court, to the Louisiana Board of Legal Specialization for a term of office which ends on June 30, 2008.

Professor Kathryn V. Lorio and Stephen D. Wheelis were appointed, by order of the Louisiana Supreme Court, to the Louisiana Board of Legal Specialization for a term of office which ends on June 30, 2008.

Death

Retired 20th Judicial District Court Judge Wilson R. Ramshur, 65, died Jan. 7. He earned his undergraduate and JD

degrees from Louisiana State University and LSU Paul M. Hebert Law Center, where he was a member of the *Law Review* from 1971-73 and a member of the Order of the Coif. He served as clerk for Louisiana Supreme Court Justice John A. Dixon during the 1973-74 term of the court, and served as clerk for Judge *ad hoc* William T. Bennett, 1st Circuit Court of Appeal, in 1976. He was a public defender in the 20th JDC from 1976-78. A member of the 20th Judicial District Indigent Defender Board from 1976-78, he served as chair from 1979-82. He was a former president of the Feliciana Bar Association. Judge Ramshur was first elected to the 20th JDC bench in 1982 and served there until his retirement in 2002. He was re-elected without opposition to that seat in 1984, 1990 and 1996. In 1994, he was appointed chair of the Judiciary Commission of Louisiana.

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PEOPLE

LAWYERS ON THE MOVE . . . NEWSMAKERS

LAWYERS ON THE MOVE

Adams and Reese, L.L.P., announces that **V. Thomas Clark, Jr.** has joined the firm's Baton Rouge office as a partner.

Breazeale, Sachse & Wilson, L.L.P., announces that John B. King has been named a partner in the firm.

Couhig Partners, L.L.P., announces that the firm has joined with Simoneaux Carleton Dunlap & Olinde, L.L.C., of Baton Rouge to form Couhig Partners, L.L.C. Former Louisiana Attorney General Richard P. Ieyoub is the senior resident partner for the Baton Rouge headquarters, located at Ste. 810, One American Place, Baton Rouge.

Frilot Partridge Kohnke & Clements an-

nounces that Jaimme A. Collins and Emile J. Dreuil III have joined the firm as associates.

Haik, Minvielle & Grubbs, L.L.P., announces that Theodore M. (Trey) Haik III has become a partner in the firm.

Hammonds & Sills announces that Franklin V. Endom, Jr. is of counsel with the firm, practicing in the firm's Baton Rouge office.

Kean Miller Hawthorne D'Armond McCowan & Jarman, L.L.P., announces that 12 lawyers have joined the firm. Michael A. (Mike) McGlone, Charles R. (Chuck) Talley, Glenn P. Orgeron, Lisa A. Easterling, Bradley J. (Brad) Schlotterer and Lawrence J. (Larry) Hand, Jr. joined the firm as partners. Karen Waters Shipman, Stephen C. Hanemann, Jamie Domilise Henry, Kelly B. Green

and Michael J. O'Brien joined the firm as associates. Heather Ashman Johnson joined the firm as of counsel.

Liskow & Lewis, A.P.L.C., announces that **K. Todd Wallace** has been named a shareholder in the New Orleans office and **Inemesit U. O'Boyle** has joined the firm as an associate in the New Orleans office.

Lobman, Carnahan, Batt, Angelle & Nader announces that **Brant J. Cacamo** has become a partner in the firm.

Milling Benson Woodward, L.L.P., announces that Matthew A. Lynch has joined the firm as an associate in its Lafayette office.

Smith Cashion & Orr, a Tennessee law firm, announces that S. Joseph (Joe) Welborn has been named a partner.

Stone Pigman Walther Wittmann, L.L.C., announces that **Jason M. Bilbe** and **Laura Walker Plunkett** have become members of the firm.

NEWSMAKERS

John M. Duck has been re-elected as chair of the Executive Committee of Adams and Reese, L.L.P. **Robin B. Cheatham** has been elected to serve on the Executive Committee.

The law firm of Frilot Partridge Kohnke & Clements received the "Good Citizen Award" presented by the Jefferson Parish public school system. The firm was honored for its contributions to area students and schools following Hurricane Katrina, among them, purchasing school supplies for students who lost everything in the storm.



Jason M. Bilbe



Brant J. Cacamo



Robin B.
Cheatham



V. Thomas
Clark, Jr.



John M. Duck



Inemesit U.
O'Boyle



Laura Walker
Plunkett



K. Todd Wallace

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REPORT BY DISCIPLINARY COUNSEL

Public matters are reported to protect the public, inform the profession and deter misconduct. Reporting date Feb. 2, 2006.

Decisions

Aubrey M. Alexander III, Alexandria, (2005-B-2516) **Interim suspension** ordered by the court on Jan. 5, 2006. JUDGMENT FINAL and EFFECTIVE on Jan. 5, 2006.

Robert P. Aulston III, Detroit, Mich. (2005-B-1546) **Three-year suspension** ordered by the court as reciprocal discipline on Jan. 13, 2006. JUDGMENT FINAL and EFFECTIVE on Jan. 27, 2006. *Gist*: Misrepresentation, criminal contempt and unauthorized practice of law.

