

The Advocate

Louisiana Association of Criminal Defense Lawyers

Volume 4, Issue 4

John DiGiulio, Issue Editor

Fall 2007

**LACDL
PRESENTS**

**Louisiana's Premier
Criminal Defense
CLE Seminar**

November 29-30, 2007

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Volume 4, Issue 4
Fall 2007

**Louisiana Association
of Criminal Defense
Lawyers**

P/O. Box 82531
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Phone: 225-767-7640
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www.lacdl.org

FROM THE PRESIDENT, John DiGiulio

In what we all hope is another historic first in the history of criminal defense in Louisiana, while not on the same level of significance as the reform of the indigent defense delivery system, the LACDL and LAPDA are joining together to promote and produce the annual Awards Banquet.

LAPDA, according to its longtime executive director Paul Marx, has been active and successful in its CLE and other educational and legislative efforts, but has not mastered the fine art of party giving. That's where we come in. Traditionally, we do give a great party.

More importantly in the long run, is the continued cooperation between the two groups, moving toward reconciliation and possible unification one day. Discussions about that goal have resulted in an agreement that we should move deliberately and that in some ways, politically and in legislative efforts, it helps to have two voices, as well as two votes on a number of boards.

And so LAPDA will be giving some awards, and of course we will do our usual congratulating and thanking those who have done exceptional deeds. We will try to keep the speechifying short and entertaining.

And we will continue to do something we have always done, which is to support in every way we can Public Defenders. The executive committee has nominated another Public Defender, this time a Chief, Mike Mitchell, to ascend to the Presidency for LACDL in a few years. Whoever said we shall always have the poor with us may have been right. And we in this business know that they will always be over-represented in criminal courts.

Our honorees, some known, some unknown include one of my personal heroes, Walt Sanchez, who qualified for the Tate many years ago. Richard Bourke, Dalton Award recipient, has stepped into some giant shoes formerly worn by Clive and Neal. No small feat.

Many of the others (got to save some surprises) worked on the historic Indigent Defense legislation. Let the party begin!

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As 2007 is starting to wind down, LACDL currently has over 405 active members. The membership total to date surpasses the total of memberships prior to the storms of 2005. Now that we have bounced back from the loss in membership, we need to strive to increase it even more. Membership is the driving force behind any association. Every member should make an effort to recruit at least one new member in 2008. You can download a membership form on the website at www.lacdl.org or call the office at 225-767-7640 and request to have one sent. We also have plenty of membership brochures if you would like some to keep with you and hand out to colleagues you see often. LACDL will be mailing 2008 Membership Invoices the first of November.

On October 19, 2007, the 2008 Executive Committee met to start the Strategic Planning for 2008. LACDL President-Elect, Elton Richey has a lot of great ideas to make LACDL the Premier State Association. His vision to "Become the Premier State Association for Advancing the Professional Interest of Criminal Defense Practitioners" is within reach with the help of a strong board and active committee chairs.

This year LaPDA will have a presence at the Annual Tate Banquet in an effort to draw the two associations to a shared vision. I look forward to seeing all of you at the November 29-30, 2007 Criminal Defense Seminar and the 22nd Annual Tate Awards Banquet at the Hotel Monteleone in New Orleans.

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HOW TO SAVE YOUR CLIENT WHILE SAVING THE COURT TIME

By Inese A. Neiders, Ph.D., J.D.

Trial courts are afforded great latitude and discretion in structuring the method by which voir dire will be conducted. Jury selection plays a critical function in assuring the criminal defendant that his sixth Amendment right to an impartial jury will be honored. Without adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able to follow the Court's instructions and evaluate the evidence cannot be fulfilled. The entire voir dire should be directed to determine whether, for any reason, a juror has a bias of mind in favor or against either party such that his impartiality as to guilt would be impaired.

The most cost-effective and timesaving approach to jury selection is the questionnaire. Jury questionnaires are increasingly being used in both civil and criminal cases. Most often, questionnaires have been used successfully in death penalty cases, white-collar cases, child rapes cases, police brutality cases, battered women's cases and drug cases.

The major reasons for using the questionnaire are the following:

- 1) The questionnaire streamlines the jury selection process. Courts, clients and lawyers save time often wasted in unnecessary repetition of questions. The questionnaire can be distributed to jurors and filled out by them before voir dire is conducted in court. Each juror's questionnaire can be photocopied prior to the trial and copies can be provided to each of the parties and one copy to the judge. These copies are to be used by all parties solely for the purpose of jury selection.
- 2) The questionnaire allows a greater number of questions to be administered to each juror. This results in greater accuracy in the use of challenges. More potential biases may be uncovered; so more competent voir dire can be conducted.
- 3) The questionnaire permits jurors to consider their answers more carefully. The jurors do not have to respond immediately to questions. Instead, they can think about their answers. This is critical if they are repressing unpleasant memories, such as being victimized.
- 4) The questionnaire gives the jurors a sense of privacy, as does individual in-court voir dire. Jurors can answer questions without being required to give their answers in a very public and formal setting. This permits more personal responses to the questions. Jurors will not be required to state that they dislike the prosecution or the defendants in open court. They can do so privately.