Anthony Bertucci, Baton Rouge, (2005-OB-2563) **Returned to active status** ordered by the court on Jan. 24, 2006. JUDGMENT FINAL and EFFECTIVE on Jan. 24, 2006.

William E. Decker, Mandeville, (2005-B-1550) **Disbarment** ordered by the

court on Dec. 16, 2005. JUDGMENT FINAL and EFFECTIVE on Dec. 30, 2005. *Gist*: Failure to act with reasonable diligence and promptness in representing a client; failure to account to client for fees; failure to cooperate with the ODC in its investigation; and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

Henry Dillon III, New Orleans, (2006-B-0083) **Interim suspension for threat of harm** ordered by the court on Jan. 13, 2006. JUDGMENT FINAL and EFFECTIVE on Jan. 13, 2006.

Wayne C. Giordano, Belle Chasse, (2005-OB-2370) **Permanent resignation in lieu of discipline** ordered by the court on Jan. 25, 2006. Previous permanent resignation granted in Docket No. 05-OB-0818 revoked. JUDGMENT FINAL and EFFECTIVE on Jan. 25, 2006. *Gist*: Commission of a criminal act, especially one that reflects adversely on the

lawyer's honesty, trustworthiness or fitness as a lawyer.

Noland James Hammond, Alexandria, (2005-B-2532) **Interim suspension** ordered by the court on Dec. 22, 2005. JUDGMENT FINAL and EFFECTIVE on Dec. 22, 2005.

L. Paul Hood, Mandeville, (2005-B-2371) **Interim suspension for threat of harm** ordered by the court on Jan. 11, 2006. JUDGMENT FINAL and EFFECTIVE on Jan. 11, 2006.

Carmen S. Madera, New Orleans, (2005-B-0816) **Permanent disbarment** ordered by the court on Dec. 9, 2005. JUDGMENT FINAL and EFFECTIVE on Dec. 27, 2005. *Gist*: Failure to provide competent representation to a client; charging an excessive fee; conversion of funds owed to third parties; failure to cooperate with the Office of Disciplinary Counsel in its investigation; violating or attempting to violate the Rules of Professional Conduct; commission of a criminal act, especially one which reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer; engaging in conduct involving dishonesty, fraud, deceit and misrepresentation; and threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

Exkano K. Philson, Baton Rouge, (2006-B-0035) **Interim suspension** ordered by the court on Jan. 9, 2006. JUDGMENT FINAL and EFFECTIVE on Jan. 9, 2006.

Continued next page

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Harry S. Redmon III, New Orleans, (2005-B-2187) **Suspended for 18 months retroactive to date of interim suspension (March 2, 2005), followed by two-year period of probation with conditions**, ordered by the court on Dec. 12, 2005. JUDGMENT FINAL and EFFECTIVE on Dec. 12, 2005. *Gist*: Commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.

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

	No. of Violations
Violating the Rules of Professional Conduct	1
Conduct involving dishonesty and misrepresentation	1
Conduct prejudicial to the administration of justice	1
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Baton Rouge	Steven Adams David E. Cooley John A. Gutierrez	(225)753-1365, (225)924-1510 (225)751-7927, (225)753-3407 (225)715-5438, (225)744-3555
Houma	Bill Leary	(985)851-0611, (985)868-4826
Lafayette	Alfred "Smitty" Landry Thomas E. Guilbeau James Lambert	(337)364-5408, (337)364-7626 (337)232-7240 (337)233-8695, (337)235-1825
Lake Charles	Thomas M. Bergstedt Nanette H. Cagney	(337)433-3004, (337)558-5032 (337)437-3884, (337)477-3986
Monroe	Robert A. Lee	(318)387-3872, (318)388-4472
New Orleans	Craig Caesar Deborah Faust Donald Massey William A. Porteous Dian Tooley	(504)596-2774 (504)486-4411, (504)833-8500 (504)585-0290 (504)581-3838, (504)897-6642 (504)861-5682, (504)831-1838
Shreveport	Bill Allison Ed Blewer Steve Thomas	(318)221-0300, (318)865-6367 (318)227-7712, (318)865-6812 (318)872-6250

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ful negotiation of two practice groups into other firms, and three in-house searches on behalf of local corporations resulting in three placements. 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.

McGlinchey Stafford, P.L.L.C., is in need of a litigation associate with zero to three years of experience for its Monroe office. Excellent academic record required. Top 15 percent, *Law Review* and Moot Court are preferred. Please direct all inquiries to Erin Watson, 643 Magazine St., New Orleans, LA 70130 or e-mail to ewatson@mcglinchey.com.

Growing New Orleans defense firm seeks energetic, goal-oriented associate for placement on partnership track. Previous maritime defense litigation experience preferred. Excellent writing and communication skills required. All inquiries will be treated with the strictest of confidence. Qualified candidates should submit résumé, transcript and writing samples to: Mr. Salvador Pusateri at Johnson, Johnson, Barrios & Yacoubian, 4700 One Shell Square, 701 Poydras St., New Orleans, LA 70139-7708. Visit our Web site at jjbylaw.com.

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Phelps Dunbar, L.L.P., a regional law firm, is interested in hiring a lateral attorney with two-plus years of experience for our New Orleans Insurance and Reinsurance Group. This position calls for experience in insurance opinion coverage matters and requires top-notch research, writing and advocacy skills. Excellent academic credentials are required (top 25 percent). Moot Court and *Law Review* preferred. This position offers competitive salary and benefits and a collegial team-oriented work environment. Interested candidates should contact Ms. Alice Trahant, Ste. 2000, 365 Canal St., New Orleans, LA 70130, fax (504)568-9130 or e-mail trahanta@phelps.com.

Staff attorney. POOLCORP (SCP Pool Corporation), the world's largest wholesale distributor of swimming pool supplies and equipment and a Fortune 1000 company headquartered in Covington, La., seeks skilled attorney with three to five years of experience for staff attorney position. Must be well organized with strong analytical skills, excellent oral and written communication and drafting skills and ability to work in a team environment. Must have ability to grasp and respond to issues quickly and understand the staff legal function and role in overall business. Substantive experience in transactional work and/or complex litigation will be considered. Candidates must be admitted to the State Bar of Louisiana. Unique opportunity to handle a variety of matters. POOLCORP offers a competitive compensation structure and an excellent benefits package. Please apply online at www.poolcorp.com. No phone calls, please. EOE M/F/V/D. Drug free.

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UPDATE

Judge Stewart Appointed Chair of Judicial Conference Advisory Committee

United States 5th Circuit Court of Appeals Judge Carl E. Stewart has been appointed chair of the Judicial Conference Advisory Committee on the Federal Rules of Appellate Procedure. The appointment was made by United States Supreme Court Chief Justice John G. Roberts, Jr. on Nov. 1, 2005.



**Judge Carl E.
Stewart**

Judge Stewart served on the committee for the past three years with then-Judge Roberts and then-Judge Samuel Alito, immediate past chair. He presided at his first meeting on April 28. His term will expire on Oct. 1, 2008.

Judge Stewart was nominated for the 5th Circuit judgeship by President William J. Clinton in 1994. He was sworn in on May 9, 1994, becoming the first African-American to serve on the court as it is presently constituted.

He was in the private practice of law from 1977-78. In 1978, he was a staff attorney for the Louisiana Attorney General's Office; 1979-83, assistant United States attorney, Western District of Louisiana; 1983-85, private practice, Stewart and Dixon; 1985-91, judge, First Judicial District Court, Louisiana; and 1991-94, judge, Louisiana 2nd Circuit Court of Appeal.

He received a BA degree, *magna cum laude*, in 1971 from Dillard University and his JD degree in 1974 from Loyola

University Law School. He served as a captain in the Judge Advocate General's Corps from 1974-77.

Judge Stewart is a member of the Shreveport Bar Association, the Federal Bar Association, the Harry V. Booth/Judge Henry A. Politz Inn of Court and the National Bar Association Judicial Council and is a charter member of the Just the Beginning Foundation of African-American Federal Judges. He serves on the Board of Trustees of the American Inns of Court Foundation.

LSU Law Center Dedicates Plaza and Memorial to Sen. Russell B. Long

The Louisiana State University Paul M. Hebert Law Center kicked off its

centennial celebration on March 10 with the dedication of the Centennial Plaza and a memorial to United States Sen. Russell B. Long.

Sen. Long, a 1942 graduate of LSU Law Center and a seven-term senator from Louisiana, was honored with the dedication of a bronze sculpture and memorial fountain in his name. Colleagues, family and friends of the senator provided resources for the memorial, the centerpiece of the Law Center's Centennial Plaza.

Sen. Long honored the Law Center with its first-ever endowed chair, the Russell B. Long Eminent Scholars Academic Chair, and also provided seven endowed professorships for the LSU A&M campus.

The LSU Law Center will celebrate "100 Years of Scholarship, Teaching and



Attending the dedication of the Louisiana State University Paul M. Hebert Law Center Centennial Plaza and memorial to United States Sen. Russell B. Long were, from left, Mrs. Russell B. Long, Pamela Long Wofford and Rita Katherine "Kay" Long.

Photo by Darlene Aguillard/real life photos

Service” during 2006, culminating in a gala celebration on Sept. 15 at the Pete Maravich Assembly Center.

The Centennial Plaza was designed by Roy T. Dufreche, ASLA, CLARB, of Hammond, in collaboration with Dennis Mitchell, landscape architect at LSU, who served as project manager. The life-sized bronze of Sen. Long was sculpted by artist Stephen Gibson of Ponchatoula.

ABA Labor Section Pledges \$25,000 to New Orleans Public Library

The American Bar Association’s Section of Labor and Employment Law donated \$25,000 to the New Orleans Public Library’s (NOPL) “Rebuild Campaign.” Members of the section’s Katrina Task Force concluded the NOPL’s efforts to provide critical community services, while using the opportunity to attempt to reinvent a model urban public library system, was worthy of the national membership’s support.