continued on next page

Forensic Mental Health Care System In Distress *By: George Steimel*

In the early 1980's the United States Federal Court Middle District for Louisiana imposed an inpatient capacity of 235 beds. The inpatient capacity of 235 beds was insufficient for the number of defendants committed by courts statewide for forensic services. As a result, a waiting list for admission was established. Defendants remained in parish prisons throughout the state for unacceptable lengths of time awaiting admission to the hospital. Because resources were not available to resolve the problem (the timely admission of forensic patients) the state's Forensic Division was drawn into a lawsuit, *Hamilton v. Morial*, No. 69-2443, Filed in U. S. Federal Court Eastern District for Louisiana.

In 1998 The Dept. of Health and Hospitals in coordination with the Office of Mental Health and the Eastern Louisiana Mental Health System Forensic Division submitted to the court a plan for forensic services which addressed timely admission of patients to forensic services in Louisiana, specifically patients in Orleans Parish and generally patients state wide. The plan for reducing delays in admission to the Forensic Division was developed for implementation in three phases. To this day much of the plan remains unfunded or partially funded.

The need for competency to stand trial, and the concept of 'Not guilty by reason of insanity' are well established in common law and in Louisiana statute and judicial procedure. In a criminal proceeding, the person must have the capacity to understand the proceedings and participate in his or her defense. The law further provides that if an individual has a mental disease of defect that makes him incapable of knowing right from wrong with respect to conduct at the time of offense, then the individual should not be held responsible. When persons are found not guilty by reason of insanity, society and the law then seek to balance individual's rights with the protection of society. While public mental health moves toward community treatment of the mentally ill, our society has moved toward reduced tolerance of law breaking regardless of mitigating circumstances, and there has been increased use of incarceration in local jails and state correction facilities. Some epidemiological studies suggest a high correlation

between de-institutionalization of the mentally ill and the increasing rates of prison and jail incarceration of this population.

In line with many other state systems, Louisiana is experiencing an increase in court referrals for the evaluation and treatment of the mentally ill offender. At present, one in three OMH state hospital inpatients are forensic patients. Over the past 15 years beds in the Louisiana Department of Corrections facilities have increased by 300%, while at the same time, there has been only a 30% increase of beds at the forensic division. The need for forensic beds over this same time period has at least corresponded to the need for correctional beds, but in all probability, has increased at a faster pace.

The forensic system that treats people who have been found by a criminal court unable to proceed due to their mental incapacity is not sufficient. To some extent, this is due to limited resources available for the treatment of forensic patients. In no way is this more or less important than the other issues we should address.

At any time you can find 200 or more people in local jails who have been found restorable but no treatment beds are available at the state forensic hospital in Jackson, Louisiana. It has only gotten worse over time and had risen to the level last year when the Governor signed an order for the state to begin paying sheriffs to house these people. You can understand that without proper treatment these people sit in local jails for an indefinite period of time. You may agree that this is not considered the best way to provide justice for the accused or the victims.

I think that part of the problem that produces this effect can be found in the current code of criminal procedure. In part, the code is outdated with respect to case law.

Take into consideration the following:
CCrP Art. 648

648(A) - should be "preponderance of the evidence"

Case support: *Cooper v. Oklahoma*, 517 U.S. 348, 116 S.Ct. 1373 (1996)

648(B) (2) - should be removed entirely

Case support: *State v. Denson*, 888 So 2d 805 (La 12/1/04)

648 (B)(2), (B)(3) - should be combined and the distinction between dangerous/non-dangerous removed. Furthermore, these permanently incompetent defendants should be subject civilly commitment proceedings pursuant to the standard civil commitment procedures embodied in Title 28.

Case support: *Jackson v. Indiana* 406 U.S. 715; 92 S.Ct. 1845 (1972); the Louisiana progeny of *Jackson* include *Lockhart v. Armistead*, 351 So. 2d 496

(La. 1977); *Grayer v. Armistead*, 402 So. 2d 88 (La. 1980); *State v. Denson*, 888 So 2d 805 (La 12/1/04)

The procedures and standards for indefinitely committing an incompetent defendant under art 648 (B)(3) are notably and meaningfully different from those that are required to civilly commit a person under the normal Title 28 procedures. The U.S. Supreme Court has held that, "subjecting an incompetent defendant to a more lenient commitment standard and to a more stringent standard of release.... deprives such defendants of equal protection of the laws under the Fourteenth Amendment."

Jackson v. Indiana 406 U.S at 730.