Louisiana members of the ABA’s Labor and Employment Law Section’s Katrina Task Force explained the NOPL selection. “Our membership agreed that focusing on one or two specific projects was the way to efficiently maximize mem-



Members of the American Bar Association’s Labor and Employment Law Section presented \$25,000 to the New Orleans Public Library. From left, Mark Mallery, ABA Labor and Employment Law Section’s Katrina Task Force member; Sharon Kohl, Children’s Resource Center branch manager; Harold Koretzky, ABA Labor and Employment Law Section’s Katrina Task Force member; and Tania Tetlow, New Orleans Public Library board chair.

bers’ contributions. We are happy to announce that both projects chosen will benefit the New Orleans Public Library. We want to use our first \$25,000 donation to help the Children’s Resource Center rebuild its collection and then hope to have further contributions that can help the Main Library’s Business and Science Division. That second gift would focus

on materials that deal with employment issues, small business support, financial health, legal issues for laypeople, and home repair/renovation.”

Louisiana members of the section’s Katrina Task Force are Harold Koretzky, William Lurye, Mark Mallery and Howard Shapiro.

A black and white photograph showing three people in a professional setting. Two women and one man are seated around a table, looking at documents. The woman on the left is looking towards the man on the right, who is looking down at the papers. The woman in the middle is also looking at the papers.

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LOCAL / SPECIALTY BARS

Bertaut Installed as NOBA President

Carmelite M. Bertaut, special counsel at Stone Pigman Walther Wittmann, L.L.C., was installed as president of the

New Orleans Bar Association (NOBA) at the 81st annual dinner meeting in January.

Bertaut received the association's Outstanding Service Award in 2003. She has served on the NOBA Young Lawyers Section's Executive Board and has chaired the association's Women's Seminar, Public Relations, Publications, Continuing Legal Education, Lawyer Referral Service and Bench Bar Conference committees and the NOBA American

Inn of Court Organizational Committee. She is a past president and charter member of the NOBA American Inn of Court. She is also a member of the American Bar Association, where she co-chairs the Women Advocate Committee of the Section of Litigation and has served as co-chair of the Rainmakers Interest Group of that committee. She is a Fellow of the Louisiana Bar Foundation and is a member of the Louisiana Association of Defense Counsel, the Defense Research Institute and the Association of Women Attorneys.

The NOBA 2005-06 board of directors are Hon. Carl J. Barbier, president-elect; Stanley J. Cohn, first vice president; Patricia A. Krebs, second vice president; Perry R. Staub, Jr., third vice president; Hon. Carolyn W. Gill-Jefferson, secretary; José R. Cot, treasurer; Jesse R. Adams, Jr., past president; and Tara G. Richard, Young Lawyers Section chair.

Board members with terms expiring in 2006 are David F. Bienvenu, Elwood F. Cahill, Jr. and Greg L. Johnson. Members with terms expiring in 2007 are Brian P. Quirk, David B. Sharpe and R. Patrick Vance. Members with terms expiring in 2008 are Nancy Scott Degan, Mary L. Meyer and Sharonda R. Williams.

Recognition was given to the 50-year members in attendance. Those honored were Dr. Norman C. Francis, George W. Healy III, John E. Jackson, Jr., Roy Lilly, Jr. and Frank J. Varela.

Jefferson Bar Auxiliary



Jefferson Bar Association Auxiliary President Marian Offner, left, presented the "Volunteer of the Year" Award to Edie Villarrubia, immediate past auxiliary president, in recognition of her legal endeavors for the Jefferson Bar, the auxiliary and other associate organizations.



Paul M. LaVelle, left, attorney and immediate past president of the Jefferson Bar Association (JBA), is the recipient of the "Volunteer of the Year" Award and appreciation plaque from the Jefferson Bar Auxiliary. Presenting the award is Auxiliary Vice President Barbara McManus at the JBA opening of the court and installation of officers in January.



At the Jefferson Bar Association Auxiliary luncheon, from left, Mary Ann Sherry; Tish Steib; Carole Dunn; Barbara McManus; Charley Varley, photo journalist; Chris Rose, *Times-Picayune* columnist; Auxiliary President Marian Offner; Patti Lee; and Amanda Offner.

Send Your News!

News deadline for the August/September 2006 Louisiana Bar Journal is Friday, June 2, 2006.

Mail, fax or e-mail your items to:
Publications Coordinator
Darlene M. LaBranche
601 St. Charles Ave.
New Orleans, LA 70130;
fax (504)566-0930;
or e-mail dlabranche@lsba.org.



Past New Orleans Bar Association President Jesse R. Adams passed the gavel to 2005-06 President Carmelite M. Bertaut.



Attending the New Orleans Bar Association's 81st annual dinner meeting were 50-year member honorees, from left, Frank J. Varela and George W. Healy III.

NOBA Inn of Court Hosts Luncheon

The New Orleans Bar Association Inn of Court hosted a luncheon in December 2005. The luncheon was followed by a one-hour CLE seminar with Michael Mestayer moderating a panel composed of Orleans Civil District Court Judges Piper Griffin, Rosemary Ledet and Madeleine Landrieu.