In addition the code leading up to 648 may be considered outdated and out of step with the rest of the States. This has led to less than effective treatment and more delay. The only area of Louisiana law that I can point to that provides any standard is the Children's Code in regard to Mental Incapacity to Proceed.

We don't claim to have all the answers or know all of the problems. I feel strongly about addressing the issue in a way that brings all of the stakeholders to the table. In my estimation it's systemic and without leadership the system will only deteriorate to the point that we will see complaints filed in our state and federal courts.

It has been my experience that mitigating these issues through the legislative process should provide us with a better result. It may help you to consider as a reference the SCR 28 of the 2002 regular session, SCR 138 of the 2003 regular session, and HCR 271 of the 2006 regular session.

Save Your Client, continued from previous page

5) The questionnaire also permits the lawyers and judge to assess the literacy level of the jurors, because they are required to write the answers. This also is a measure of the ability of the jurors to relate to complex ideas that they are not likely to use in their daily lives. These complexities may arise because of legal issues, complex evidence or complex testimony, particularly from expert witnesses.

6) The questionnaire is useful because written, rather than oral, responses assist the lawyers in recalling the responses of the jurors. Recall of oral materials declines very quickly, particularly over the first twenty-four hours.

7) The questionnaire provides better information for jurors not in the box. In many jurisdictions, most of the jurors are almost ignored. The jurors in the box receive most of the attention of the lawyers. In fact, often jurors are ignored when they raise their hands.

8) The questionnaire pivots a more unbiased finding of the juror's responses than the oral voir dire provides,

because the lawyer cannot influence the jurors by the way he or she asks the questions. The personality of the lawyer does not influence the respondents.

9) The questionnaire provides a way to measure each juror's own biases and ideas rather than those of the other jurors. When jurors are questioned in a group, they often give the same responses as the other jurors. Since each juror must fill out the questionnaire without the input of the other jurors and does not hear the responses of the other jurors, he or she cannot give the same response that the other jurors do, but must arrive at his or her own answers, measuring the juror's own opinions and biases.

10) The questionnaire reduces the jurors' opportunity to contrive to be seated or excused. A juror who has reasons for being excused must state them without having seen which excuses have (or have not) worked for other jurors.

11) The questionnaire method does not permit the jurors to hear the responses of the other jurors. Thus, the opinions and biases of the other jurors cannot contaminate the jurors. This is critical if some jurors are not only biased but articulate.

12) The questionnaire can incorporate complex and reliable "lie scale" measures. Historically, questionnaires have incorporated these measures. This is critical for such issues as race, sex and money in particular.

13) The questionnaire can incorporate open-ended questions, multiple choice or forced-choice questions. Generally, it makes the open-ended questions easier to rate and allows for the greater use of multiple-choice questions that are also easier to rate.

14) The questionnaire approach makes it difficult for the jurors to figure out whether it is the defense attorney or the prosecution who wants to know the answers to the questions. Therefore, they do not know with whom to be upset when they do not like some of the more personal questions such as those related to sex or finances. This is important because some of the most critical questions are sensitive questions and may evoke such feeling and bias among the jurors.

15) The questionnaire approach is less expensive than other jury selection approaches such as surveys and mock juries.

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Archiving Files on Digital Media

By: D. Wesley Attaway

LACDL Associate Member

EnCase Certified Computer Forensic Examiner

Many people are looking at the idea of converting old files to a digital format and storing them on some type of digital media. This is a great idea as far as saving space and time are concerned, but there are some potential problem areas.

Here is a short list of some things to consider before you shred all your paper files:

- 1) Media Longevity: CDs, DVDs, Tapes, and hard drives will not last forever. They have a relatively short life span compared to paper and film. You will be lucky to get more than 10-15 years unless you store your media in a temperature and humidity controlled environment.
- 2) Technological Obsolescence: Do you have anything stored on floppy disks? Most computers sold today do not have a floppy disk drive. Technology is always changing and there is no guarantee that media you take for granted today will be easily usable 15-years from now.
- 3) Software Obsolescence: As with hardware, software changes are a potential problem. You need to consider the storage format and probably should stay away from anything that is proprietary and not easily used by a variety of products.
- 4) The foregoing problem areas indicate that there will probably be a need to re-copy or re-format the data at some point in the future. This can get expensive and could lead to permanent loss of data if it is not done correctly.
- 5) You need to have more than one copy of your data. And, it should not all be stored in the same place.
- 6) Pay attention to your filing system. Sorting through digital media is a great time saver as long as everything works. If something goes wrong you will quickly discover that finding a missing piece of data is really difficult. You can't just rummage through digital data like you can with a few boxes of paper files.
- 7) Archiving files to digital media will require attention to detail by your employees. This will require training and consistency that some small offices may not be used to. One new person doing something a little bit different could create a nightmare.

There are professionals in the field of data retention and archiving. Getting some expert advice would probably be a good idea and would likely save money and time in the long run.

Publications of Interest

From the National Criminal Justice Reference Service <http://www.ncjrs.org>

By Elton B. Richey, Jr.

Holding Prosecutors Accountable: What is Successful Prosecutorial Performance and Why Should it be Measured?

The Prosecutor Volume: 41 Issue: 3 Dated: May/June 2007 Pages: 22,26 to 32

Author: Lisa M. Budzilowicz

URL: <http://www.ndaa.org>

Annotation: This article presents key findings from the Performance Measures for Prosecutors Project showing a lack of measurement for prosecutor performance in the criminal justice system and with encouragement in the exploration of the utility of performance measurement.

Project STOP: Cognitive Behavioral Assessment and Treatment for Sex Offenders with Intellectual Disability

Journal of Forensic Psychology Practice Volume: 6 Issue: 3 Dated: 2006 Pages: 87 to 103

Author: Christine Maguth Nezu Ph.D.; Jeffrey Greenberg M.A.; Arthur M. Nezu Ph.D.

Annotation: This paper briefly reviews sex offending behavior in persons with intellectual disabilities (ID) and the need for effective solutions and programs targeted towards assessment and treatment, such as Project STOP. The paper describes Project STOP, which provides assessment and treatment to adults with ID who have been convicted or identified as being at risk for sex offending behavior. An evaluation of the project revealed a low rate of recidivism and a high degree of treatment adherence.

Developing a Structured Interview Tool for Children Embroiled in Family Litigation and Forensic Mental Health Services: The Query Grid

Journal of Forensic Psychology Practice Volume: 7 Issue: 1 Dated: 2007 Pages: 1 to 18

Author: Benjamin D. Garber Ph.D.

Annotation: This paper introduces the Query Grid (QG), a child-centered, multi-modal, and minimally leading interview tool as a suitable tool for use with clinical populations and court-involved children. Young children are highly suggestible and even skilled, well-intended interviewers can corrupt the data. The QG is a structured tool designed to assist interviewers in eliciting accurate reports from court-involved children ages 4 through 12 years old.

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"Louisiana's Premier" Criminal Defense CLE Seminar Schedule

Thursday, November 29, 2007

- 8:00 - 8:30 a.m. **Registration & Breakfast**
- 8:30 - 8:45 a.m. **Welcome**
- 8:45 - 9:45 a.m. **Ethics: How to Practice Law Against your Opponent, the Court & your Client without Losing your Law License.** Mike Walsh, Baton Rouge, LA
- 9:45 - 10:00 a.m. **Break**
- 10:00 - 11:00 a.m. **Batson Issues**
Richard Bourke, New Orleans, LA
- 11:00 - 12:00 p.m. **Professionalism: Dealing with the Media.** Kerry Cuccia, New Orleans, LA
- 12:00 - 1:00 p.m. **Lunch (on your own)**
- 1:00 - 2:00 p.m. **Constructive Possession vs. Actual Possession, In light of Aggressive Prosecutions Since Project Exile**
Prof. Donald North and SU Law Clinic Students, Baton Rouge, LA
- 2:00 - 3:00 p.m. **Litigating Eyewitness ID Cases**
Zeke Edwards, New York, NY
- 3:00 - 3:15 p.m. **Break**
- 3:15 - 4:45 p.m. **Panel: Meet the Enemy**
Christine Lehmann and Judge Davis, New Orleans, LA
- 5:30 - 7:00 pm **General Membership Meeting and Board Meeting** (Board Meeting will follow the General Membership Meeting)

Friday, November 30, 2007

- 8:00 - 8:30 a.m. **Registration & Breakfast**
- 8:30 - 9:30 a.m. **"The Louisiana Public Records Act: Dangers and Possibilities in Criminal Cases"** Stephen Haedicke & Pauline Hardin, New Orleans, LA
- 9:30 - 10:30 a.m. **Competency Hearings**
Katherine Mattes, Sheila Myers and Tulane Criminal Defense Clinic, New Orleans, LA
- 10:30 - 10:45 a.m. **Break**
- 10:45 - 11:45 a.m. **Panel: Immigration - Collateral Consequences of Criminal Convictions**
Hiroko Kusuda & Luz Molino, New Orleans, LA
- 11:45 - 12:45 p.m. **Lunch (on your own)**
- 12:45 - 1:45 p.m. **"I'll Never Forget That Face: Expert Testimony on Eyewitness Reliability"**
Prof. Sol Fulero, Dayton, OH
- 1:45 - 2:00 p.m. **Break**
- 2:00 - 3:00 p.m. **Criminal Law Updates**
Michelle Ghetti, Baton Rouge, LA
- 3:00 - 4:00 p.m. **"LA's Public Defender Act of 2007 - A Model for the Nation"**
Paul Marx, Lafayette, LA
- 6:30 - 8:00 pm **Tate Cocktail Reception** (cash bar)
Hotel Monteleone
- 8:00 - 10:30 pm **Tate Awards Banquet**
Hotel Monteleone

Association and Member News Bulletin Board

Congratulations Tate & LaPDA Award Recipients

Walt Sanchez

Justice Albert Tate, Jr. Award Honoree

Richard Bourke

Sam Dalton Capital Defense Award Honoree

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Criminal Justice Act Panel Attorney Award Honoree

Rep. Danny Martiny & Sen. Lydia Jackson

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DWI Seminar Speakers, Victor Carmody and James Nesci with Vicki Cranford.