2006 New Orleans Bar Association Inn of Court President Michael Mestayer, left, and 2005 Inn of Court President Grady Hurley.



Left, New Orleans Bar Association Inn of Court Counselor William Schwartz with NOBA President Carmelite Bertaut.

Above, At the New Orleans Bar Association Inn of Court luncheon, seated from left, panelists Judge Rosemary Ledet, Judge Piper Griffin and Judge Madeleine Landrieu. Standing, program moderator Michael Mestayer.

Richard is NOBA's 2005-06 YLS Chair

Tara G. Richard was installed as chair of the New Orleans Bar Association's Young Lawyers Section (NOBA YLS) at the 81st annual dinner meeting in January. Richard is an associate at Jones, Walker, Waechter, Poitevent, Carrère & Denègre.

The NOBA YLS has 17 committees that develop and staff numerous programs and events that provide networking opportunities, practical experience and opportunities to better the community.

The 2006 executive board includes Tad Bartlett, Deborah McCrocklin, Conrad Meyer, Maurice C. Ruffin and K. Todd Wallace.



New Orleans Bar Association Young Lawyers Section members, from left, immediate past YLS Chair Bradford E. Adatto, YLS Director Lesli D. Harris, YLS Treasurer Christopher K. Ralston and 2006 YLS Chair Tara G. Richard.

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LOUISIANA BAR FOUNDATION

LBF Seeks 2006-08 Scholar-In-Residence

The Louisiana Bar Foundation (LBF) is accepting applications for a scholar-in-residence to serve for a two-year term, beginning in July 2006. A \$7,500 honorarium will be paid to the scholar-in-residence as consideration for his/her work product. The topic selected by the Education Committee and approved by the LBF's board of directors is:

The impact of Hurricanes Katrina and Rita upon the legal system and the response of lawyers and courts to the challenge of providing legal services in the wake of the hurricanes. The scholar shall compile source materials and organize them in narrative form to permit their use

at a later date for purposes of the production and publication of a scholarly quality written contribution.

Applicants considering the topic are asked to submit a specific proposal. Proposals should include: prospectus, suggested format, proposed time-line and applicant's qualifications. Applications must be received by June 30, 2006 and are to be sent to:

Louisiana Bar Foundation
Education Committee
601 St. Charles Ave., 3rd Flr.
New Orleans, LA 70130
Fax: (504)566-1926
E-mail: dennette@raisingthebar.org

If you have questions, direct them to Dennette L. Young at the Louisiana Bar Foundation by e-mail at dennette@raisingthebar.org or by phone at (504)561-1046.

LBF Honors Distinguished Judge, Attorney and Professors at Fellows Gala

The Louisiana Bar Foundation (LBF) honored the 2005 Distinguished Jurist Jay C. Zainey, the 2005 Distinguished Attorney H. Alston Johnson III, and the 2005 Distinguished Professors Dean Brian Bromberger and Chancellor Freddie Pitcher, Jr. on May 5 at the 20th annual Fellows Gala at the Houmas House Plantation in Gonzales. The honorees were selected by the LBF's board of directors for their many contributions to the legal profession and their communities.

Fellows from across the state joined the honorees and the LBF in celebrating 21 years of working to enhance the legal community and increasing access to the justice system.

During the event, the 2005 Fellows Class was honored and the 20-year Fellows Class of 1986 was recognized.

Hon. Jay C. Zainey 2005 Distinguished Jurist

Judge Jay C. Zainey was appointed by President George W. Bush to the United States District Court for the Eastern District of Louisiana in February 2002. He is a graduate of Louisiana State University Paul M. Hebert Law Center. He served in the United States Air Force Reserves from 1970-76.



Hon. Jay C. Zainey

Judge Zainey and New Orleans attorney Mark Surprenant founded SOLACE (Support of Lawyers/Legal Personnel, All Concern Encouraged), a Louisiana State Bar Association (LSBA) program that assists members of the bar and the legal community during family tragedies. There are currently 1,900 attorneys throughout the state volunteering for SOLACE work. SOLACE was instrumental in assisting attorneys displaced by Hurricane Katrina in finding housing, office space, office furniture and books.

In May 2004, Judge Zainey organized the Homeless Experience Legal Protection (HELP) Program. More than 350 attorneys provide legal consultation and notary services at four homeless centers in New Orleans. He is organizing similar programs in Baton Rouge, Lafayette, Shreveport, Alexandria, New York City, Washington, D.C., and Memphis.

In October 2004, Judge Zainey and his wife Joy founded the God's Special Children Program. The program includes a monthly Mass for people with special needs, their families and friends.

Judge Zainey also has worked with the LSBA's Legal Services for Persons with Disabilities Committee in providing pro bono legal services to people with disabilities and their families.

While currently carrying a full docket in the Eastern District of Louisiana, Judge Zainey also assists his colleagues by presiding over cases in both the Southern District of Texas and the Southern District of Mississippi.