President-Elect, Elton Richey presents "How To Get An Expert and Get Him Paid" at the Capital Defense Seminar.



LSU Law School Students enjoying the DWI Seminar Poolside Social.



Congratulations OPD Board!!!! The FBA recognized the OPD Board by presenting them with the Camille Gravel award on August 10, 2007 at the World Trade Center in New Orleans. The award was presented in recognition of all of the work done to reorganize and reinvent the Orleans Public Defender System.

REMINDER:

**LACDL Presents
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November 29-30, 2007
Hotel Monteleone**

214 Royal Street, New Orleans, LA



"Cure for Bad Breath" –Discussing Variance Readings from Machines presented by James Nescie at the DWI Seminar

*Louisiana Association of
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AND
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*Twenty Second Annual
Justice Albert Tate, Jr.
Awards Banquet
Friday, November 30, 2007*

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The QG provides interviewers with a common, standardized means of entering the child's world and eliciting his/her report without recourse to those methods known to be associated with bias and suggestibility. The QG prompts the child to acknowledge events associated with a spectrum of emotions as experienced in each of the environments or relationships in the child's life. This paper describes the Query Grid as a leading interview tool suitable for use with clinical populations and court-involved children.

Between a Rock and a Hard Place: Why Hearsay Testimony May Be a Necessary Evil in Child Sexual Abuse Cases

Journal of Forensic Psychology Practice
Volume: 7 Issue: 1 Dated: 2007 Pages: 47 to 57

Author: Terri Watters PsyD; Jocelyn Brineman B.A.; Sara Wright B.A.

Annotation: This commentary discusses the longtime criticisms against hearsay testimony and the problems that arise when children testify in court. This commentary outlines the arguments against hearsay testimony in court and then discusses the dangers of allowing children to testify in court. It is argued that the harmful effects of allowing children to testify outweigh the criticisms of allowing hearsay testimony. Alternative recommendations and modifications in allowing hearsay testimony for children testifying in court are provided.

Hearsay Testimony: Protecting the Needs of Children at the Expense of the Defendant's Right to a Fair Trial

Journal of Forensic Psychology Practice
Volume: 7 Issue: 1 Dated: 2007 Pages: 59 to 66

Author: Andre Kehn B.S.; Jennifer M. Gray B.A.; Narina L. Nunez Ph.D.

Annotation: This paper argues that the use of hearsay testimony, in its current format, should be inadmissible in cases of child sexual abuse due to its violating the defendants' sixth amendment right to confront their accuser. The only way to reconcile the needs of the child without violating the rights of the defendant is to encourage interviewers to audiotape and/or videotape their original interviews with children in its totality. The taped pretrial interviews are still considered hearsay, but they may be the most "trustworthy" representation of a child's description of an abusive event.

Gangs, Guns, and Drugs: Recidivism Among Serious, Young Offenders

Criminology & Public Policy Volume: 6 Issue: 2
Dated: May 2007 Pages: 187 to 222

Author: Beth M. Huebner ; Sean P. Varano ; Timothy S. Bynum

Annotation: This study investigated the predictors of recidivism among 322 young men aged 17 to 24 years released from prison in a Midwestern State. Results revealed that race, gang membership, drug dependence, and institutional behavior were the most significant factors predicting the timing of reconviction among 17 and 24 year old males released from prison. Surprisingly, gun use was not associated

with post-release recidivism. The findings underscore the importance of considering institutional behavior when making release decisions since institutional misconduct was a significant predictor of recidivism and may be an important marker of sustained gang membership. The findings also suggest that institutional programming and aftercare services are a priority for young male offenders who act out while in prison.

Instructional Materials: Investigative

Interviews of Adolescent Victims

Author: Martha J. Finnegan MSW

URL: <http://www.fbi.gov>

Annotation: This booklet provides guidance to FBI agents in conducting interviews of adolescent victims of Federal crimes. The Federal crimes most likely to involve investigative interviews with adolescent victims are computer facilitated crimes, human trafficking, and forced prostitution. Typical interview protocols may not be appropriate for interviewing adolescent victims of these crimes. A common mistake interviewers make when interviewing teens about such exploitation is the failure to test multiple hypotheses about the victimization and obtain

family background information. This booklet outlines interview procedures that avoid this common mistake. It first addresses preparation for the interview. Topics discussed for the preparation phase are setting the stage, pre-interview preparation, the interview environment, selection of the interviewer, and documenting the interview. The booklet's next major section focuses on issues in conducting a phased interview with an adolescent victim. The issues covered are rapport building, the adolescent victim's competency and suggestibility, eliciting information, and the use of interview tools. The booklet then provides post-interview guidelines for discussing interview details with the parents of the adolescent. Other sections of the booklet provide guidelines for dealing with the adolescent victim's medical exam; interviews with compliant victims; and disclosure, evidence, and denial. The appendixes discuss adolescent development, how interviews of juvenile victims differ from interviews of juvenile subjects, custody issues, and resources for runaway adolescents, and specific populations of teen victims.

Child Abuse in the Eyes of the Beholder: Lay Perceptions of Child Sexual and Physical Abuse

Annotation: This study explored the effects of various victim and perpetrator characteristics on university students' and non-students' perceptions of different types of child abuse. Results indicated that participants' perceptions of abuse were impacted by all of the manipulated variables and the participant's gender. Specifically, sexual abuse was considered more traumatic and severe

if perpetrated by a parent rather than a babysitter. Homosexual abuse was rated as more traumatic and repressible than heterosexual abuse. Male participants were more impacted in their perceptions of abuse based on the gender of the perpetrator and the abuse type than were female participants. Female participants perceived the abuse as more severe and more likely to reoccur, and they were more believing of abuse victims than their male counterparts. The abuse of females was considered more severe and traumatic by both male and female participants and abuse perpetrated by a male was also perceived as more traumatic, severe, and repressible than abuse perpetrated by a female. The findings have implications for practice because it is possible that a clinician's own beliefs about types of abuse can influence the course of treatment.



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**Commissioners/Deputy
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The Interstate Commission for Adult Offender Supervision is pleased to announce that a Judicial/Legal on-demand training module has been published to the ICAOS website. This module is intended to provide the Judiciary and attorneys information on the legal foundation and the rules of the Interstate Compact for Adult Offender Supervision.

Over 1700 participants have viewed the Rule on-demand modules since they were first published, June 2006. We anticipate the same success with this module as we encourage Judges and Attorneys throughout the country to become familiar with the Interstate Compact and its efforts to promote public safety.

The module can be accessed via the following link:

<http://www.interstatecompact.org/training/online/judicial.shtml>

ICAOS Training Committee Chair

STRICKEN: WHAT TO DO WHEN A WITNESS SAYS TOO MUCH

By Professor Michelle Ghetti

In a recent LACDL listserve post, one member expressed a concern over the judge in his trial sustaining a DA objection to testimony and ordering the testimony "stricken from the record." It brought to mind one of my pet peeves, the "motion to strike."

No such thing. There is no such thing as a motion to strike testimony. In fact, in a criminal case there is no such thing as a motion to strike, period. *See State v. Chaisson*, 425 So.2d 745 (La. 1983)(police officer testified items belonged to victim although he had no personal knowledge); *State v. Garrison*, 400 So.2d 874 (La. 1981)(objection was that videotape was better evidence and previous testimony should be stricken); *State v. Kirsch*, 363 So.2d 429 (La. 1978)(hearsay); *State v. Passman*, 345 So.2d 874 (La. 1977)(cannot strike testimony of witness who violated sequestration order). In a civil case, there is a motion to strike *the pleadings* but it can be used only to remove irrelevant and prejudicial information from a *pleading*, which is generally memorialized as a public record, not from the record or transcript of a case. *See* La. C.C.P. art. 964. *See also State v. Isaac*, 260 So.2d 302 (La. 1972)(objection to hearsay made after lunch).

Proper remedy. The proper remedy for testimony or other evidence which came in but is ruled inadmissible is a request to the judge to admonish the jury to disregard the testimony. *See* La. C.C.P. art. 771; *State v. Baker*, 288 So.2d 52 (La. 1973)(non-responsive prejudicial answer by witness on cross-exam); *State v. Hall*, 624 So.2d 927 (La. App. 2d Cir. 1993)(embellished answer to defense question by police officer). Although, realistically, it is probably ineffective, it is the sole remedy. Apparently, often times, an admonition to disregard is really what is meant by the attorney and/or judge who says the evidence should or will be stricken from the record. The motion to strike, though, may not communicate to the jury that they should ignore the statements and is, technically, not the same thing as a request to admonish and may not preserve the error for appeal. *See State v. Hall, supra*, 624 So.2d at 932.