He is a past president of the LSBA and the Jefferson Bar Association. He is currently on the board of directors of the Pro Bono Project, the New Orleans Chapter of the Federal Bar Association and Magnolia Special School. He is president of the Judge John C. Boutall American Inn of Court. He also currently serves on the American Bar Association's Hurricane Katrina Task Force and has recently written an article about the HELP Program that will be included in a book entitled *Lawyers Working to End Homelessness*, published by the American Bar Association's Commission on Homelessness and Poverty.

H. Alston Johnson III 2005 Distinguished Attorney

H. Alston Johnson III is a managing partner of Phelps Dunbar's Baton Rouge office. He graduated *cum laude* in 1967 from Georgetown University. He received his JD degree in 1970 from Louisiana State University Paul M. Hebert Law Center where he was a senior associate editor of the *Law Review*. Prior to joining Phelps Dunbar in 1984, he was a full-time member of the LSU law faculty for

12 years. He continues to teach as an adjunct member of that faculty, teaching primarily conflict of laws, federal courts and insurance.

His practice concentrates primarily in litigation, particularly at the appellate level and with particular emphasis in the areas of tort, insurance coverage and administrative law. He has extensive experience in legislative, regulatory and governmental matters and has represented numerous public entities in both counseling and litigation capacities.

Johnson served on the Louisiana State Bar Association (LSBA) Board of Governors from 1975-76. He is a member of the LSBA, the American Bar Association and the American Law Institute and a former member of the council of the Louisiana State Law Institute. He is a past president of the Louisiana Association of Defense Counsel. In 1988, he served as chair of the Governor's Advisory Committee on Tort, Workers' Compensation and Insurance Reform. From 1973-84, he served as consultant for the LSBA Law Reform Committee.

Johnson received the 2005 LBF Curtis R. Boisfontaine Trial Advocacy Award for his long-standing devotion to excellence in trial practice and for upholding the standards of ethics and consideration for the courts, litigants and all counsel in his practice of the law.

He is the author or co-author of three treatises on Louisiana law published by Thomson/West Publishing Co.: *Louisiana Workers' Compensation* (4th ed.), *Louisiana Insurance Law* (3rd ed. in manuscript) and *Louisiana Civil Jury Instructions* (2nd ed.).

Dean Brian Bromberger 2005 Distinguished Professor

Brian Bromberger was educated in his native Australia where he earned a bachelor of laws degree with honors at



H. Alston
Johnson III

Melbourne University. He also completed an LLM degree at the University of Pennsylvania. He began his teaching career in law in 1969 and has taught or served as a visiting professor at law schools in Australia, Canada, the United Kingdom and the United States, including the University of Pennsylvania, Syracuse University, the University of Utah, and William and Mary College.



Dean Brian Bromberger

While in Australia, he was the director of the Center for the Study of Law and Technology at the University of New South Wales. He also served on boards and a tribunal that focused on mental health issues and was a part-time lecturer at New South Wales Institute of Psychiatry and the School of Medicine.

He came to Loyola from the University of North Carolina at Chapel Hill where he was associate dean for academic affairs and professor of law since 1995. Bromberger has written four books and numerous articles. His scholarship was recognized with a Ford Foundation Graduate Research Scholarship and a graduate scholarship to the University of Pennsylvania.

In the aftermath of Hurricane Katrina, Bromberger relocated Loyola Law School onto the campus of the University of Houston for the fall 2005 semester — an unprecedented feat in America's legal education.

More than 300 students from Loyola and Tulane participated in the Loyola Houston curriculum. For the first-year law students, Loyola's Houston program was the only way they could commence their legal education this year and, for a number of Louisiana students planning to graduate, taking Louisiana's unique civil law courses at other schools was not an option. Bromberger's leadership kept Loyola Law School on track and boosted morale with a much-needed "can-do" attitude.

Chancellor Freddie Pitcher, Jr. 2005 Distinguished Professor

Freddie Pitcher, Jr. (Judge, Ret.) was appointed chancellor and full professor of law at Southern University Law Center (SULC) in November 2002. His more than 25 years of teaching experience has included adjunct professorships at SULC and at Louisiana State University Paul M. Hebert Law Center.



Chancellor Freddie Pitcher, Jr.

He has been appointed to a three-year term on the American Bar Association Law School Legal Education Section's Committee on Professionalism and has been named to two ABA Site Evaluation Teams for Reaccrediting Law Schools (he serves as chair on one team).

Under Pitcher's leadership, SULC has thrived. He initiated a part-time evening division; created a distance learning partnership with New York Law School to offer an online curriculum; established a certificate program in public interest law; added a Low-Income Taxpayer Clinic and a Domestic Violence Law Clinic to its successful Clinical Education Program; offered its first Summer Studies Abroad Program to London, England; attracted a donation to establish the J.J. McKernan Distinguished Lecture Series; significantly increased in size and number faculty summer research stipends; and increased the Law Center's endowed professorships from two to eight.

Pitcher is a member of the American Bar Association, National Bar Association, Louisiana State Bar Association and Baton Rouge Bar Association. He is admitted to practice before the United States Eastern, Middle and Western District Courts of Louisiana and the United States 5th Circuit Court of Appeals.