Objection. On the other hand, some courts have considered the motion to strike to be an objection, albeit a late one. *See, e.g., State v. Provost*, 352 So.2d 661 (La. 1977)(motion to strike irrelevant and prejudicial testimony at end of cross-examination); *State v. Scott*, 278 So.2d 121 (La. 1973)(once the answers were admitted without objection, a belated attempt to have the testimony retrospectively stricken from the record could not succeed); *State v. Vince*, 305 So.2d 916 (La. 1974)(motion to strike/objection re: hearsay too late). Louisiana has adopted the contemporaneous objection rule. *See* La. Code of Evidence art. 103; C.C.P. art. 841; *State v. Taylor*, 669 So.2d 364 (La. 1996). An objection must be made at the time of the error; it cannot come after the testimony has been heard by the trier of fact. *See State v. Richmond*, 278 So.2d 17 (La. 1973). Thus, a motion to strike *testimony*, if viewed as an objection, is always too late. In fact, in one case, the Supreme Court found that an assignment of error to the denial of a motion to strike "border[ed] on being a frivolous assignment." *State v. Chaisson*, 425 So.2d 745 (La. 1983)(after stating that certain items found at the scene

belonged to the victim, upon cross examination he admitted he had no personal knowledge of such fact).

Right to record. Code of Criminal Procedure article 777 requires that a record of the trial proceedings be made. The Louisiana Supreme Court has said, "Once a witness testifies, his testimony cannot be removed from the record." *State v. Chaisson*, 425 So.2d 745 (La. 1983)(police officer's testimony not based on personal knowledge). *See also State v. Provost*, 352 So.2d 661 (La. 1977). Thus, a trial judge cannot strike testimony from the record.

Furthermore, arguably, a defendant is entitled to a full and complete record on appeal under the Fourteenth Amendment due process clause and the Sixth Amendment right to counsel clause of the United States Constitution and Article 1 Section 2, and Article 1 Section 13 of the Louisiana Constitution. *See Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431 (1971) and cases cited therein.

Court reporter liability. Finally, should a court reporter "strike" the testimony from the record, she may be liable in damages and/or on her bond to the defendant. La. R.S. 13:961 provides that a court reporter "shall record all portion of the proceedings required by law or by the court" and requires court reporters to post a bond "for the faithful performance of their duties" and "for the purpose of protecting litigants against any acts of incompetency or neglect of duty by the court reporter" (emphasis added). Furthermore, although employees of the court, court reporters are not immune from liability for breach of official duty that causes damage to others. *See Hero Lands Co. v. Borello*, 459 So.2d 658 (La.App. 4th Cir. 1984) *writs den.* 462 So.2d 651 (La. 1985).

Pointers. So, what do you do? First, if relevant, object that the prosecutor has not established a foundation to show that the witness has personal knowledge of the factual issue. Hold their feet to the fire! Anticipate where the prosecutor is going and make them establish relevancy *before* the witness testifies. Do not wait for cross-examination. Object whenever you hear the words "say" or "said" and request a bench conference. Finally, object loudly when a witness begins to say something that you believe to be inadmissible. If the judge sustains your objection, it is still *your* responsibility to ask the judge to admonish the jury to disregard whatever amount of the testimony could have been heard. C.C.P. art. 771. If the district attorney objects to testimony and the judge sustains her objection and then says that the testimony should be stricken from the record, politely ask to approach the bench and, with this article or a pre-prepared memorandum in hand, ask the judge if she didn't mean to simply admonish the jury to disregard. If that fails, I would suggest emergency writs to the appellate court.

Laws Governing DWI and DUI & West's Handbook References Written By: West Editorial Staff

The Louisiana legislature has made important changes in the laws governing DWI and DUI by enacting three 2007 Louisiana Regular Session Acts. The first, **Acts 2007, No. 413**, amends R.S. 32:414, 32:415.1, 32:666, 32:667, and 32:668 covering the topics of **Driver's License Suspension, Ignition Interlock Devices, and Chemical Testing**. The amendments increase the potential length of driver's license suspension for alcohol-related motor vehicle offenses. They also provide for the installation of ignition interlock devices in the vehicles of certain offenders, and add physician assistants, emergency medical technicians, nurse practitioners, and other qualified technicians to the listing of persons qualified to perform chemical tests for intoxication.

The second is **Acts 2007, No. 227** which amends R.S. 14:98 and deals specifically with **Operating a Vehicle While Intoxicated on Legally Obtainable Drugs**. Now, in cases involving the consumption of excessive quantities of legally obtainable drugs, it is an affirmative defense that the vehicle operator did not knowingly consume quantities of the drugs which substantially exceeded the dosage prescribed by a physician or recommended by the drug manufacturer.

The third is **Acts 2007, No. 96** which amends R.S. 32:664 and addresses **Who is Qualified to Test for Suspected Drunken Driving**. The change allows for the addition of physician assistants, emergency medical technicians, nurse practitioners, and other qualified technicians to the listing of persons qualified to perform chemical tests for intoxication.

*** Order your copy today:**

Detailed information regarding these changes to Louisiana's DWI and DUI laws are available in the **2008 Edition of West's Handbook of Louisiana Statutory Criminal Law and Procedure** (scheduled for publication October 2007) now available with a CD-ROM.