He received his undergraduate degree in political science from Southern University in 1966 and his JD degree from Southern University Law Center in 1973. While in law school, he was elected presi-

LBF Welcomes New Fellows

The Louisiana Bar Foundation welcomes the following new Fellows:

W. Arthur

Abercrombie, Jr. Baton Rouge

Janet S. Boles Baton Rouge

Edna Ayliffe

Latchem Baton Rouge

Robert W. Nuzum New Orleans

dent of the Student Bar Association and won distinction as an outstanding moot court competitor. Pitcher was also the founding vice president of the Southern University Law Center's American Inn of Court Chapter.

Pitcher has a career of many firsts. He became the first African-American person elected to a judgeship in Baton Rouge with his election to the City Court in a citywide election in April 1983. He was the first African-American person elected to the 19th Judicial District Court in a parishwide election in 1987. In 1992, he achieved another first with his election to the Louisiana 1st Circuit Court of Appeal, without opposition. He also has served as an associate justice ad hoc on the Louisiana Supreme Court. He authored nearly 200 judicial opinions while serving on the Louisiana 1st Circuit Court of Appeal.

Upon his retirement from the bench in 1997, Pitcher was named a partner in the Baton Rouge office of Phelps Dunbar, L.L.P. His practice focused in the areas of commercial, casualty and employment litigation. He was also a member of the firm's appellate practice group.

Prior to his election to the bench, Pitcher was the principal partner in the firm Pitcher, Tyson, Avery and Cunningham. He also has served as a special counsel in the Louisiana Attorney General's Office and as an assistant district attorney for East Baton Rouge Parish.

Pitcher is a recipient of the Brotherhood Award from the Baton Rouge Region of the National Conference for Community and Justice.

LBF Presents Grant Funds, Certificates in Monroe and New Orleans

The Louisiana Bar Foundation (LBF) presented 2006 grants and certificates of appreciation to “no-fee” banks at the 4th Judicial District Bar Association dinner in Monroe on Jan. 30.

The LBF awarded \$231,075 to five grantees in the Monroe area. Seven Monroe banks also were presented certificates of appreciation for their participation as “no-fee” banks in the Interest on Lawyers’ Trust Accounts (IOLTA) program. Judge C. Wendell Manning made the presentations.

Also, on Feb. 1, David Krebs, board chair of the Pro Bono Project (New Orleans), accepted a 2006 grantee check from LBF Secretary-Treasurer Elwood F. Cahill, Jr.



Accepting the New Orleans Pro Bono Project 2006 IOLTA grant was Project Board Chair David Krebs, left, from Louisiana Bar Foundation Secretary-Treasurer Elwood F. Cahill, Jr.



Louisiana State Bar Association President and Louisiana Bar Foundation (LBF) board member Frank X. Neuner, Jr., from left, and Judge C. Wendell Manning presented 2006 grant checks to Monroe area recipients: from left, Tammie Slawson, The Wellspring; Wanda James, DART; Alma Jones, Legal Services and Pro Bono; Scott Lowery, Teen Court of Morehouse; and Alex Rankin, LBF Fellow.



Several Monroe area “no-fee” banks received certificates of appreciation. From left, Judge C. Wendell Manning; Jim Cuthbert, senior vice president, Cross Keys Bank; Scooter Pleasant, vice president of private banking, IberiaBank; Taylor Cagle, vice president, Community Trust Bank; John Tolar, vice president of retail division and marketing, Ouachita Independent Bank; and Alex Rankin, Louisiana Bar Foundation Fellow.

Journal Editorial Board Seeking Multigenerational Legal Families

The *Louisiana Bar Journal* Editorial Board is seeking the names of multigenerational legal families in Louisiana for a special issue. The board is interested in families with three or more generations of lawyers.

If you are from a multigenerational legal family, or know of one, you may mail, fax or e-mail the information to:

Publications Coordinator Darlene M. LaBranche
601 St. Charles Ave., New Orleans, LA 70130-3404
fax (504)566-0930
or e-mail dlabranche@lsba.org

Include names of the family members, the relationships between them and a contact phone number or e-mail address.

By Vincent P. Fornias

JUMPING TO CONCLUSIONS

As a mediator, I often feel like a combination of rodeo clown and punching bag, the proverbial messenger who has to duck when he imparts less than favorable news to The Opposition. I could help Billy Joel write lyrics to his next hit tune, “Don’t Shoot Me, I’m Only The Reality Man.”

I recall with PTSM (Post Traumatic Stress from Mediating) the day a few years ago when I used the “Don’t shoot the messenger” preparatory warning once too often in a plaintiff’s caucus room and found myself scurrying for cover when his L5-S1 herniation miraculously failed to prevent him from turning the conference room table over on its side. It was then that his counsel took me aside to share that he “forgot” to tell me that his client had served a decade and a half in Angola for a trumped-up murder charge and that he was still “a little sensitive about that.” Hey, that’s what they pay me for.

But the protagonist of this tale is not the mediator, but one Wes Gralapp of the Rapides bar, who was defending a suit set for mediation and featuring a plaintiff reputed to have certain psychological buttons that, if pushed, could unleash an arsenal rivaled only by your typical gangsta rapper or Iraqi border guard. As he reviewed medical records in preparing for the mediation, Wes noted with some alarm that the plaintiff’s psychologist had noted that the patient was known to carry weapons and was capable of using them “in times of stress.” As is so often the case, the poor mediator was never apprised of this little detail — but excuse my self-serving but therapeutic venting.

Gralapp wisely decided to become a bit

proactive for this particular mediation. In addition to being figuratively loaded for bear in the form of an awesome position paper, he phoned and hired a trusty (and armed) retired local law enforcement officer to sit in during the mediation — maybe posing as a rough-looking structured benefits guy? — with orders to shoot first and ask questions later if the plaintiff as much as made a move for a cup of java.

Fast forward to the near-conclusion of the mediation, Licklog Time, the time when Monopoly money numbers are all used up, and The Dance is proceeding to Spotlight Time. Sometimes these occasions have been known to get somewhat stressful, with a dash of fatigue thrown in. Apparently for some reason, the parties were brought back together and, suddenly, without a word being said, the plaintiff arose mysteriously from the conference room and methodically exited to the parking lot, where he obtained from his F-150 pickup an ominous-looking bag. (“Ready. . .”) He then re-entered the conference room and placed said bag on his lap (“Aim . . .”), and, as Wes stared expectantly at “the structure guy,” plaintiff sloooooo (this probably saved someone’s life) pulled out his King James edition Bible, where he kept, for sacred safekeeping, his treasured picture of the model of the Harley chopper he intended to buy with his take-home from the proposed settlement proceeds.

And all the mediator ever knew was that he’d never seen a “structure guy” before with a briefcase shaped like a violin.



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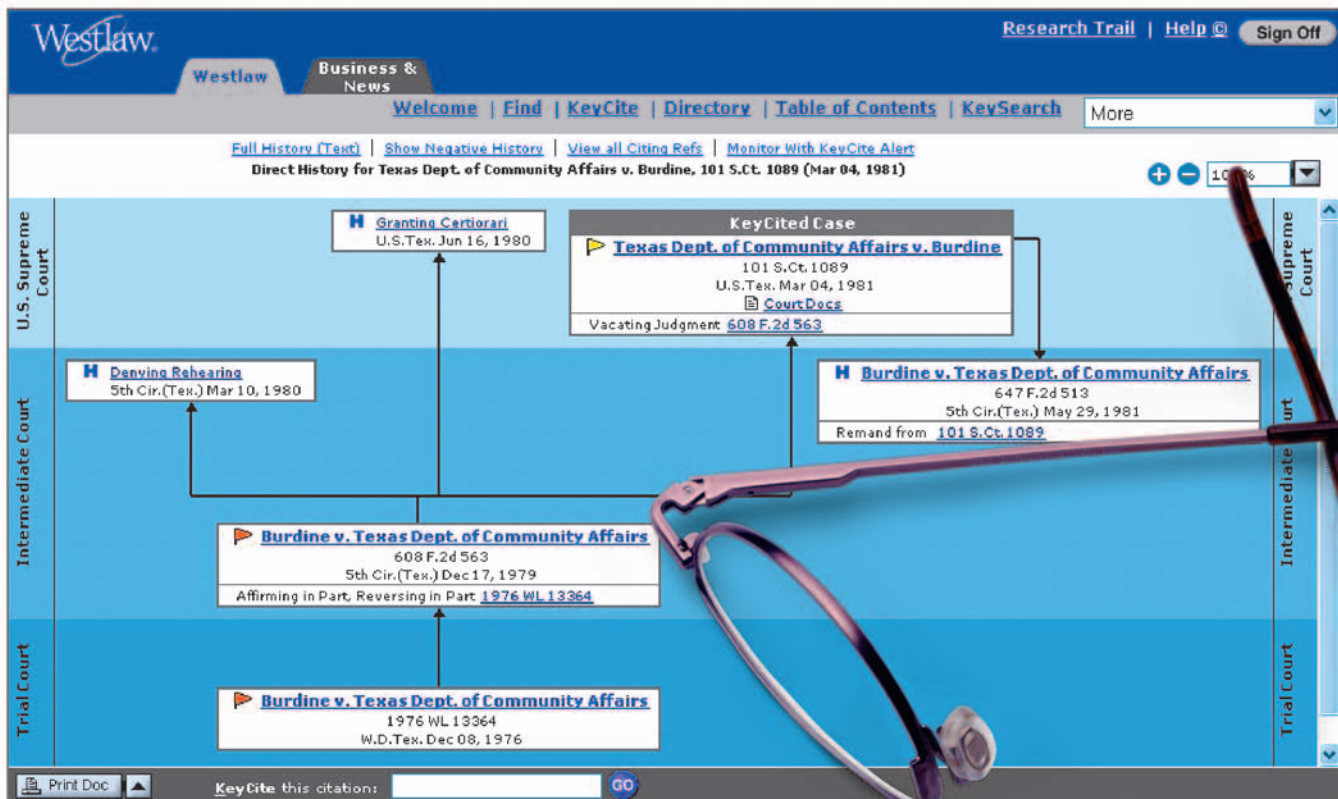
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