In addition, the 2007 Regular Session Acts are currently available in West's 2007 Louisiana Session Law Service pamphlets and in the LA-LEGIS database on Westlaw. And the annotated provisions, with judicial constructions and historical notes, are available in the LA-ST-ANN database on Westlaw (to be updated shortly) and will appear in the 2008 pocket parts to West's Louisiana Statutes Annotated (scheduled for publication December 2007).



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Continued from page 5

Therefore, more criminal defendants will be able to use the method. In situations where courts allocate funds for jury selection, the more expensive methods should be used with this approach.

16) The questionnaire reduces the time and tedium involved in asking questions repeatedly.

17) The questionnaire is helpful in arranging a better plea bargain since the prosecutors are aware the defense attorneys are prepared.

18) Finally, the questionnaire approach is fair to both the defense and the prosecutors. Both have access to the information generated by the instrument.

I do not recommend this procedure for every criminal case. It is critical in cases that involve very high penalties, cases that involve extensive pretrial publicity, cases that are located in areas that are noted for discrimination or volatile ethnic relations or cases involving sensitive issues that may easily evoke prejudice in jurors.

The questionnaire is only one tool to measure beatitudes and does not resolve all jury selection problems. It does provide a cost-effective approach to ensure that jurors who will be seated are competent.

Inese A. Neiders, Ph.D., J.D. is a jury consultant who assists lawyers in trial preparation, jury selection and trial presentation. Her Ph.D. is in sociology for the Ohio State University and her J.D. is from Case Western Reserve. She has assisted lawyers in jury selection throughout the country. Lawyers with whom she has worked have been successful in defending death penalty cases, white-collar cases, child sex cases, drug cases, police brutality cases as well as civil cases.

Inese A. Neiders, Ph.D., J.D.
25 E. Henderson Road, Suite 2
P.O. Box 14736
Columbus, OH 43214
(614) 263-7558
jury.Neiders@core.com

Capital Defense Seminar Wrap-Up



19th District Chief and Speaker Mike Mitchell, Seminar Chair David Price and LACDL Lobbyist George Steimel.

The LACDL Capital Defense Certification Seminar held at the Paragon Casino & Resort in Marksville, LA was very well attended and informative. A grant from LIDAB enabled LACDL to offer the CLE seminar to Public Defenders at no charge and many Public Defenders took advantage of this opportunity and LACDL signed up a number of new members. Up to date information on The Colorado Method of Capital Jury Selection was presented, with great interest, to attendees by LACDL Past President and Seminar Chair, David Price. Attendees found the seminar to be “very useful, especially those presentations directed



Richard Bourke speaking on Motion Practice.



14th District Chief, Ron Ware and Speaker Paul Marx

toward the trial Batson and Voir seminar more time actual crimes and and sex programs majority been in and a one of the best Capital Defense Seminars they had ever attended.



Speaker Richard Goorley, Marsha Oliver with LIDAB, Speaker Kerry Cuccia, and LACDL Board Member Paul Fleming .

itself, such as Motion Practice, and Reverse Batson Challenges, Dire.” Comments from the evaluations included making for motion practice sessions and demonstrations, computer identity theft, and molestation crimes defense, in future CLE planned by LACDL. The of the seminar registrants had practice seven or more years number of them noted this was

DWI Seminar Wrap-Up

The most requested and long awaited DWI CLE Seminar took place on September 13-14, 2007 at the Marriott Hotel in Baton Rouge. Considering the recent changes in the



Tribbey Thornton with Thomson West, Victoria Cranford and Penelope Richard.

DWI laws during the 2007 Regular Legislative Session, the timing of the seminar was perfect. The LACDL DWI Seminar was very successful and well received by all. Seminar Chair, Marci Blaize lined up an expert panel of speakers from Louisiana, as well as, Alabama, Arizona, Mississippi, Ohio and Texas. Jim Boren and his wife, Teresa hosted the Poolside Social at their home and everyone had a relaxing enjoyable time. The seminar’s success can be attributed to Marci’s hard work lining up excellent speakers, Victoria Cranford’s willingness to step in and serve as Seminar Chair at the last minute and our wonderful sponsor’s and exhibitors; Smart Start of Louisiana, Thomson West and the Baton Rouge Bar of Criminal Justice.



Poolside Social Host, Jim Boren and Slidell City Court Judge Jim Lamz enjoying the social.



Speaker Sheriff Webre presenting “ Ignition Interlock: Legislation, Function & Practicalities.”

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LACDL General Membership

November 29, 2007

Hotel Monteleone

New Orleans, LA

5:30 pm

LACDL Board Meeting

November 29, 2007

Hotel Monteleone

New Orleans, LA

(Following the Membership Meeting)

Justice Albert Tate Awards Banquet

November 30, 2007

Hotel Monteleone

New Orleans, LA

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